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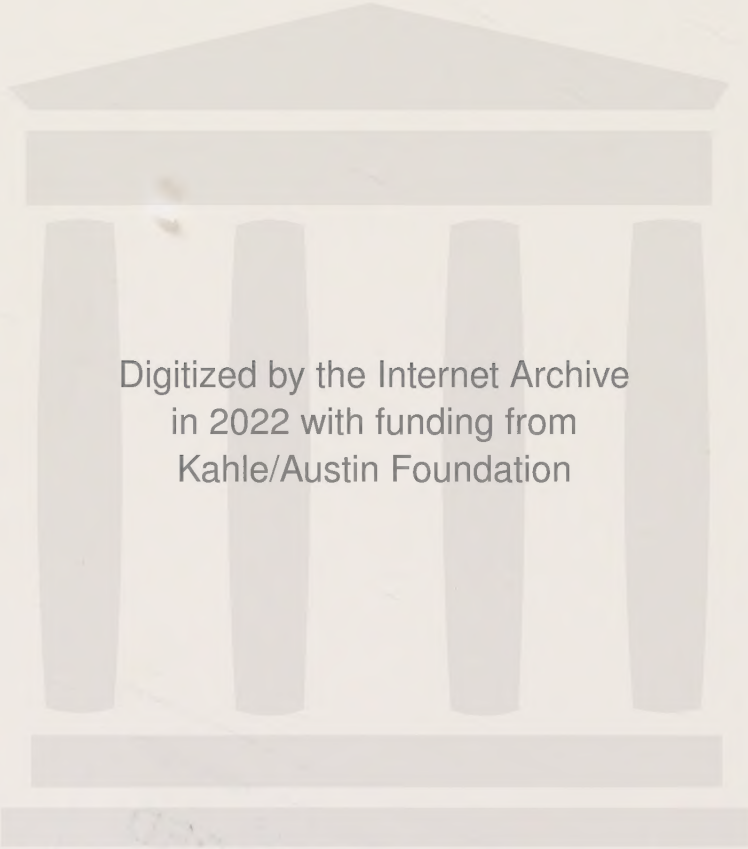
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THE INCORPORATED COUNCIL OF LAW REPORTING
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SHIPS' NAMES*Derbyshire**Lips**Ypatianna***Coltman v. Bibby Tankers Ltd., H.L.(E.) 1181****President of India v. Lips Maritime Corpn., H.L.(E.) 572****Indian Oil Corpn. Ltd. v. Greenstone Shipping S.A. (Panama), Staughton J. 869****SOCIAL SECURITY****Unemployment benefit***Disqualification from benefit*

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“Disposal”—Finance Act 1965, s.19(1), Sch. 7, para. 4(2)

Craven v. White (Stephen), C.A. 660

“Equipment”—Employer's Liability (Defective Equipment) Act 1969, s. 1(3)

Coltman v. Bibby Tankers Ltd., H.L.(E.) 1181

“Evidence . . . presented within two months”—Anglo-Belgian Extradition Treaty 1901, art. V

Reg. v. Governor of Ashford Remand Centre, Ex parte Postlethwaite, D.C. and H.L.(E.) 365

“False instrument”—Forgery and Counterfeiting Act 1981, s. 1

Reg. v. Gold, C.A. 803

“First consideration”—Matrimonial Causes Act 1973, s. 25(1) (as substituted)

Suter v. Suter and Jones, C.A. 9

WORDS AND PHRASES—*continued*

- "Furnish"—Value Added Tax (General) Regulations 1985, reg. 58(1)
Hayman v. Griffiths, D.C. 1125
- "House"—Housing Act 1957, s. 189
Reg. v. Lambeth London Borough Council, Ex parte Clayhope Properties Ltd., C.A. 854
- "Inequitable to disregard it"—Matrimonial Causes Act 1973, s. 25(2)(g) (as substituted)
Kyte v. Kyte, C.A. 1114
- "Issue"—Police and Criminal Evidence Act 1984, s. 74(1)
Reg. v. Robertson, C.A. 327
- "Just and equitable"—Employment Protection (Consolidation) Act 1978, s. 74(1)
Addison v. Babcock F.A.T.A. Ltd., C.A. 122
- "Other records"—Bankers' Books Evidence Act 1879, s. 9(2) (as amended)
Williams v. Williams, C.A. 790
- "Serious professional misconduct"—Dentists Act 1984, s. 27(1)(b)
Doughty v. General Dental Council, P.C. 769
- "Special police services"—Police Act 1964, s. 15(1)
Harris v. Sheffield United Football Club Ltd., C.A. 305
- "Use"—Town and Country Planning Act, s. 2 (Trinidad and Tobago)
Lopinot Limestone Ltd. v. Attorney-General of Trinidad and Tobago, P.C. 797
- "Well-founded fear of being persecuted"—Statement of Changes in Immigration Rules (1983), para. 73
Reg. v. Secretary of State for the Home Department, Ex parte Sivakumaran, C.A. 1047
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ERRATA

[1987] 3 W.L.R.

Page 31E, line 31: *for* “1950” *read* “1958”

Page 534A, line 2: *for* “post, pp. 11H–14A, *read* “post, pp. 539H–542C”

Page 810B, line 8: *for* “should be” *read* “should not be”

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The Weekly Law Reports

Volume 3

*Containing those cases which are intended to be included in
The Law Reports.*

[COURT OF APPEAL]

REGINA v. SHARP

1987 April 7

Lord Lane C.J., Farquharson
and Gatehouse JJ.

*Crime—Duress—Homicide—Person voluntarily joining gang of armed
robbers—Reluctant participation in robbery when victim shot and
killed—Conviction for manslaughter—Whether defence of duress
available*

The appellant, who joined a gang of robbers, knew that they used firearms and he participated in a robbery during which the gang leader shot and killed the victim. The appellant was tried on a count charging murder. He submitted that the defence of duress was available to him since he had wished to pull out of the robbery but had participated in fear because a gun had been pointed at his head by the gang leader with a threat to blow it off if the appellant did not participate. The submission was rejected by the trial judge and the appellant was convicted of manslaughter.

On appeal against conviction:—

Held, dismissing the appeal, that the defence of duress was not available to a person who voluntarily and with knowledge of its nature joined a criminal organisation or gang, which he knew might bring pressure on him to commit an offence, and was an active member when he was put under such pressure; and that, accordingly, the trial judge was correct in his decision to reject the appellant's submission (post, pp. 8H—9A).

Dicta in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653, 670, 679, 687, H.L.(N.I.) applied.

Reg. v. Hurley and Murray [1967] V.R. 526 and *Reg. v. Fitzpatrick* [1977] N.I. 20 considered.

The following cases are referred to in the judgment:

Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653; [1975] 2 W.L.R. 641; [1975] 1 All E.R. 913, H.L. (N.I.)

Reg. v. Fitzpatrick [1977] N.I. 20

Reg. v. Hurley and Murray [1967] V.R. 526

Reg. v. Tyler (1838) 8 C. & P. 616

The following additional cases were cited in argument:

Reg. v. Gill [1963] 1 W.L.R. 841; [1963] 2 All E.R. 688, C.C.A.

Reg. v. Howe [1987] 2 W.L.R. 568; [1987] 1 All E.R. 771, H.L.(E.)

Subramaniam v. The Queen [1956] 1 W.L.R. 456, P.C.

APPEAL against conviction.

The appellant, David Bruce Sharp, on 21 May 1985 in the Crown Court at Reading before Kenneth Jones J. and a jury on a count charging murder was convicted of manslaughter in respect of which he was sentenced to 16 years' imprisonment. He pleaded guilty to counts charging attempted robbery, for which he was sentenced to 15 years' imprisonment and to robbery for which he was sentenced to 16 years' imprisonment; all sentences were ordered to be concurrent. He appealed against conviction for manslaughter on the ground, *inter alia*, that the trial judge was wrong to withdraw the defence of duress from the jury.

On 16 May 1986 the appeal came before the court (Lawton L.J., Drake J. and Sir Ralph Kilner Brown) and was adjourned pending the decision of the House of Lords in *Reg. v. Howe* [1987] 2 W.L.R. 568. The appeal was relisted for hearing on 7 April 1987.

The facts are stated in the judgment.

Nigel Mylne Q.C. and *Stephen Smyth* (assigned by the Registrar of Criminal Appeals) for the appellant.

Daniel Hollis Q.C. and *Anthony Longden* for the Crown.

LORD LANE C.J. gave the following judgment of the court. On 21 May 1985 in the Crown Court at Reading before Kenneth Jones J. and a jury, the appellant, David Bruce Sharp, was charged with murder. He was eventually convicted of manslaughter. Then he pleaded guilty to the remaining counts in the indictment against him. He was sentenced as follows. In respect of count 2, which was an attempted robbery at Hounslow, he was sentenced to 15 years' imprisonment. On count 3, robbery, to which he pleaded guilty—that was a robbery at Wraysbury—he was sentenced to 16 years' imprisonment. On the manslaughter to which I have referred, which arose from the same incident at Wraysbury, he was sentenced to 16 years' imprisonment, all those sentences to run concurrently. He was jointly charged with two other men: Alderson and Hussey. Hussey was convicted of murder in respect of the Wraysbury offence. The appellant now appeals against conviction by leave of the single judge.

The circumstances which gave rise to the charge of murder were the culmination of what was in effect a series of armed robberies committed upon sub-post offices. They culminated in the Wraysbury offence which resulted in the death of the sub-postmaster at that place.

Count 2, the Hounslow robbery, to which the appellant pleaded guilty, concerned the following facts, and they are of relevance to the main issue. At about midday on 23 August Alderson and Hussey, both of whom were armed with sawn-off shotguns, in the company of the appellant, held up a sub-post office in Hounslow. They wore wigs. Hussey threatened the wife of the postmaster, whereupon the postmaster himself pressed the alarm. All three then ran off to the getaway car empty handed, because they had not time, after the sounding of the alarm, to take any of the money which they had coveted. Hussey tried to fire his gun in the air in order to discourage anyone who was minded to pursue them. His first attempt to fire the gun failed, but his second attempt succeeded, and a pellet from that gun in fact hit Alderson, one of the other miscreants, in the ear.

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A The importance of that incident is this, that both Alderson and Sharp as a result of that knew the sort of man with whom they were associating in the commission of these offences and the predilection which Hussey had for loaded weapons. They must have known also that any attempt in the future by an unlucky postmaster to press the alarm button would be viewed by Hussey with disfavour to say the least.

B On 14 September 1984 the sub-post office at Wraysbury, near Staines, was the subject of a reconnaissance by the appellant and the two other men. Then they determined to attack the office. Alderson and Hussey once again carried loaded sawn-off shotguns. A further weapon, a pump action shotgun, was left in the getaway car. Hussey's gun was loaded with a particular venomous sort of shot, namely, buckshot. Sharp was responsible for locking the post office door after the three of them had entered.

C Alderson moved towards the wife of the sub-postmaster and Hussey went to the post office area of this little shop. Hussey then shot the sub-postmaster in the head at close range: the ballistic expert thought about two or three feet. The unfortunate postmaster died instantly. As he fell, so money was scattered. Alderson took the opportunity to hit the sub-postmaster's wife on the head with his gun three times. That was in order to try to stop her screaming, which, not surprisingly, she had started to do. Once outside, Alderson shot at the tyre of a parked vehicle which belonged to the sub-postmaster in order plainly to impede anyone who might be minded to pursue them.

D Hussey, as already stated, was convicted of murder. The jury, not unnaturally, rejected his contention that the gun may have been discharged by accident. Alderson at first denied that he had taken part in the matter at all, but eventually went on to admit his part in the affair and he was in due course convicted of manslaughter.

E Sharp put forward the contention that he had been invited indeed to take part in these robberies and had willingly acceded to the invitation. He was the "bagman," as he put it, the man carrying the bag in which the loot, if any, would be contained. He regarded Hussey in the vernacular as a "nutcase." He, Sharp, did not wish any weapons to be used, so he said. He said that he panicked when he saw the guns being loaded into the car. He thought they were blanks, so he said. He wanted to pull out, but he lost his nerve and he carried on despite his wish to withdraw from the conspiracy, because Hussey pointed a gun at him and threatened to blow his head off if he did not carry on with the plan to rob the post office. He, Sharp, did not carry a gun. He said he had thought of sabotaging either the gun or the ammunition by using some salt, but he did not get the opportunity.

F So stood the case. Counsel for the appellant, Mr. Mylne, who appeared for him in the court below as he appears for him today, submitted to the judge that his client was entitled to rely upon duress as a defence to the charges of murder and manslaughter. There then took place a series of submissions by counsel to the judge and a ruling by the judge.

G There was plainly a misunderstanding between the judge and Mr. Mylne as to what it was that the judge had in fact ruled. As some of the grounds of appeal are based upon that misconception, it is necessary perhaps very briefly to refer to them, although as matters

have turned out today, they are not vital to the determination of this appeal.

Counsel thought that the judge was ruling that the defence of duress was not open to the appellant on three grounds: (a) such a defence is only available where the defendant discharges the evidential burden of proof sufficient to show that there is something fit for the jury to consider in the way of duress; (b) the defence of duress is not available to a man who has voluntarily joined an organisation or a gang which he knows might compel him to commit serious crimes similar to those with which he is charged; and (c) the evidence was such that the jury could come to no conclusion other than the appellant had voluntarily joined such a gang. That was plainly counsel's understanding of the matter, which was based upon a passage in the judge's ruling which initially gave that impression. In fact the judge, as is clear if one reads the passage as a whole, was taking the view that all he had ruled upon was point (b), namely, that duress is not available to a man who, to put it briefly, has the necessary knowledge, and with the necessary knowledge joins the gang of miscreants.

There is no need to go further into that misconception, because Mr. Mylne now agrees that everything in this appeal depends upon whether the judge was correct or not in ruling that a defendant who has voluntarily joined a gang such as this cannot subsequently rely upon the defence of duress.

So we turn to examine the situation which lies behind Mr. Mylne's submission to the judge, and again the submissions to this court, namely, that the common law knows no such exception to the defence of duress. Mr. Mylne realistically is the first to concede that pragmatically, to use his own word, and realistically, the judge's interpretation of the law was desirable, if not essential, if justice is to be done in circumstances such as existed in the present case. But he submits that it is not for this court, or indeed any other court, to usurp the function of Parliament and to introduce into the common law a rule which, in his submission, has never previously been held to form part of it.

No one could question that if a person can avoid the effects of duress by escaping from the threats, without damage to himself, he must do so. In other words if there is a moment at which he is able to escape, so to speak, from the gun being held at his head by Hussey, or the equivalent of Hussey, he must do so. It seems to us to be part of the same argument, or at least to be so close to the same argument as to be practically indistinguishable from it, to say that a man must not voluntarily put himself in a position where he is likely to be subjected to such compulsion.

Mr. Mylne, I hope, will forgive us if we do not refer to all the citations which he made of authority. He read to us lengthy extracts from the decision in *Reg. v. Tyler* (1838) 8 C. & P. 616, and a further passage from *Glanville Williams, Criminal Law*, 2nd ed. (1961), pp. 751 et seq. which do not, if we may say so respectfully, seem to advance the argument one way or the other. But we are fortified in the view which I indicate, which, to jump ahead, is that this is part of the common law and always has been, by certain matters which appear in the speeches of their Lordships in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653. Although

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A *Lynch's* case has been the subject of certain adverse comment since the date of those speeches, nevertheless the passages to which we wish to refer have not, as far as we know, been the subject of criticism.

First of all in the speech of Lord Morris of Borth-y-Gest appears this passage, at p. 668:

B "Where duress is in issue many questions may arise such as whether threats are serious and compelling or whether (as on the facts of the present case may specially call for consideration) a person the subject of duress could reasonably have extricated himself or could have sought protection or had what has been called a 'safe avenue of escape.' Other questions may arise such as whether a person is only under duress as a result of being in
C voluntary association with those whom he knew would require some course of action. In the present case, as duress was not left to the jury, we naturally do not know what they thought of it all."

A little later Lord Morris of Borth-y-Gest again said, at p. 670:

D "In posing the case where someone is 'really' threatened I use the word 'really' in order to emphasise that duress must never be allowed to be the easy answer of those who can devise no other explanation of their conduct nor of those who readily could have avoided the dominance of threats nor of those who allow themselves to be at the disposal and under the sway of some gangster-tyrant. Where duress becomes an issue courts and juries
E will surely consider the facts with care and discernment."

Here of course, I interpolate. Hussey was the archetypal gangster-tyrant.

I turn from Lord Morris of Borth-y-Gest to the speech of Lord Wilberforce, at p. 679:

F "It is clear that a possible case of duress, on the facts, could have been made. I say 'a possible case' because there were a number of matters which the jury would have had to consider if this defence had been left to them. Among these would have been whether Meehan, though uttering no express threats of death or serious injury, impliedly did so in such a way as to put the appellant in fear of death or serious injury; whether, if so, the threats continued to operate throughout the enterprise; whether
G the appellant had voluntarily exposed himself to a situation in which threats might be used against him if he did not participate in a criminal enterprise (the appellant denied that he had done so); whether the appellant had taken every opportunity open to him to escape from the situation of duress. In order to test the validity of the judge's decision to exclude this defence, we must
H assume on this appeal that these matters would have been decided in favour of the appellant."

Finally, so far as the passages in favour of the contention which we are supporting are concerned, in the speech of Lord Simon of Glaisdale appears this passage, at p. 687:

"I spoke of the social evils which might be attendant on the recognition of a general defence of duress. Would it not enable a

gang leader of notorious violence to confer on his organisation by terrorism immunity from the criminal law? Every member of his gang might well be able to say with truth, 'It was as much as my life was worth to disobey.' Was this not in essence the plea of the appellant? We do not, in general, allow a superior officer to confer such immunity on his subordinates by any defence of obedience to orders: why should we allow it to terrorists? Nor would it seem to be sufficient to stipulate that no one can plead duress as a defence who had put himself into a position in which duress could be exercised on himself."

In deference to Mr. Mylne, we turn finally to a passage in the speech of Lord Kilbrandon, who, in his opening words, said, at p. 699:

"My Lords, the learned trial judge directed the jury to the effect that the defence of duress is not available as exculpation in a charge of murder, whether the accused has been charged as a principal in the first or in the second degree. In my opinion, that direction correctly stated the law as it then stood and now stands. It is my misfortune that while I agree with those of your Lordships who consider that that law is in a very unsatisfactory state, and is in urgent need of restatement, I remain convinced that the grounds upon which the majority propose that the conviction of the appellant be set aside involve changes in the law which are outside the proper functions of your Lordships in your judicial capacity."

Mr. Mylne submits, as already indicated, that that view is a correct one, that it is not for this court to extend by judicial interpretation what he submits is the present state of the common law.

We draw assistance from the fact that common law jurisdictions as well as Commonwealth jurisdictions throughout the world have adopted this rule almost unanimously (although the wording in their various statutes differs the one from the other), which is an indication to us that this may well have been, and indeed was, throughout a principle of the common law.

The matter was stated clearly by Winneke C.J. of the State of Victoria in *Reg. v. Hurley and Murray* [1967] V.R. 526, decided in the Supreme Court of Victoria. Before turning to the passage in the judgment of Winneke C.J., let me just read part of the headnote, in order to summarise the effect of the decision:

"*Held* . . . (2) Whether or not the matters raised by M could amount to a defence of duress, that defence was not available to him in the present case because he had voluntarily, and without any threat to himself, joined in the criminal enterprise and could not excuse his conduct by showing that he had subsequently been subjected to threats of violence to ensure that he did not withdraw from the enterprise."

Turning to the judgment of Winneke C.J., which was the majority judgment of the court, the passage runs as follows, at p. 533:

"*Tyler's case*, 8 C. & P. 616 was cited to us by Mr. Gaffy (who appeared for the Crown) as authority for the proposition contained in the last sentence of the passage quoted above from Dr.

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A Glanville Williams' book, but it is plain on consulting the report that Lord Denman did not in his charge to the jury advert to the matter at all."

If I may interpolate there, that is a statement with which this court entirely agrees. Winneke C.J. went on:

B "There is thus nothing in his charge to the jury which is authority for Dr. Glanville Williams' statement. Nevertheless, we are persuaded that it is both good law and good sense, and that a person who without threat of death or serious violence voluntarily makes himself a party to a criminal enterprise cannot excuse his criminal conduct in participating in that enterprise by showing that after he had embraced the cause he was subjected to threats of violence at the hands of the other parties to ensure that he did not resile from the bargain he had voluntarily entered into."

That was the precise description of what happened in this case between the appellant and Hussey.

D Then Winneke C.J. went on to cite from the Criminal Codes of Queensland, Western Australia and Tasmania, each of which contained a provision to that very effect. He cited the first Criminal Code from Canada. He cited the New Zealand codification of the criminal law, and he cited also the well-known American textbook, *Perkins on Criminal Law*, (1957), where the following passage appears, at p. 843:

E "If D for example is compelled under threat of death to provide a getaway car for robbers, or to assist them in some other way, he is not guilty of robbery. . . . He cannot be a perpetrator of a robbery of which he is innocent. This is not comparable in any way to the claim that one who willingly joins in the robbery was compelled during the perpetration to do something against his will. Such a claim will be rejected because the situation was the result of extreme culpability on his part."

F Two American decisions are cited there by name.

We are therefore, in the light of that persuasive authority and the indications in their Lordships' speeches in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653 of the opinion that the judge, Kenneth Jones J., was correct in the decision which he reached.

G We are further fortified in that view by the judgment of Lord Lowry C.J. of Northern Ireland, in *Reg. v. Fitzpatrick* [1977] N.I. 20. Let me read the brief headnote once again in order to indicate the nature of the decision. It runs as follows:

H "If a person by joining an illegal organisation or a similar group of men with criminal objectives and coercive methods, voluntarily exposes and submits himself to illegal compulsion, he cannot rely on the duress to which he has voluntarily exposed himself as an excuse either in respect of the crimes he commits against his will or in respect of his continued but unwilling association with those capable of exercising upon him the duress which he calls in aid."

Turning to the body of the judgment, there are just three passages which we would like to cite to indicate the way in which the judgment of Lord Lowry C.J. went. The first reads, at p. 22:

"the judge held that, having joined the I.R.A. and voluntarily exposed himself to the risk of compulsion by the I.R.A. to commit crimes on its behalf, the appellant was not entitled to rely on the defence of duress exercised by that organisation. In so holding the learned trial judge cited the well known passage from Stephen's *History of the Criminal Law of England*, vol. 2, p. 108, which was referred to by Lord Edmund-Davies in *Reg. v. Lynch* [1975] N.I. 35, 112: 'If a man chooses to expose and still more if he chooses to submit himself to illegal compulsion, it may not operate even in mitigation of punishment. It would surely be monstrous to mitigate the punishment of a murderer on the ground that he was a member of a secret society by which he would have been assassinated if he had not committed murder.' "

The second passage reads, at p. 23:

"Counsel on both sides have informed us that the point is devoid of judicial authority and we have not found anything to suggest the contrary. Therefore we have to decide, in the absence of judicial decisions, what is the common law. Assistance may be sought from the opinions of textwriters, judicial dicta and the reports of Commissions and legal committees, and from analogies with legal systems which share our common law heritage, with a view to considering matters of general principle and arriving at the answer. Mr. Curran drew to our attention the penal codes of Canada, New Zealand and the State of Queensland and we have also considered among others the penal codes of Western Australia and the State of New York as well as the draft code of 1879 prepared by the Royal Commission of which Mr. Justice Stephen was a member and the American Model Penal Code. All these codes and draft codes contain various provisions withholding from members of unlawful organisations the right to rely on a defence of duress."

Then Lord Lowry C.J. cites two extracts from the various codes and authorities which he indicates in précis in the passage which I have read. There is no need for us to go into that and there is no need for us to cite further from Lord Lowry C.J., except for one passage, where he said, at p. 26:

"We consider that the widespread adoption of such limiting provisions with regard to duress shows that the framers of the codes and drafts which we have mentioned considered that this exclusory doctrine was already part of the common law and the Law Commission's recommendation indicates the view of a distinguished body of jurists, (whose recommendations are in general favourable to duress as a defence), that participation in unlawful associations or conspiracies should disqualify the accused from relying on it."

In other words, in our judgment, where a person has voluntarily, and with knowledge of its nature, joined a criminal organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such

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A pressure, he cannot avail himself of the defence of duress. Mr. Mylne concedes that such a ruling is the end of his appeal. The appeal is therefore dismissed.

Appeal dismissed.

Solicitors: Crown Prosecution Service, Headquarters.

L. N. W.

[COURT OF APPEAL]

SUTER v. SUTER AND JONES

1986 Oct. 13, 14;
Dec. 19

May L.J. and Sir Roualeyn Cumming-Bruce

Husband and Wife—Financial provision—Divorce proceedings—“Clean break” order—Children under 18 in care and control of wife—Welfare of children “first consideration”—Whether overriding consideration on application for financial provision—Court’s duty to consider period terminating right to claim periodical payments—Matrimonial Causes Act 1973 (c. 18), ss. 25(1), 25A(2) (as substituted by Matrimonial and Family Proceedings Act 1984 (c. 42), s. 3)¹

Section 25(1) of the Matrimonial Causes Act 1973 (as substituted by section 3 of the Matrimonial and Family Proceedings Act 1984) provides:

“It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 or 24A above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18.”

The husband and wife, who had married in 1971, were divorced in 1985, on the husband’s petition, on the ground of the wife’s adultery with the co-respondent. Care and control of the two children of the marriage, born in 1972 and 1978, was awarded to the wife who continued to live with them in the former matrimonial home. The co-respondent, who earned £7,000 per annum, paid rent to his mother for a room in her

¹ Matrimonial Proceedings Act 1973, s. 25A: “(1) Where on or after the grant of a decree of divorce . . . the court decides to exercise its powers under section 23(1)(a), (b) or (c) . . . above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable. (2) Where the court decides in such a case to make a periodical payments . . . order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made . . . only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party. . . .”

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house and had his meals there, but spent most nights with the wife, who neither sought nor received any contribution from him towards the expenses of running the home. The husband remarried. On the wife's application for financial provision, the registrar in the county court ordered, inter alia, the husband to transfer to the wife all his interest in the former matrimonial home, subject to the mortgage, together with the surrender value of two insurance policies, and to make periodical payments of £100 per month to her until she remarry or both children attain the age of 18 and periodical payments of £110 and £90 per month respectively to the children during their respective minorities. Without the periodical payments to her the wife's outgoings would have exceeded her income by £570 per annum. The circuit judge dismissed the husband's appeal against the periodical payments order in favour of the wife, on the basis that a "clean break" could not be ordered, under section 25A(2), where there were children under 18, that section 25(1) of the Act of 1973 made the welfare of the children the paramount consideration in deciding whether to make a periodical payments order and its amount, and that the children's welfare required the order to be made so as to ensure that they continued to have a roof over their heads.

On the husband's appeal:—

Held, (1) that section 25A(2) of the Matrimonial Causes Act 1973 imposed a mandatory duty on the court, whenever it made a periodical payments order in favour of a party to a marriage, to consider whether it would be appropriate so to limit its term as to enable that party to adjust without undue hardship to the termination of her financial dependence on the paying party; that the circuit judge had misdirected himself in failing to apply the test provided by section 25A(2) because children were involved but it was impossible at the present time to predict a period sufficient for the wife to adjust to the termination of her right to claim periodical payments (post, pp. 15G—16B, F—G).

(2) Allowing the appeal, that section 25(1) of the Act of 1973 made the welfare of any minor children of the family a consideration of first importance for the court when deciding whether and how to exercise its powers under sections 23, 24 or 24A, to be borne in mind throughout consideration of all the circumstances including those specified in section 25(2), but it was not the paramount or overriding consideration, and the circuit judge had erred in treating the children's welfare as the paramount consideration in determining the amount of the periodical payments to be made to the wife; that the fact that the wife had invited the co-respondent to live with her and the children in the former matrimonial home without seeking or receiving any financial contribution from him was conduct which under section 25(2)(g) it would be inequitable to disregard and which, in view of the financial resources available to the wife and the co-respondent, made it unjust that the husband should be required to make substantial periodical payments to the wife; and that, accordingly, the husband's liability to make such payments would be reduced to £1 per annum (post, pp. 17F—G, 18A—B, H—19A, D—20A).

The following cases are referred to in the judgment of Sir Roualeyn Cumming-Bruce:

Barnes (R. M.) v. Barnes (G. W.) [1972] 1 W.L.R. 1381; [1972] 3 All E.R. 872, C.A.

J. v. C. [1970] A.C. 668; [1969] 2 W.L.R. 540; [1969] 1 All E.R. 788, H.L.(E.)

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- A *Minton v. Minton* [1979] A.C. 593; [1979] 2 W.L.R. 31; [1979] 1 All E.R. 79, H.L.(E.)
Moore v. Moore (1980) 11 Fam. Law 109, C.A.
Pearce v. Pearce (1979) 1 F.L.R. 261, C.A.
Practice Direction (Family Division: Transfer of Business) [1986] 1 W.L.R. 1139; [1986] 2 All E.R. 703
Stockford v. Stockford (1981) 3 F.L.R. 58, C.A.
- B The following additional cases were cited in argument:
Ackerman v. Ackerman [1972] Fam. 225; [1972] 2 W.L.R. 1253; [1972] 2 All E.R. 420, C.A.
B. (An Infant) (Adoption: Parental Consent), In re [1976] Fam. 161; [1976] 2 W.L.R. 755; [1976] 3 All E.R. 124
D. (An Infant) (Adoption: Parent's Consent), In re [1977] A.C. 602; [1977] 2 W.L.R. 79; [1977] 1 All E.R. 145, H.L.(E.)
M.-H. v. M.-H. (1981) 3 F.L.R. 429
P. (An Infant) (Adoption: Parental Consent), In re [1977] Fam. 25; [1976] 3 W.L.R. 924; [1977] 1 All E.R. 182, C.A.
Richards v. Richards [1984] A.C. 174; [1983] 3 W.L.R. 173; [1983] 2 All E.R. 807, H.L.(E.)
Robinson v. Robinson (1973) 2 F.L.R. 1, C.A.
Robinson v. Robinson [1983] Fam. 42; [1983] 2 W.L.R. 146; [1983] 1 All E.R. 391, C.A.
Vasey v. Vasey [1985] F.L.R. 596, D.C. and C.A.
- C
D

APPEAL from Mr. David Pennant sitting as a circuit judge at Weymouth County Court.

E The husband, James Anthony Suter, and his wife, Pauline Ann Suter, who were married in 1971, were divorced in 1985 on the husband's petition on the ground of her adultery with the co-respondent, Steven Richard Jones. By a notice of application dated 20 December 1985 the wife applied for, inter alia, orders (i) that the husband pay to the children of the family, their daughter (born on 29 June 1972) and their son (born on 22 September 1978), such periodical payment as might be just; (ii) that he pay her during their joint lives until her remarriage such sums in respect of periodical payments as the court thought fit; (iii) that he pay her such lump sum or sums as the court thought reasonable; and (iv) that the matrimonial home be transferred into the sole name of the wife, subject to existing liabilities. On 22 January 1986 Mr. Registrar Trayhurn, inter alia, made the transfer of property order sought and ordered the husband to make periodical payments of £100 per month to the wife until she remarry or both the children attain the age of 18, and £110 and £90 per month respectively to the children until they reach the age of 18 or further order. The husband appealed against the order that he make periodical payments to the wife, and on 20 February 1986 Mr. David Pennant, sitting as a circuit judge, dismissed the appeal and refused the husband leave to appeal.

F
G
H

By a notice dated 14 March 1986, the husband applied to the Court of Appeal for leave to appeal against the judge's order, for an order that the wife's rights to receive periodical payments be terminated or limited to such a period as might seem just or reduced. The proposed grounds of appeal were (1) that, having correctly directed himself that the wife's relationship with the co-respondent ought to be taken into account, the judge had erred in giving that factor no or insufficient

weight in considering whether or not to terminate or reduce or limit the financial dependence of the wife on the husband; (2) that, having correctly found that it was inevitable that the co-respondent would make a substantial financial contribution towards the discharge of the wife's outgoings, the judge had erred in failing to make any sufficient reduction in the sum which the husband was ordered to pay to cover her needs as found by him; (3) that there was no evidence to support the finding that the children would become homeless if the husband did not make the periodical payments to the wife, or alternatively that it was against the weight of the evidence; (4) that, having correctly directed himself that it would be right to reduce the wife's periodical payments because of her relationship with the co-respondent, the judge had erred in not making any such reduction and had misdirected himself that the limitation of the time for which the husband would remain liable to maintain the wife was such a reduction; (5) that in adopting the registrar's findings, that the children needed a total order of £300 per month if they were to live in the matrimonial home whether or not the co-respondent was also using the house and that the children's needs included the obligation to keep a roof over their heads by paying the mortgage instalments, the judge had erred in treating the whole cost of maintaining the roof over their heads as part of their needs in that only part of the mortgage repayments were properly attributable to the children, having regard to the use made of the property by the wife and the co-respondent and to the capital element involved in the mortgage payments; (6) that the judge had misdirected himself by treating the children's welfare not as the first consideration but as the paramount consideration; and (7) that the judge had wrongly exercised his discretion in that the periodical payments which he had ordered the husband to pay to the wife were excessive having regard to the respective means, earning capacity, needs, obligations and responsibilities of each of the parties and to their conduct.

On 13 October 1986 the Court of Appeal granted the husband leave to appeal and proceeded to hear the appeal.

The facts are stated in the judgment of Sir Roualeyn Cumming-Bruce.

Alan Ward Q.C. and *Timothy Coombes* for the husband.

George Brown for the wife.

The co-respondent did not appear and was not represented.

Cur. adv. vult.

19 December. The following judgments were handed down.

SIR ROUALEYN CUMMING-BRUCE. This appeal raises questions about the meaning and application of section 25(1) of the Matrimonial Causes Act 1973, as amended by section 3 of the Matrimonial and Family Proceedings Act 1984, and the correct exercise of the powers and duties conferred on the court by section 25A of the Act of 1973.

The appeal to this court is against the order made by Mr. David Pennant sitting as a circuit judge on 20 February 1986, when he dismissed the former husband's appeal (herein called "the husband") against that part of the order made by the registrar on 22 January 1986 ordering the husband to pay to his former wife (herein called "the

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A wife") periodical payments for her maintenance at the rate of £100 per month.

B The facts are fully set out in the judgment of the registrar. In bare summary, the parties married in 1971. Decree nisi upon the husband's petition alleging adultery with the co-respondent, Steven Jones, was made on 20 June 1986; decree absolute on 27 September. The effective duration of the marriage was 13 years. He is about 34; she is 31. There are two children, a girl aged 14 and a boy aged 8. The husband serves as a petty officer in the Royal Navy, and has recently remarried. The wife has the care of the children where she lives with them in the former matrimonial home. She also works in domestic service for about 112 hours per month. The co-respondent, aged 21, pays for a room in his mother's house where he goes for breakfast, but sleeps every night with the wife. He is a labourer at Devonport Dockyard earning £7,000 per annum gross. The orders made by the registrar were: (1) husband to transfer to wife all his interest in the former matrimonial home subject to the mortgage; (2) wife to receive surrender value of two insurance policies (£472); (3) periodical payments to the wife for her maintenance at the rate of £100 per month until she remarries or until both children attain the age of 18, i.e. potentially a 10-year term; (4) periodical payments to the daughter of £110 per month and to the son £90 per month until each attain the age of 18; (5) other claims for ancillary relief dismissed; (6) claims under the Inheritance (Provision for Family and Dependents) Act 1975 dismissed.

E The husband has given the contents of the matrimonial home and a car to the wife. By his appeal against the circuit judge's order he seeks (a) termination or reduction of the order that he pay £100 per month to the wife for her maintenance, (b) an order that his financial obligations to her should be terminated forthwith by an order under section 25A of the Act of 1973 as amended by the Act of 1984; alternatively a date for termination should be set substantially earlier than the term indicated by the registrar and approved by the judge. He does not challenge any of the other orders.

F The effect of the orders may be summarised as follows:

Capital

Agreed value of matrimonial home	£30,000
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Less mortgage	20,400
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Equity	9,600
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Surrender value of policies	472
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Capital receipt of wife	10,072 (plus a car and contents of the home)
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Wife had debts amounting to about	400
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Capital of husband	Nil
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On leaving the Royal Navy in 1991 he will receive a gratuity of	£10,000
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H The registrar assessed the financial needs and resources of the parties and their children. He found that the total housekeeping needs of the wife for herself and the children were at the rate of £300 per month. In addition the mortgage of £179 per month had to be paid—being £2,148 per annum. On this basis her total financial needs amount to £5,748 per

annum. Her resources without maintenance for her from the husband come to £5,178. There was thus an annual deficit of £570. The order for periodical payments thus met the deficit and left her with £630 per annum above her basic needs.

The husband's resources were his gross naval pay, which in February was £10,698 less superannuation payments and tax. Since August 1985 he had been living with a Mrs. Bickerton in rented accommodation at £100 per calendar month. He intended in February 1986 to marry Mrs. Bickerton and has done so. She has very little capital and small part-time earnings. He has debts of £1,800 which he is paying off by instalments. The registrar decided, at paragraphs 15 and 16 of his judgment, that in the opinion of the court it would be inequitable to disregard the conduct of the wife in affording a home to which her paramour returns to sleep nearly every night and he proposed to take it into account in deciding the issue of periodical payments. He proceeded, at paragraph 16 of his judgment:

"It by no means follows however that I should therefore dismiss her application for periodical payments. Considering the needs of the children in isolation would result in a periodical payments order for them, bearing in mind the difference in their ages, of £25 and £20 respectively or a total of £195 per calendar month. But this total will simply be insufficient to satisfy their needs if one includes the obligation to keep a roof over their heads by paying the mortgage instalments. It might be said that in that event, the Department of Health and Social Security will step in at least to the extent of paying the mortgage interest. There is no certainty of this, however, having regard to what would be [the wife's] total income and particularly if the Department of Health and Social Security learn of her relationship with [the co-respondent]. In any event I can see no good reason why any burden should fall on the taxpayer."

The circuit judge approved of the approach of the registrar quoted above. He found that it was inevitable to conclude as a probability that the co-respondent would make a substantial financial contribution. The deputy judge continued:

"it still leaves the question which the registrar posed at paragraph 16 of his judgment. Now this husband had originally agreed to sign over his share of the house to the wife and she had given up her application for a lump sum which might have had some value when his terminal grant came to be paid but the gift of half a share in the equity of a house worth £10,000 isn't the same as a gift of a house the children can live in, because unless the mortgage can be kept up the children are homeless. The registrar is right that the children need an order of £300 if they are to live in that home whether or not [the co-respondent] is also using the house and I don't think that the mere fact of [the co-respondent] using the house entitles a court to say that the children's mother should not have any money to keep a roof over the children's heads. But on the other hand, in findings that I have made, it would be right to reduce her periodical payments because of the relationship with [the co-respondent]. Mr. Brown's argument is cogent, that the order the registrar made took account of these findings by giving her enough to keep a roof over the family head but with limitations as to the size and time limit and the registrar said '[the wife] must now look to the future. It is

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A improbable that she will be entitled to any maintenance beyond the youngest child reaching the age of 18 years.’”

In connection with the term for which the order should run, the judge commented on the fact that the house was being used for the children and said, “One must remember where there are children, a clean break is impossible until they grow up.”

B Counsel for the appellant husband’s first submission was that the judge misdirected himself in that he never carried out the exercise prescribed as a mandatory duty upon the court by section 25A. By section 25A(1) it is the duty of the court to consider whether it would be appropriate to exercise the powers so that financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court thinks just and reasonable. By subsection (2), where
C the court decides to make a periodical payments order in favour of a party to a marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the
D other party.

Those provisions, introduced by the Act of 1984, enshrine in statute law the principle that after dissolution of marriage a time may have come, or can be foreseen in the future, when the party in whose favour financial provision has been made can so adjust his or her life as to attain sufficient financial independence to enable that party to live without undue hardship without any further dependence on the other
E party. This has been described as the principle of a “clean break,” the phrase used by Lord Scarman in his speech in *Minton v. Minton* [1979] A.C. 593, 608. In a number of cases which were decided before the new legislation came into force the court observed that where there were children for whom the parties shared a continuing obligation there is likely to be little or no room for the father and mother to have a clean
F break from each other: see, for example, *Pearce v. Pearce* (1979) 1 F.L.R. 261 and *Moore v. Moore* (1980) 11 Fam. Law 109, in which Ormrod L.J. observed, at p. 109:

“It is one thing to talk about a ‘clean break’ when there are sufficient financial resources to make a comprehensive settlement. Where there are no capital resources, as here, it is unrealistic to talk about a ‘clean break’ if there are children. It is not possible for the father and mother of dependent children to have a clean break from one another. . . . So, in my judgment, the so-called principle of the ‘clean break’ has no application where there are young children.”
G

I agree with the submission of counsel that the new section 25A
H imposes a mandatory duty in every case to apply itself to questions set out in section 25A(2) whenever a court decides to make a periodical payments order in favour of a party to the marriage. The judgments in the cases before 1984 have to be read with that in mind. Though the parties may have to co-operate with each other over children still dependent upon them, it may be possible on the facts to recognise a date when the party in whose favour the order is made will have been able to adjust without undue hardship to the termination of financial

dependence on the other party. I also agree that the judge appears to have been influenced by the earlier cases to approach the question of termination of financial dependence without specifically addressing himself to the question whether this wife could and should find a way of adjusting her way of life so as to attain financial independence of her husband. So this court is entitled to consider the facts for itself and to carry out the statutory duty prescribed by section 25A. Having said that, I am clear that on the facts it is not possible at this date to predict with any more confidence than the registrar when the wife will have been able to make the adjustment which leads to the inference that it will then be just and reasonable to terminate her right to claim periodical payments from her husband. The children are growing up. It is likely that it will become progressively easier for the wife to organise and increase her earning capacity. But there are too many uncertainties to predict the development of events over the next 10 years. Likewise in connection with the financial advantages which on the judge's finding she can expect to derive, if she wishes, from her association with the co-respondent. It is their declared intention at present not to marry. There has already been one interruption in the continuity of their cohabitation, if that is the right description of their present arrangements, as I think it is. She may become increasingly and permanently financially dependent on the co-respondent. She may not. Consideration of the facts in evidence before the registrar does not at this date enable the court to predict with any confidence whether she will in the next 10 years have had the opportunity so to adjust herself that her claim for periodical payments can be terminated without undue hardship. The registrar warned her that such would be the position once the younger child reached the age of 18. It may be that that situation will be attained earlier. It is not impossible that even after the younger child is 18, consideration of the wife's needs and earning capacity will still make it just and reasonable for her to claim some support from her husband, though I would expect it to be unlikely. For those reasons I reject the submission that the judge was wrong in refusing to make an order terminating the husband's financial obligations towards his wife.

I do not however found that conclusion upon the judge's reasoning and approach. I am satisfied for the reasons that I have stated, that he misdirected himself by failing to apply the test prescribed in section 25A(2). This court is therefore entitled to consider the facts in the way that section 25A(2) has enjoined, and then to exercise the discretionary power itself. So directing myself I come to the conclusion that it would be premature to make an order terminating the wife's claim for periodical payments for her support from her husband.

The second submission made on behalf of the husband is that the judge, following the approach of the registrar, misdirected himself upon the proper construction and effect of section 25 of the Act of 1973, as amended by section 3 of the Act of 1984.

By section 25(1):

"It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 or 24A above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18."

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A This subsection is new, and in effect replaces the words formerly enacted in section 25 at the end of the list of matters in paragraphs (a) to (g) of section 25(1) and paragraphs (a) to (e) of section 25(2) to which the court had to have regard amongst all the circumstances of the case.

B The husband submits that both the judge and the registrar treated the welfare of the children as first and paramount, in the sense in which that phrase was interpreted by Lord MacDermott in the context of section 1 of the Guardianship of Infants Act 1925: see *J. v. C.* [1970] A.C. 668, 711. There Lord MacDermott considered the two adjectives in the phrase, and said:

C "That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed."

D I agree with the submission that counsel culled from a commentary by a distinguished commentator* that the phrase "first and paramount" means simply "overriding," and that if the draftsman had omitted the adjective "first" the meaning and effect of the single adjective "paramount" would have been the same. We are faced with the problem of discovering the intention of Parliament when it used the phrase "the first consideration" without the conjunction of the adjective "and paramount" which gave the phrase in section 1 of the Guardianship of Infants Act 1925 its dominant force and effect.

E The duty of the court under section 25(1), as amended, is to have regard to all the circumstances, first consideration being given to the welfare while a minor of any child of the family under the age of 18. As regards the exercise of the powers in relation to a party to the marriage, the court shall in particular have regard to the matters set out in section 25(2) in the sub-paragraphs lettered (a) to (h). Sub-paragraph (g) introduces a matter not previously included: "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; . . ."

F Having regard to the prominence which the consideration of the welfare of children is given in section 25(1), being selected as the first consideration among all the circumstances of the case, I collect an intention that this consideration is to be regarded as of first importance, to be borne in mind throughout consideration of all the circumstances including the particular circumstances specified in section 25(2). But if it had been intended to be paramount, overriding all other considerations pointing to a just result, Parliament would have said so. It has not. So I construe the section as requiring the court to consider all the circumstances, including those set out in subsection (2), always bearing in mind the important consideration of the welfare of the children, and then try to attain a financial result which is just as between husband and wife.

G Consideration of the judge's judgment, taken in conjunction with paragraphs 15 and 16 of the judgment of the registrar which he clearly approved, shows that the judge treated the consideration of the children's welfare as paramount, and controlling the effect of the interplay of all other matters. Though the registrar and the judge gave some effect by way of reduction of the periodical payments to the financial contribution of the co-respondent to the wife's finances, which the judge held would

H * F.A.R. Bennion, "First Consideration: A Cautionary Tale" (1976) 126 N.L.J. 1237.

be substantial, the order was calculated in such a way as to provide the wife with a periodical payments order which would enable her to make all the mortgage payments. And the reasoning thus proceeded because it was considered that the children's welfare required that solution, although the registrar for the reasons that he gave thought that ordinary people would regard the result as unjust. In my view the judge fell into error in treating section 25(1) as requiring him to give effect to a consideration of the children's welfare as the overriding or paramount consideration. This was a misdirection, and this court is entitled to review the facts, apply the statute on its proper construction, and decide how to determine the wife's financial claim for periodical payments.

In the course of the appeal before us the wife sought leave to put in an affidavit dealing with the husband's conduct during continuance of matrimonial co-habitation. There was no cross-appeal by the wife to the effect that the judge was wrong to regard the wife's association with the co-respondent and invitation to him to live in her home as a consideration relevant under section 25(2)(g). No evidence had been filed or given in evidence by the wife alleging misconduct on the part of the husband as relevant to the wife's financial claim for periodical payments. Further, in the proceedings before the registrar and the judge there was no issue between them about the facts of the association between her and the co-respondent, including his almost continuous residence with her every night in the former matrimonial home. This was a case in which there had never been contested issues about the facts of conduct. The only way in which conduct had become relevant under section 25(2)(g) was in relation to the question whether it was inequitable to disregard the wife's conduct with the co-respondent, on which she had not appealed against the judge's decision not to disregard it. We refused to admit the affidavit sought to be tendered to us. I observe that *Practice Direction (Family Division: Transfer of Business)* [1986] 1 W.L.R. 1139, dated 28 April 1986, only directs that transfer of claims for financial provision should be made to the High Court, if conduct is relevant, where there are contested allegations of conduct. These allegations of the wife's conduct which were the only ones hitherto raised were not contested allegations. The question was what if any effect the conduct should have for the purposes of section 25. The question which arose for the purpose of section 25 was whether it was inequitable to disregard the conduct of the wife, who had invited the co-respondent to spend most evenings and nights at her home. It was agreed before the judge that evidence before him should be limited to the issue as to what if any contributions the co-respondent was making, or was likely to make, to the finances of the wife. She described the situation in the words "We are lovers. We sleep together every night except when he goes off to Kent with friends." She did not ask him for money and he made no financial support for the household. He gave evidence that there was nothing to stop their relationship as far as he could see. He takes her out twice a week. On 14 November 1985 his income was £7,000 per annum gross; £4,050 net. The judge considered that the co-respondent could make a substantial financial contribution. He affirmed the registrar's order of £100 per month, which was clearly related to enabling the wife to pay the mortgage payments. In fact, leaving the co-respondent out of account, she would have about £12 per week above the basic needs of herself and the children. We heard various calculations from her counsel in the familiar one-third rule calculations. In my view they do not help. My

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A conclusion is that it was wrong to order the husband to pay periodical
payments to his wife in addition to the substantial benefits which she
enjoys as a consequence of the capital transfers that he has already
made. He has remarried, and has to begin with provision of
accommodation for himself and his wife, which may be rented
accommodation or in married quarters. The co-respondent told the
B judge with becoming candour, "It could be said we have been as close
as man and wife and it is likely to continue as far as I can see. I haven't
a lot of money."

In my view there is no reason, on the facts found, to expect that the
children will find themselves without a roof over their heads if periodical
payments for the wife came to an end. The co-respondent should and
could make a sufficient contribution to the expenses of his residence
without any contribution from the husband beyond his payments of
C maintenance for the children. The wife may organise herself to earn
more remuneration by her own efforts. If there is a financial crisis, I see
no reason why the Department of Health and Social Security should not
be asked to contribute to the mortgage interest: see *Barnes (R.M.) v.*
D *Barnes (G.W.)* [1972] 1 W.L.R. 1381 and *Stockford v. Stockford* (1981)
3 F.L.R. 58. The principle in point is that the husband should not be
ordered to pay more for his wife's support than is just.

So I approach the question whether any, and if so what, reduction
should be made in what otherwise would have been an appropriate
order for periodical payments in support of the wife in order to achieve
a result which is reasonable. I return to figures set out earlier in this
E judgment and consider the needs and resources of the parties and the
fact, relevant as part of all the circumstances and to sub-paragraph (g)
of section 25(2), that the wife has invited her lover to live for the
foreseeable future in the former matrimonial home with herself and the
children, without seeking or receiving any contribution to the expenses
of maintaining that house. He is a bachelor aged 21 with a gross income
F of not less than £7,000, subject to tax. The figures demonstrate that the
payment of the mortgage amounts to £2,148 per annum, and that after
payment thereof she has a deficit of £570 per annum. It is reasonable to
infer that the co-respondent is in a position to contribute at least £12 per
week for the privileges which he enjoys in the furnished residence
which, as a consequence of the husband's transfer of property, now
G belongs wholly to the wife, subject to the mortgage. It is material to
bear in mind that since he moved to reside in the wife's house the co-
respondent has continued to pay £16 per week to his mother for the
room in which he no longer sleeps. As the wife is now for practical
purposes living with the co-respondent in the former matrimonial home,
it is just and reasonable to make an order on the basis that she require
H him to contribute not less than £600 per annum for the expenses of the
house which she has invited him to enjoy. On that basis I would not
think it just that the husband should do more than he has done by
making the capital transfers already completed and by continuing to
make payments to the children amounting to £200 per month. In that
situation the wife's and children's needs are met, she can afford to run
the home and pay the mortgage, and the husband and wife can expect

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to enjoy a comparable standard of living in the accommodation in which they respectively live.

I would move that the appeal be allowed and that the husband's obligation to contribute to her support be reduced to a nominal order of £1 per year.

MAY L.J. I agree.

Appeal allowed.
No order as to costs.
Legal aid taxation.
Leave to appeal refused.

Solicitors: Wickham & Lloyd Edwards, Portland; Curtis, Torpoint.

[Reported by CLIVE SCOWEN ESQ., Barrister-at-Law]

[COURT OF APPEAL]

HAYWARD v. CAMELL LAIRD SHIPBUILDERS LTD. (No. 2)

1987 Jan. 22, 23;
March 5

Purchas and Nicholls L.JJ. and
Sir Roualeyn Cumming-Bruce

Discrimination, Sex—Equal pay—Work of equal value—Work of applicant and male comparators of equal value—Applicant's basic pay and overtime rates less than comparators—Other conditions more favourable to applicant—Whether terms in contract of employment relating to basic and overtime rates to be modified so as not to be less favourable—Equal Pay Act 1970 (c. 41), s. 1(2)(c) (as amended by Sex Discrimination Act 1975 (c. 65), s. 8 and Equal Pay (Amendment) Regulations 1983 (S.I. 1983 No. 1794), reg. 2(1))

The applicant, a woman, was employed at a shipyard canteen as a cook and was classified as unskilled for the purposes of pay. She claimed under section 1(2)(c) of the Equal Pay Act 1970¹ that she was doing work of equal value to male comparators who were shipyard workers paid at the higher rate for skilled tradesmen in the yard. Following an evaluation by an independent expert under section 2A(1)(b) of the Act, an industrial tribunal held that the applicant's work was of equal value to that of the men. The industrial tribunal, at a further hearing, rejected the applicant's contention that, in considering whether her contract of employment should be modified, it was sufficient to compare her basic pay and overtime rates with that of the male comparators and held that without a comparison of all terms and conditions of employment, she was not entitled to a declaration that she should receive a higher rate of pay. The Employment Appeal Tribunal dismissed the applicant's appeal holding that since the terms of section 1(2)(c) were ambiguous, it was necessary to construe that section in accordance with

¹ Equal Pay Act 1970, as amended, s. 1(2)(c): see post, p. 24B-D.

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article 119 of the E.E.C. Treaty, which gave a broad meaning to the word "pay" so as to include not only basic rates of pay but any other consideration received in the course of employment.

On appeal by the applicant:—

Held, dismissing the appeal, that when comparing the term relating to pay in the applicant's contract of employment with that in the male comparators' contracts under section 1(2)(c) of the Act of 1970, it was necessary to look at the whole of the relevant term in the respective contracts, and to take into account any additional payments, whether in cash or in kind, which the applicant received as part of her overall remuneration; that such a construction was consistent with the broad meaning given to the word "pay" in article 119 of the E.E.C. Treaty; and that, accordingly, failing agreement between the parties, it would be for the industrial tribunal to determine whether the term of the applicant's contract relating to pay was less favourable to her than that of the male comparators, and if so, to determine the extent of the modification needed to render the applicant's contract no less favourable (post, pp. 27B, 28A-C, F-H, 29A-B, H—30B, C-E).

Decision of the Employment Appeal Tribunal [1986] I.C.R. 862 affirmed.

The following case is referred to in the judgment of the court:

Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland (Case 61/81) [1982] I.C.R. 578, E.C.J.

The following additional cases were cited in argument:

Bulmer (H.P.) Ltd. v. J. Bollinger S.A. [1974] Ch. 401; [1974] 3 W.L.R. 202; [1974] 2 All E.R. 1226, C.A.

Coal Economising Gas Co., In re (Gover's Case) (1875) 1 Ch.D. 182, C.A.

Clay Cross (Quarry Services) Ltd. v. Fletcher [1978] 1 W.L.R. 1429; [1979] I.C.R. 1; [1979] 1 All E.R. 474, C.A.

Customs and Excise Commissioners v. ApS Samex [1983] 1 All E.R. 1042

Garland v. British Rail Engineering Ltd. [1983] 2 A.C. 751; [1982] 2 W.L.R. 918; [1982] I.C.R. 420; [1982] 2 All E.R. 402, E.C.J. and H.L.(E.)

Gill v. El Vino Co. Ltd. [1983] Q.B. 425; [1983] 2 W.L.R. 155; [1983] 1 All E.R. 398, C.A.

Haughton v. Olau Line (U.K.) Ltd. [1986] 1 W.L.R. 504; [1986] I.C.R. 357; [1986] 2 All E.R. 47, C.A.

Jenkins v. Kingsgate (Clothing Productions) Ltd. (Case 96/80) [1981] 1 W.L.R. 972; [1981] I.C.R. 592, E.C.J.; [1981] 1 W.L.R. 1485; [1981] I.C.R. 715, E.A.T.

Macarthy's Ltd. v. Smith [1981] Q.B. 180; [1980] 3 W.L.R. 929; [1980] I.C.R. 672; [1981] 1 All E.R. 111, E.C.J. and C.A.

Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching) (Case 152/84) [1986] Q.B. 401; [1986] 2 W.L.R. 780; [1986] I.C.R. 335; [1986] 2 All E.R. 584, E.C.J.

Ministry of Defence v. Jeremiah [1980] Q.B. 87; [1979] 3 W.L.R. 857; [1980] I.C.R. 13; [1979] 3 All E.R. 833, C.A.

Rainey v. Greater Glasgow Health Board [1986] 3 W.L.R. 1017; [1987] 1 All E.R. 65, H.L.(Sc.)

Reg. v. Tonbridge Overseers (1884) 13 Q.B.D. 339, C.A.

River Wear Commissioners v. Adamson (1876) 1 Q.B.D. 546, C.A.

Roberts v. Tate & Lyle Food and Distribution Ltd. [1983] I.C.R. 521, E.A.T.

Shields v. E. Coomes (Holdings) Ltd. [1978] 1 W.L.R. 1408; [1978] I.C.R. 1159; [1979] 1 All E.R. 456, C.A.

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Sorbie v. Trust Houses Forte Hotels Ltd. [1977] Q.B. 931; [1976] 3 W.L.R. 918; [1977] I.C.R. 55; [1977] 2 All E.R. 155, E.A.T. A

Stock v. Frank Jones (Tipton) Ltd. [1978] 1 W.L.R. 231; [1978] I.C.R. 347; [1978] 1 All E.R. 948, H.L.(E.)

Worringham v. Lloyds Bank Ltd. (Case 69/80) [1981] 1 W.L.R. 950; [1981] I.C.R. 558; [1981] 2 All E.R. 434, E.C.J.

APPEAL from the Employment Appeal Tribunal.

The applicant, Julie Ann Hayward, made a complaint, in reliance on section 1(2)(c) of the Equal Pay Act 1970, as amended, claiming equal pay with tradesmen at the shipyard of Cammell Laird Shipbuilders Ltd., where she was employed. The member of the panel of experts designated by A.C.A.S. reported to the industrial tribunal that the work performed by the applicant was of equal value to the work of certain named tradesmen and the industrial tribunal [1985] I.C.R. 71 directed that, if it could not be settled, the applicant's claim should be restored to the tribunal for further consideration. On 13 September 1985 the same tribunal decided that she was not entitled to a declaration that the employer should pay her the same basic and overtime rates of pay as for men doing work of equal value in the same employment and on 19 May 1986 the Employment Appeal Tribunal [1986] I.C.R. 862 dismissed the applicant's appeal. B

By notice of appeal dated 5 June 1986 the applicant appealed on the grounds (1) that the appeal tribunal erred in law in failing to conclude that section 1(2)(c) of the Equal Pay Act 1970 entitled the applicant to point to a specific term of her contract of employment, such as that relating to basic pay or that relating to overtime rates, which was less favourable than the comparable term in the contract of a man doing work of equal value, and entitled her to have that term modified so as not to be less favourable, irrespective of whether her terms and conditions, as a whole, were less favourable than those of the man; (2) the appeal tribunal erred in law in concluding that European Community law required an industrial tribunal to compare the applicant's terms and conditions, as a whole, with the man's terms and conditions, as a whole, for the purposes of deciding a claim under section 1(2)(c), rather than considering and comparing the specific less favourable term of which complaint was made, in that (a) community law was an aid to the interpretation of the Act of 1970: in the present case, the relevant provisions of the Act of 1970 were unambiguous; (b) the relevant Community law which served as an aid to interpretation, if the Act of 1970 was ambiguous, was article 119 of the E.E.C. Treaty and Council Directive (75/117 E.E.C.); those elements of Community law did not confine a woman who did work of equal value to a man to a claim in respect of her terms and conditions considered as a whole, but permitted a claim in respect of a particular less favourable term and (c) even if the relevant Community law did confine a woman to a claim in respect of her terms and conditions considered as a whole, still the Act of 1970 could, consistently with Community law, provide more extensive rights to an employee, and did so as described in (1) above. C

The facts are stated in the judgment of the court. D

David Pannick for the applicant.

Charles James for the employer. E

Cur. adv. vult. F

5 March. The following judgment of the court was handed down. G

H

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Hayward v. Cammell Laird (No. 2) (C.A.)

A NICHOLLS L.J. This appeal raises a point of construction of the equal pay legislation. The applicant, Miss Hayward, is 27 years old. She has been employed by Cammell Laird Shipbuilders Ltd. at its shipyard in Birkenhead for over 10 years. Initially she was a catering trainee. She attended college and obtained the appropriate City and Guilds qualification and other certificates. For the first three of the four years that she was a trainee she was paid the same basic rate of pay as trade apprentices in the shipyard. After qualifying, she was employed in the canteen as a cook. Her basic rate of pay was lower than that of the skilled shipyard workmen who qualified in their trades at the same time as the applicant completed her training in catering.

B So in 1982 the applicant made a complaint under the Equal Pay Act 1970 to the industrial tribunal, claiming equal pay with the male tradesmen. In 1983, in circumstances to which we shall have to return, section 1(2) of that Act was amended by the addition of a new paragraph, paragraph (c). The amendment came into force on 1 January 1984. In February 1984 the applicant made a fresh complaint to the industrial tribunal, this time in reliance on the new paragraph (c) in section 1(2), again claiming equal pay with the male tradesmen in the shipyard. She withdrew her earlier application, and it is with her second application alone that this appeal is concerned.

D This second application came before the industrial tribunal sitting in Liverpool on 10 April 1984. An issue arose over whether the work performed by the applicant was of equal value to the work of certain named tradesmen employed in the same shipyard and whose trades respectively were those of painter, joiner and thermal insulation engineer. E In accordance with the prescribed procedure, the industrial tribunal referred that question for report to a member of the panel of experts designated by the Advisory, Conciliation and Arbitration Service. An expert, Mr. T. A. Dillon, duly made his report, in which he answered the referred question in favour of the applicant.

F The matter then came back again to the industrial tribunal. Having heard further argument, on 29 October 1984 the tribunal accepted the conclusions in the expert's report. They directed, in short, that if the applicant's claim in respect of her employer's contravention of any terms modified by virtue of the equality clause deemed to operate in relation to any variation between her contract of employment and the contracts of the so-called male "comparators," could not be settled between the parties, the applicant might restore the matter for further consideration by the industrial tribunal. That decision of the industrial tribunal is reported: [1985] I.C.R. 71.

G The parties were unable to agree on the implementation of that decision, and the matter came before the same industrial tribunal again on 20 June 1985. Before mentioning the stumbling block between the parties, we should refer to the material terms of the relevant legislation. H The effect of section 1(1) of the Equal Pay Act 1970 is to imply an "equality clause" into every contract of employment of a woman which does not contain such a clause. The nature and effect of an equality clause are spelled out in subsection (2). The opening words of that subsection provide:

"An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the 'woman's contract'), and has the effect that— . . ."

Of the three paragraphs that follow, paragraph (a) is concerned with the case where the woman is employed on like work with a man in the same employment, and paragraph (b) with the case where the woman is employed on work rated as equivalent with that of a man in the same employment. Each of these two paragraphs (a) and (b) contains two sub-paragraphs, (i) and (ii), which are, in all material respects, the same as sub-paragraphs (i) and (ii) in paragraph (c). Paragraph (c) is in these terms:

"where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term."

The point upon which the parties were unable to agree in implementing the decision of the industrial tribunal given in October 1984 was whether, in considering if any term of the applicant's contract is less favourable to her than a term of a similar kind in the men's contracts, it is appropriate (a) to compare only their respective terms as to the basic wage rates and overtime rates, or (b) to have regard to the terms and conditions of the contracts of employment as a whole of the applicant and the tradesmen. The applicant contended for (a), and the employer contended for (b). The industrial tribunal, by a majority, found in favour of the employer on 25 July 1985, and this decision was upheld by the Employment Appeal Tribunal on 19 May 1986. The applicant has now appealed from that decision.

We can illustrate the effect of these rival contentions in this case, in terms of figures, by using (but only for illustration purposes, because the figures are not agreed) some figures put forward by the employer. On these figures, at April 1984 the applicant, who is paid an annual salary, received the equivalent of £103.89 per week. The tradesmen's basic pay was £126.50 per week. The applicant's hourly overtime rates were £3.44 from Monday to Friday and £4.22 on Saturday and Sunday. The men's hourly overtime rates were £3.81 from Monday to Saturday, and £4.68 on Sunday. Thus the men's overtime rates were higher, save as to Saturdays. These comparisons yield an aggregate advantage of £24.51 per week in favour of the men, having regard (as we were told) to the actual overtime worked by the applicant and the men over an unspecified period.

On the other side of the coin, although the hours of work were nominally the same, the applicant's hours include a paid meal break of 30 minutes each day. The employer values this, and the benefit of her free meals, at £18.12 per week. Further, but as a very small item, the applicant has an additional two days' paid holiday each year (worth 71p per week). Finally, the applicant enjoys better sickness benefits, to an extent which the employer values at £16.95 per week. Using these

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A figures, the items in respect of which the applicant is treated more favourably than the men comparables show an aggregate weekly advantage of £35.78 to the applicant. Overall, therefore, setting the men's advantage of £24.51 on basic and overtime pay against the applicant's advantage of £35.78 on other benefits, she is, so the employer contends, £11.27 per week better off than the men.

B The conclusion of the majority of the industrial tribunal was:

C "In relation to the concept of equal pay for work of equal value we find that an employer is entitled, when dealing with the implementation of an award to consider pay as meaning not only basic pay, and overtime pay, but also, to use the words of article 119 'any other consideration whether in cash or in kind which the worker receives directly or indirectly in respect of his employment from his employer.' That, in our view, would require sick pay to be taken into account in some way, but it does not follow, as we have indicated above, that we would afford unqualified acceptance to the mathematical approach adopted by the employer in its schedule."

D Accordingly the tribunal refused to make an unqualified declaration, as asked on behalf of the applicant, that her basic pay and overtime pay should be the same as that of her male comparables.

E In upholding this decision the Employment Appeal Tribunal, whose judgment was delivered by Popplewell J., concluded that section 1(2) was capable of bearing either of the two rival meanings, and that, accordingly, article 119 of the Treaty establishing the European Economic Community had to be applied.

F In brief, article 119 comes into the history of the Equal Pay Act 1970 in this way. Although the Equal Pay Act 1970 received the royal assent on 29 May 1970, the coming into force of section 1 was postponed until 29 December 1975 (section 9(1)). Before that date arrived the United Kingdom, on 1 January 1973, became a member of the European Economic Community and the provisions of the E.E.C. Treaty became binding upon it. The treaty of accession was signed on 22 January 1972, and section 2 of the European Communities Act 1972, introducing the E.E.C. Treaty into English law, was enacted on 17 October 1972.

H Article 119 of the E.E.C. Treaty provides:

G "Each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job."

Progress in implementing this principle having been uneven in different member states, on 10 February 1975 the Council of the European Communities issued Council Directive (75/117/E.E.C.). We shall refer to this as the "equal pay directive."

Thereafter the Sex Discrimination Act 1975 was enacted on 12 November 1975. It amended the Equal Pay Act 1970 by substituting the

present section 1(1) and (2), except for paragraph (c), for the original section 1(1) and (2). The new section 1(1) and (2) came into force on 29 December 1975.

Article 1 of the equal pay directive is concerned with the elimination of discrimination over remuneration on the ground of sex for "the same work or for work to which equal value is attributed." Article 8 of the directive gave member states a period of one year in which to put into force the laws necessary to comply with the directive. In July 1982, in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (Case 61/81) [1982] I.C.R. 578 the European Court of Justice held that, in relation to work of equal value, this country had failed to fulfil its obligations under the E.E.C. Treaty by failing to implement article 1 of the equal pay directive. In consequence, section 1(2)(c) was introduced into the Equal Pay Act by an amendment made by the Equal Pay (Amendment) Regulations 1983. These regulations were made under section 2(2) of the European Communities Act 1972.

With that introduction we come to the Employment Appeal Tribunal's conclusion [1986] I.C.R. 862, 873:

"Applying article 119 the appeal tribunal must look at the overall package. We reject the submission that this will pose any difficulty in practice for an industrial tribunal which is quite capable of carrying out the inquiry. A decision to the contrary, which would necessarily involve leap-frogging, would in the view of the industrial members of this appeal tribunal result in widespread chaos in industry and inflict grave damage on commerce. We are a pragmatic tribunal, as are the industrial tribunals, with members well versed in industrial practice. We should seek to interpret an Act of Parliament with common sense applicable to industrial affairs and not in a way which has precisely the opposite effect unless we were driven to it. To adopt and adapt the words of Lord Reid in *Post Office v. Crouch* [1974] I.C.R. 378, 399, when he said in relation to the Industrial Relations Act 1971: 'This, in my judgment, shows that the Act must be construed in a broad and reasonable way so that legal technicalities shall not prevail against industrial realities and common sense.' We agree with the views of the industrial tribunal as an industrial jury."

We can illustrate what we understand the appeal tribunal meant by leap-frogging in this way. Take the case of a man and a woman who are doing the same work, or work of equal value. The woman's salary is lower than the man's, but unlike the man she is provided with a car by the employer. On the applicant's argument, the woman is entitled to have her salary increased to the same level as the man's regardless of the extra benefit she receives in the form of a car. But the matter would not stop there. The equality provisions in section 1 of the Equal Pay Act 1970 apply to men just as much as to women: section 1(13). So, after the woman's pay had been increased to match the man's, he could make a complaint in respect of the failure of the employer to provide him with a car. Thus, by pointing out and relying on the differences in each other's contract, each would be able to obtain an improvement in his or her contractual terms to match the most favourable parts of the other's contract.

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A On this appeal Mr. Pannick's primary and principal argument was short and simple: section 1(2) is unambiguous in focusing on the specific term of which complaint is made. Here the terms of which complaint is made are those relating to the applicant's basic rate of pay and her overtime rate of pay. She is entitled to have those rates of pay increased to match those of the men comparables, regardless of the content of any other terms of her contract or of the men's contracts.

B We are unable to accept this. Under section 1(2)(c)(i), as under the corresponding sub-paragraphs of paragraphs (a) and (b), a comparison has to be made between "any term" of the woman's contract and "a term of a similar kind" in the man's contract. The comparison has to be made to decide whether the relevant term in the woman's contract is less favourable than the corresponding term in the man's contract. If the complaint concerns a term as to the woman's basic rate of pay, and she is paid on the same basis as the man (for instance, at the same weekly rate), and they both work the same hours, a simple comparison will be possible between the two rates of pay. In such a case, the statutory favourability comparison may be capable of being carried out without any adjustments being necessary.

D But in all save the simplest of cases, that will not be so. Take the case of a woman who is paid a lower basic weekly wage than a man but whose hours of work are shorter. In such a case, to make a comparison of their respective terms of pay, some adjustment to the weekly wage rates would obviously be necessary. Otherwise one would not be comparing like with like.

E We think that this reasoning would apply with equal validity and force if the woman's hours of work included a paid meal break but the man's did not: the adjustment being made in order to see if the term of the woman's contract regarding pay was less favourable than that of the man's would need to cover this item also.

F Moreover, in some instances the adjustments needed to carry out the statutory favourability comparison of corresponding terms will be more than the merely arithmetical calculations appropriate in the above examples. Take another case: a woman and a man work similar hours, but the woman is paid on a piece rate basis whilst the comparable man is paid on a time basis. We can see no reason why that difference should preclude the industrial tribunal from hearing and determining a complaint under section 1(2), even though this would involve inquiring into the wages which, over the hours of work in question, the woman could reasonably expect to obtain on her piece rates. The tribunal would, in such a case, have to make an assessment of the value of the woman's piece rates, having heard the evidence necessary for that purpose.

G But it is not only in such a case that adjustments would be called for. If a woman were paid a basic weekly sum but with productivity bonuses added, and a man were paid a fixed wage with no bonuses, in our view it is plain that the comparison exercise called for under section 1(2)(c)(i) would require the bonuses to be brought into account. The woman could not have her basic weekly wage brought up to the level of the man's wage, and ignore the bonuses she was receiving. The object of the Equal Pay Act 1970 is to prevent discrimination. The purpose of an equality clause is to achieve equality. But to leave the productivity bonuses out of account would not be to achieve equality. It would have the effect of raising the woman's "pay," giving that expression the

normal meaning of the remuneration from one's employment, to a level above that of the man.

That cannot have been the intention of Parliament, nor do we consider that the language used in the section compels or, indeed, is sensibly capable of, such a construction. The Act requires the "term" of the woman's contract to be compared with a "term of a similar kind." Terms in contracts of employment are of many "kinds"; concerning the nature of the work, working conditions, hours of work, pay, and so forth. Where the complaint relates to pay, the provisions which have to be compared are the terms concerning pay. The "term" in the woman's contract concerning pay must not be less favourable than the "term" concerning pay in the man's contract. This involves looking, in the case of the woman and of the man, at the whole of the relevant term, viz., the term concerning pay. This will be so even if the complainant seeks to isolate one item of her remuneration and compare that alone with a corresponding item in the man's remuneration. The complainant cannot, by limiting her claim in such a way, elevate to the status of a term what is, in the context of the statutory comparison, only part of the relevant term. To revert to my last example, the woman cannot claim parity on basic pay and ignore the bonuses which she receives but the man does not. To do so would produce a result so manifestly absurd as to bring into disrepute the underlying, non-discrimination, equality principle which the Act of 1970 is seeking to further.

The artificiality of looking only at one or more ingredients in the woman's overall remuneration package, as selected by the woman, can be illustrated further by reference to the overtime rates in the present case. On the figures put forward, the applicant's hourly rate is lower than the men's in respect of every day in the week except (somewhat curiously) Saturday, when hers is higher. Self-evidently it would be absurd if, by making complaint only in respect of her overtime rates for the days Sunday to Friday inclusive, the applicant could have the better overtime rate at which she is paid on Saturday left out of account. In fairness to her, that has not been suggested in this case. But what this shows, in stark form, is that to achieve a fair and sensible result with a complaint regarding pay, one cannot look merely at one part of the pay of the complainant and of the comparables and ignore the other parts.

We have mentioned the case of the woman who receives productivity bonuses in addition to her basic pay. What of the case where the woman receives not a fixed or variable cash bonus on top of her basic pay, but a benefit in kind, such as the use of a car, or free meals, or free transport, or free medical insurance? "Pay" is not defined in the Equal Pay Act 1970, but we are unable to discern any reason why, if a cash bonus has to be brought into the comparison exercise, bonuses in kind should not. In an era when many employees receive part of their remuneration in the form of such benefits, frequently of considerable value, to distinguish between payments in cash and payments in kind would be to introduce an artificial and unrealistic distinction.

We come, finally, to the sickness benefits. These are capable of being distinguished from all the other items we have so far mentioned in that these benefits will only result in a benefit, in cash or in kind, being received by the employee if and when he or she falls ill. In argument these benefits were said to be contingent. But, here again, we do not think that any sound distinction exists. Sickness benefits constitute sums paid to an employee when, through sickness, he or she is unable to

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A work. Paid holidays represent periods when an employee, although not working, will be paid. Of course, holidays are fixed and will be taken, as arranged, year after year, whilst the incidence of illness is uncertain and unpredictable. But most employees are prevented from going to work by illness from time to time. If the length of paid holidays is, in an appropriate case, a matter to be taken into account when comparing two employees' terms as to pay, so also should sickness benefits. They form
B part of the employees' remuneration; they are part of their "pay," giving that word the wide meaning which, in step with article 119 and the equal pay directive, it must surely bear in the context of the Equal Pay Act 1970, as amended.

C In reaching this conclusion, however, we wish to note our agreement with the industrial tribunal's reservation regarding the manner in which the employer appears to have valued the sickness benefits in this case. On its face the calculation assumes that the applicant is receiving one-half of her maximum annual sickness benefit. That is to say, that she is away ill for 13 weeks each year. That seems much too high a figure, but we have heard no argument on the figures, and this will be one of the matters for further consideration by the industrial tribunal.

D For the applicant, in support of her contention on the construction of the Act of 1970, it was argued that assessing the worth of contractual rights such as sickness benefits was a very difficult, if not impossible, task. We do not find this argument persuasive. Even on the applicant's construction, the industrial tribunal will be faced with an evaluation exercise such as that involved in comparing pay on time rates with pay on piece rates. We see no insuperable difficulty in industrial tribunals, with their industrial expertise, putting a fair value on benefits such as
E sickness benefits and benefits in kind.

Mr. Pannick drew our attention to the "material factor" defence in section 1(3) of the Act of 1970. In short, section 1(3) provides the employer with a defence in respect of any variation between a woman's contract and a man's contract if the employer proves that the variation is genuinely due to a material difference, other than sex, between the woman's case and the man's case. It was submitted that the existence of this defence provides the answer to the undesirable practical consequences outlined above. It was also submitted that, for reasons which it is not material to mention, section 1(3) is not now available as a defence to the employer in this case. We prefer to express no view on whether
F section 1(3) would be available as a defence in all the instances we have mentioned above. We are content to assume that the ambit of section 1(3) may be wide enough to embrace such cases. But we do not think that making this assumption robs the examples given of their force as an aid to understanding what is meant by the expression "any term" in section 1(2) in the context of a complaint concerning pay. In setting out the effect of an equality clause, section 1(2) requires a favourability comparison to be made. On the applicant's construction, that exercise
G will be a manifestly absurd one in some instances. We are unable to impute to Parliament an intention that this should be the effect of section 1(2), with resort then needing to be had to section 1(3) to bring sense out of nonsense.

H We can deal with article 119 of the E.E.C. Treaty, very briefly. In our view the conclusion we have reached above on the construction of "term" in section 1(2) is consistent with article 119. Indeed, we are fortified in that conclusion by the terms of the article. Article 119

contains a wide definition of "pay" for the purpose of the principle that men and women should receive equal pay for equal work. The article does not expressly state that, in applying the principle, pay as a whole as defined should be looked at, rather than the individual ingredients one by one, in isolation from each other, but we have no doubt that that is what is meant. That is the only sensible interpretation of the article. We add that we can see nothing in the equal pay directive to suggest otherwise.

We should also note a submission made for the applicant based on the Sex Discrimination Act 1975. That Act, with which the Equal Pay Act 1970 forms a single code, makes it unlawful for a person to discriminate against a female employee in the way he affords her "access to opportunities for promotion, transfer or training, or to any other benefits": section 6(2). It was submitted that that provision is concerned with specific benefits, not an overall package. We do not derive assistance from this provision when determining the meaning to be given to the word "term" in section 1(2) of the Equal Pay Act 1970 in the context of a complaint concerning pay.

For these reasons this appeal will be dismissed. Accordingly it will be for the industrial tribunal, failing agreement between the parties, to determine whether the term of the applicant's contract concerning pay is less favourable to her than the terms concerning pay of the men comparables and, if it is less favourable, to determine the extent and to determine also what modification needs to be made to that term in the applicant's contract so that it will be not less favourable. Pay for this purpose will include all the items listed in the employer's schedule. It will be for the industrial tribunal to determine all disputes concerning the figures.

*Appeal dismissed with costs.
Leave to appeal refused.*

7 May. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Goff of Chieveley) allowed a petition by the applicant for leave to appeal.

Solicitors: Brian Thompson & Partners, Manchester; Davis Campbell & Co., Liverpool.

M. F.

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[FAMILY DIVISION¹]*In re* ADOPTION APPLICATION (PAYMENT FOR ADOPTION)

1987 March 2, 3; 11

Latey J.

Adoption—Adoption order—Payment or reward—Proposed adopters entering into surrogacy agreement—Payments made to mother—Whether payment unlawful—Whether court having jurisdiction to authorise payments retroactively—Adoption Act 1958 (7 Eliz. 2, c. 5), s. 50(1)(3) (as amended by Children Act 1975 (c. 72), s. 108(1), Sch. 3, paras. 21(2)(4), 34)

A childless married couple, Mr. and Mrs. A, made an arrangement with Mrs. B that if she became pregnant following sexual intercourse with Mr. A, then, after the birth, the child would be handed over to Mr. and Mrs. A to be brought up as their own child. Mr. B consented to the arrangement and the parties agreed that Mr. and Mrs. A would pay a sum of money to cover Mrs. B's loss of wages and expenses during pregnancy. A child was conceived and Mr. and Mrs. A paid to Mrs. B the sum of £1,000 and a further £4,000 after the child's birth. The child was handed over to Mr. and Mrs. A two days after birth. They applied to adopt the child and Mrs. B, as the child's mother, consented to an adoption order being made.

On the question whether there had been any payment or reward for or in consideration of the adoption contrary to section 50(1) of the Adoption Act 1958¹ and, if so, whether the court could authorise the payments made under section 50(3):—

Held, making the adoption order, that the intention of the parties had been to provide a child for a childless couple that they could bring up as their own and there had been no commercial transaction and, therefore, the payments made were not payments or rewards contrary to the provisions of section 50(1) of the Adoption Act 1950; but that, if the payments had been made as a reward for placing a child for adoption, then the court had jurisdiction subsequently to authorise those payments under the provisions of section 50(3) and, if necessary, would do so since it was in the child's interest that the adoption order be made (post, pp. 33H—34A, 35H—36B, F—37A, E-F).

No cases are referred to in the judgment.

The following cases, supplied by the courtesy of counsel, were cited in argument:

A. v. C. [1985] F.L.R. 445

C. (A Minor) (Wardship: Surrogacy), *In re* [1985] F.L.R. 846

D. (An Infant) (Adoption: Parent's Consent), *In re* [1977] A.C. 602; [1977] 2 W.L.R. 79; [1977] 1 All E.R. 145, H.L.(E.)

H. (A Minor) (Adoption: Non-Patrilal), *In re* [1982] Fam. 121; [1982] 3 W.L.R. 501; [1982] 3 All E.R. 84

APPLICATION

The applicants, a married couple, sought to adopt a child, aged two years and four months at the time of the hearing of the application, whose natural father was the male applicant. The child's mother, who

¹ Adoption Act 1958, s. 50(1)(3), as amended: see post, p. 35A-B.

consented to the adoption, had received a total sum of £5,000 from the applicants more than two years earlier.

The hearing was in chambers but judgment was delivered in open court.

The facts are stated in the judgment.

Jane Gill for the applicants.

Allan Levy for the guardian ad litem.

E. James Holman as amicus curiae.

Cur. adv. vult.

11 March. LATEY J. read the following judgment. Mr. and Mrs. A apply to adopt a little child, now aged 2 years and 4 months. The child's mother (whom I shall call "the mother") is Mrs. B. The child was conceived as a result of a surrogacy arrangement, as it is described, between Mr. and Mrs. A and Mrs. B and her husband, Mr. B. As a result of that arrangement Mr. A and Mrs. B had sexual intercourse on a few occasions and in due course the child was conceived. It was in no sense a love affair. It was physical congress with the sole purpose of procreating a child. As soon as there was conception intercourse ceased.

What led up to this arrangement was this: Mr. and Mrs. A are a devoted couple. To complete and fulfil their union they dearly wanted a child. For medical reasons Mrs. A was and is unable to have a baby. They did everything they could with medical help and advice, including surgery, to overcome this but to no avail. They then tried to adopt a child both in this country and abroad, again to no avail. As to this country, the principal reason given was their ages. This is surprising. At that time Mr. A was barely 40, and Mrs. A in her mid-30s, well within the normal age of parenthood, I would have thought. Another and subsidiary reason may have been that it was their second marriage, each having been divorced. But there is no doubt that their marriage is solid and stable, especially now that they have the baby, or toddler as it now is.

Then they heard a radio programme, and Mrs. A saw a television programme, about surrogacy. They saw it as their last chance.

In the meanwhile, Mr. and Mrs. B had two children of their own. They decided at that time to have no more (though recently they have had a third child). Mrs. B is one who enjoys pregnancy despite sickness and backache. She too heard, saw and read about surrogacy. She was deeply and genuinely moved about the plight of childless couples. There is no question about her sincerity about this. After much thought she decided to embark on this path. She discussed it with her husband, who was not, at first, enthusiastic but acquiesced and later supported her.

She put an advertisement in a magazine. Mr. and Mrs. A saw it and answered it. They met and the arrangement was made. Finance entered into it and this aspect of it is at the heart of whether an adoption order can be made in this case and, if it can be, whether it should be made. This is because of the terms of certain statutory enactments which I will come to shortly.

The mother, Mrs. B, was in full-time employment. She and her husband's joint income enabled them and their children to live in comfort. If she became pregnant it would mean giving up her job and earnings. It would mean incurring other expenses. She had responses

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A from other couples—one couple in particular who offered a very large sum of money. This was not what she wanted.

She agreed with Mr. and Mrs. A to act as a surrogate mother because as she says:

B “I wanted to help a childless couple. My own children are very precious to me and I sympathised greatly with any couple who were unable to have children of their own, so much so that I was willing to have another pregnancy in order to give someone else that joy.”

She wanted a couple with whom she could be friendly, empathise, have a rapport. She and Mr. and Mrs. A found each other and she declined the others, including the couple offering the very large sum.

The two couples agreed a global sum of £10,000. The mother says:

C “The money represented only my loss of earnings, expenses in connection with the pregnancy, and emotional and physical factors. I emphasise that I did not go into the arrangements for commercial reasons, nor did I accept the money to hand [the child] over. I would have done that in any event. In fact, overall, I was marginally worse off. This does not bother me since my motive was not financial.”

D In his report the child's guardian ad litem says:

E “The mother does *not* appear to have been primarily motivated in entering into the arrangements by financial considerations. She appears to have felt strongly that through a surrogacy arrangement she could offer an important service to a childless couple and to have regarded the money mainly as the equivalent of compensation for loss of earnings while pregnant. . . . Her interest in surrogacy the mother attributes to a particular pleasure she has in having babies and a great sympathy for women who are unable to experience the joy of having and caring for a baby. The public discussions and debates she heard about this subject struck a special chord for her, thus her initiative in advertising herself.”

F I have heard the mother speak about this in her evidence. I am left in no doubt that it is the plain, unvarnished truth.

G Mr. and Mrs. A paid £1,000 when she was some months pregnant, and £4,000 shortly after the baby was born. The balance of £5,000 was due some months later, but the mother refused to accept it. This was because she and a professional writer as co-author wrote a book: “Surrogate Mother. One Woman's Story,” from which she made money. That book has been put in as part of the material in this case. It was written pseudonymously and with care to conceal the identity of the child and those connected with the child. I have tried to do the same in this judgment. In the interest of the child nothing must be published which might point to the child's identity with serious consequences to the child later in life, if it were publicly known. Mr. and Mrs. A's close circle know the facts. They accept and love the child. Mr. and Mrs. A are very intelligent people who adore the child. They have already worked out what and when they are going to tell the child, and done so admirably, as it seems to me. But for any public publicity to happen about this child as it grows up would certainly damage its emotional development and might be disastrous.

H If the word “commercial” has any bearing on what has to be decided in this case and if it connotes a profit or financial reward element there

was nothing commercial in what happened. There was no written contract or agreement; no lawyers were consulted until after the baby was born. The arrangement was one of trust which was fully honoured on both sides.

The rest of the history can be told briefly. The child was born in hospital with Mrs. A present at the birth and Mr. A joining them almost immediately. Two days later the mother and child went to Mr. and Mrs. A's home. The four of them spent a week together. The mother went back to her own home. Mr. and Mrs. A and the child have been together since. The child has thrived. The three of them have been and are supremely happy. The mother and Mr. and Mrs. A have kept in contact. The mother and Mr. B have had a third child. They are closer than they ever have been.

Leaving aside questions of morality and ethics it is now a happy story, though all four of them went through many anxious, distressing and embarrassing moments, which I will mention briefly later.

The questions are whether in law an adoption order is permissible; and, if it is, whether it is a correct exercise of the discretion to make it.

I am indebted to counsel for their most helpful arguments. Counsel for Mr. and Mrs. A and for the child's guardian ad litem, who strongly supports the application for adoption, while properly advancing their clients' cases, were careful to apprise me of anything I should know which pointed in the opposite direction.

On my invitation the Attorney-General instructed counsel, Mr. Holman, to appear as *amicus curiae*. Mr. Holman stressed that there was no public policy formulated regarding surrogacy arrangements other than as was enshrined in the Surrogacy Arrangements Act 1985 which illegalises commercial surrogacy agencies and negotiations and advertisements; and save in so far as it may already be enshrined in the Adoption Act 1958 and Children Act 1975.

The Surrogacy Arrangements Act 1985 had not been enacted when the arrangement in the instant case was entered into and carried out. Otherwise, as Mr. Holman said, there is no public policy in existence. There is active consideration and consultation with the public being carried out by the government and its advisers. A consultation paper entitled "Legislation on Human Infertility Services and Embryo Research" was presented to Parliament in December 1986 which includes, among several other topics, the wider implications of surrogacy. It needs no saying that there is no more difficult and sensitive subject. Presumably when the consultations and considerations are complete, policies will be formulated and put before Parliament. It is there, in my opinion, that questions of morality and ethics should be weighed. There is no requirement in the instant case for the court to weigh them, which it is not equipped to do and should not attempt. I agree fully about this with counsel for the Attorney-General who also has the benefit of advice from a senior member of the legal staff of the Department of Health and Social Security.

Whether or not an adoption order can and, if it can, should be made, falls to be considered in the light of the relevant provisions of the Adoption Act 1958 and the Children Act 1975. As I had hoped he would, Mr. Holman advanced the arguments against the making of an order. Counsel for the applicants and the child's guardian ad litem put the arguments in favour.

Section 50(1) of the Adoption Act 1958, as amended, enacts:

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A “Subject to the provisions of this section, it shall not be lawful to make or give to any person any payment or reward for or in consideration of—(a) the adoption by that person of a child; (b) the grant by that person of any agreement or consent required in connection with the adoption of a child; (c) the transfer by that person of the actual custody of a child with a view to the adoption of the child; or (d) the making by that person of any arrangements for the adoption of a child.”

B Subsection (2) sets out the penalties for any contravention. Subsection (3) enacts (omitting words immaterial to the present case):

C “This section does not apply . . . to any payment or reward authorised by the court to which an application for an adoption order in respect of a child is made.”

Next there is section 22(5) of the Children Act 1975, which enacts:

D “The court shall not make an adoption order in relation to a child unless it is satisfied that the applicants have not, as respects the child, contravened section 50 of the 1958 Act (prohibition of certain payments in relation to adoption).”

E Then there is section 57(2) of the Adoption Act 1958 (interpretation section) which enacts:

F “For the purposes of this Act, a person shall be deemed to make arrangements for the adoption of a child or to take part in arrangements for the placing of a child in the actual custody of another person, if (as the case may be)—(a) he enters into or makes any agreement or arrangement for, or for facilitating, the adoption of the child by any other person, whether the adoption is effected, or is intended to be effected, in pursuance of an adoption order or otherwise; or (b) he enters into or makes any agreement or arrangement for, or facilitates, the placing of the child in the actual custody of that other person; or if he initiates or takes part in any negotiations of which the purpose or effect is the conclusion of any agreement or the making of any arrangement therefor, or if he causes another to do so.”

Lastly, there is section 3 of the Children Act 1975, which provides:

G “In reaching any decision relating to the adoption of a child, a court or adoption agency shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.”

H The first question, therefore, is whether in the present case there has been “any payment or reward” within the meaning of section 50 of the Adoption Act 1958—“for adoption,” to put it conveniently albeit imprecisely. This is a question of fact to be decided on the evidence. Mr. and Mrs. A and Mrs. B have all given evidence. All are transparently honest. They did not make notes. They did not take legal advice. Not surprisingly, their recollection of the precise sequence of events and what was discussed and when is not clear. What does come out strongly is that what was wanted was a baby and that Mr. and Mrs. A should

have it from birth to care for and bring up. And that it was upon this that they were all concentrating. It was only after the payments had been made and the baby was born that any of them began to turn their minds in any real sense to adoption and the legalities.

In my judgment there was no payment or reward within the meaning of section 50(1) of the Adoption Act 1958. But if I am mistaken about this and the payments do rank as payments or rewards within the meaning of the section, is that the end of the matter? Is there an absolute prohibition against adoption regardless of the adverse effects on this child and its family.

Much of the argument has been directed towards this question. It turns on the interpretation to be given to section 50(3) which provides, as I have said, that the prohibition shall not apply "to any payment or reward authorised by the court . . ." Can such authorisation be given only in advance of the making of a proposed payment or giving of a reward? Or can it be given for a payment or reward already made or given?

In his role as *amicus curiae*, Mr. Holman advanced the arguments in favour of the former interpretation. If that is the correct view the results, as he acknowledges, would be draconian indeed. It would mean, for example, that any payment, however modest and however innocently made, would bar an adoption and do so however much the welfare of the child cried aloud for adoption with all the security and legal rights and status it carried with it: and that, be it said, within the framework of legislation whose first concern is promoting the welfare of the children concerned.

I do not believe that Parliament ever intended to produce such a result (nor, anticipating, has it done so in my judgment). The result it intended to produce is wise and humane. It produced a balance by setting its face against trafficking in children, on the one hand, but recognising that there may be transactions which are venial and should not prohibit adoption, on the other hand.

Nor in my judgment does the language of the section compel the draconian interpretation. What does "authorise" mean in this context? Counsel have been unable to find any reported cases on the point, perhaps because none is necessary. In the *Shorter Oxford English Dictionary* "authorise" is described variously as: "1. To set up or acknowledge as authoritative . . . 2. To give legal force to . . . 3. To give formal approval to; to sanction, countenance . . . ; to justify . . ."

To my mind, in plain language, there is nothing in "authorise" or its synonyms to suggest that authorisation can only be given prospectively. On the contrary, it can equally well be given retroactively. Mr. Baker, the Deputy Official Solicitor, has been in court during the argument and with his wide experience he informed me through Mr. Holman that authorisation is much more likely to be called for for something which has happened than for something which is in future contemplation. For these reasons the correct interpretation is the second one, with the result that Parliament has produced the result it intended to.

It follows that in each case the court has a discretion whether or not to authorise any payment or reward which has already been made or may be contemplated in the future. In exercising that discretion the court would no doubt balance all the circumstances of the case with the welfare of the child as first consideration against what Mr. Levy well described as the degree of taint of the transaction for which authorisation

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A is asked. If the matter were to reach that stage, Mr. Holman, with evident pleasure and relief, submitted that authorisation be given and an adoption order made.

The evidence and the full and balanced reports are all one way. As I have said this little child is thriving and it and its family are supremely happy. It is all accurately and clearly summarised in the guardian ad litem's report and I cannot do better than quote from it:

"Mr. and Mrs. A appear both to be sensible, warm and open people. Their relationship with the child is loving and appears a very normal parent/child relationship. . . . Both the doctor and health visitor are entirely happy with the care the As give the child and are entirely happy with the child's physical, social and emotional development. . . . In all respects the care the child receives from Mr. and Mrs. A appears excellent. The child has lived with Mr. and Mrs. A since two days after birth. [The child] has known no other home or parents. . . . It is also most desirable that Mr. and Mrs. A feel fully responsible for the child now and into the future. Anything other than adoption will leave them with some fear that at some future date their care of the child may be interfered with or even [the child] be removed from them. Such a fear, given the existing background anxieties could, in my view, have a corrosive effect on their feelings of commitment to the child. If the parents feel less than fully secure in their rights, duties and responsibilities to the child then this insecurity will communicate itself to the child affecting, in turn, its feelings of security with them which would be to its detriment."

I agree unreservedly with every word of that. If I am mistaken in my finding that the payments did not fall within the prohibited ambit, I should without hesitation exercise discretion by authorising them and making the adoption order.

For all these reasons the adoption order is made. For the sake of completeness I should add that the mother consents, and at a preliminary hearing I declared paternity, and approved the placement with a view to adoption.

This being the first case of its kind to come to court in this country I was invited by counsel to make some further remarks and it may be helpful to do so. Other than those outlawed by the Surrogacy Arrangements Act 1985, surrogacy arrangements are not against the law as it stands. But those contemplating taking this path should have their eyes open to the kind of pitfalls, obstacles and anxiety that they are likely to meet. Mr. and Mrs. A, a devoted and very nice couple, encountered many of them. So too did Mr. and Mrs. B. And they found themselves caught in a tangled web of family and social embarrassment and deception, including the deception of doctors and others, from which they could not escape. There was not, I stress, any illegality. They went to all lengths within their power and knowledge to avoid any illegality. To give just one example, Mrs. B declined medical and other financial benefits to which in the ordinary course she would have been entitled and which she could have had and no one the wiser. I shall not go into more detail in this case. It is enough to say that all the way through they have had to find ways to get over obstacles, and they have had to resort to all manner of shifts and stratagems. The expense has been heavy. And there have been these proceedings. These people have

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had three years of unremitting anxiety and many moments of distress, though I know that it has all been worthwhile for them in the end.

Last and very far from least there is that fact that in other cases it might well not end up happily. In the nature of things those who undertake the role of surrogate mother are those with very strong maternal instincts. The likelihood must be there that when the baby arrives the mother cannot bear to part with it. The trauma and turmoil then for all needs no describing.

One cannot sit in these courts and hear all the multitude of professionals and others without knowing well the depth of longing in couples, devoted to each other, who cannot have a child through no fault of their own. But before they go down the path of surrogacy they should know and know fully what it may entail. It is not a primrose path.

Adoption order granted.

Solicitors: Chambers, Rutland & Crauford; Richard White & Michael Sherwin Croydon; Treasury Solicitor.

M. B. D.

[HOUSE OF LORDS]

DEWS APPELLANT

AND

NATIONAL COAL BOARD RESPONDENTS

1987 March 30, 31;
June 4

Lord Keith of Kinkel, Lord Brandon of Oakbrook,
Lord Griffiths, Lord Mackay of Clashfern
and Lord Ackner

Damages—Earnings, loss of—Pension contributions—Compulsory pension scheme—Deduction of contributions from plaintiff's wages—Plaintiff off work with no pay as result of accident—No pension contributions payable in respect of period with no pay—Pension rights not affected—Whether damages for loss of earnings to include pension contributions—Whether unpaid contributions part of plaintiff's loss

The plaintiff, who was employed by the defendant board, was required by his contract of employment to belong to the Mineworkers' Pension Scheme. Under its rules he was obliged to make a weekly contribution of a percentage of his earnings, which the board was entitled to, and did, deduct from his pay. The board was required to make a matching contribution. The plaintiff was injured at work in circumstances for which the board was liable. He was off work for 31 weeks, during the latter part of which he received no pay and accordingly no deductions could be made in respect of contributions to the pension scheme. The plaintiff suffered no loss of pension rights in respect of the period for which he was off work. He was awarded damages against the board, subject to reservation of

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A the issue whether he was entitled to additional damages equal to the amount of the contributions that he and the board would have made to the pension scheme if he had not suffered a loss of earnings. Michael Davies J. rejected the plaintiff's claim that the board's contribution should be taken into account but awarded the plaintiff £55 together with £20 agreed interest in respect of his own contributions. The Court of Appeal allowed an appeal by the board.

B On appeal by the plaintiff:—

C *Held*, dismissing the appeal, that a contribution to a retirement pension was not intended to provide any immediate benefit to the injured plaintiff and did not form part of the money available for his current expenditure so that he would suffer no immediate loss in respect of it as a result of the loss of his wages; and that, applying the fundamental principle that damages for personal injury were compensatory and intended to put the plaintiff as far as possible in the same financial position as if the accident had not happened, the plaintiff was not entitled to recover the £55 in respect of his pension contributions in circumstances in which he would not suffer any diminution in his pension rights (post, pp. 40B–C, 41D, 43E–H, 46A–B, H—47A, F–H).

D *British Transport Commission v. Gourley* [1956] A.C. 185, H.L.(E.) and *Parry v. Cleaver* [1970] A.C. 1, H.L.(E.) applied.

Decision of the Court of Appeal [1987] Q.B. 81; [1986] 3 W.L.R. 227; [1986] 2 All E.R. 769 affirmed.

The following cases are referred to in their Lordships' opinions:

British Transport Commission v. Gourley [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796, H.L.(E.)

E *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174; [1979] 3 W.L.R. 44; [1979] 2 All E.R. 910, H.L.(E.)

M'Daid v. Clyde Navigation Trustees, 1946 S.C. 462

Parry v. Cleaver [1970] A.C. 1; [1969] 2 W.L.R. 821; [1969] 1 All E.R. 555, H.L.(E.)

Shearman v. Folland [1950] 2 K.B. 43; [1950] 1 All E.R. 796, C.A.

F The following additional cases were cited in argument:

Cooper v. Firth Brown Ltd. [1963] 1 W.L.R. 418; [1963] 2 All E.R. 31

Cowan v. Greig, 1969 S.L.T. 34

Halcyon Skies, The [1977] Q.B. 14; [1976] 2 W.L.R. 514; [1976] 1 All E.R. 856

McCreadie v. Clydebank Co-operative Society Ltd., 1966 S.L.T. 22

G APPEAL from the Court of Appeal.

This was an appeal by the plaintiff, John Dews, by leave of the House of Lords from the decision of the Court of Appeal (Sir John Donaldson M.R., Parker and Woolf L.J.J.) [1987] Q.B. 81 who on 19 May 1986 allowed an appeal by the defendants, the National Coal Board,* from a judgment of Michael Davies J. on 15 March 1985 awarding the plaintiff £55 damages and £20 interest in his action against the board.

H The Court of Appeal refused the plaintiff leave to appeal from their decision, but on 17 July 1987 the Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Mackay of Clashfern and Lord Ackner) [1986] 1 W.L.R. 994 allowed a petition by him for leave.

* Now the British Coal Corporation: see the Coal Industry Act 1987, s. 1.

The facts are set out in the opinion of Lord Griffiths.

A

Robert Alexander Q.C. and *Simon P. Grenfell* for the plaintiff.
T. R. A. Morison Q.C. and *Nicholas Underhill* for the board.

Their Lordships took time for consideration.

4 JUNE. LORD KEITH OF KINKEL. My Lords, I have had the opportunity of reading in draft the speeches prepared by my noble and learned friends Lord Griffiths and Lord Mackay of Clashfern. I agree with them, and for the reasons they give would dismiss the appeal.

B

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Griffiths and Lord Mackay of Clashfern. I agree with them, and for the reasons which they give I would dismiss the appeal.

C

LORD GRIFFITHS. My Lords, the appellant plaintiff is a miner. On 7 February 1976 he was injured during the course of his employment at St. John's Colliery in West Yorkshire. He sued his employers the National Coal Board for damages. On 21 October 1980 judgment was given in the plaintiff's favour and he was awarded damages subject to reserving for further argument one particular head of damage which raises the question with which your Lordships are now concerned. It arises in the following circumstances.

D

It was a condition of the plaintiff's employment that he should belong to the Mineworkers' Pension Scheme and that he should contribute a percentage of his wages to the scheme which at the relevant time was 5.25 per cent. Under his contract of employment his employers were entitled to, and did, deduct this sum from his weekly wage and paid it directly to the scheme. The employers were obliged to make an equal contribution to the scheme and this they did. Thus the employers made a total weekly contribution to the scheme equal to 10.5 per cent. of the plaintiff's wages.

E

The pension to which the plaintiff would ultimately become entitled as a member of the scheme was not directly dependent on the amount of his contributions to the scheme or the matching contributions of his employers but was calculated upon a formula by which the average of the highest three consecutive years' earnings in his last 13 years of service is multiplied by his number of years of pensionable service divided by 90. So if he had spent his whole working life in the industry he would have received a pension of approximately half his best earning rate in the last 13 years of work.

F

If a member of the scheme was off work and received no wages neither he nor the employers were obliged to make any contribution to the scheme.

It was a particular feature of the scheme that if a member was off work for less than 18 months, the break in contributions by him and the employer caused no loss of pensionable service, and therefore no prospective loss of pension under the scheme.

G

For a part of the period that the plaintiff was off work neither he nor his employers made any contributions to the scheme. The "lost contributions" amounted in all to £110, £55 of which represented the plaintiff's contributions and £55 the employers'. However as the plaintiff

H

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A was off work for less than 18 months this in no way affected his pension entitlement under the scheme.

B The plaintiff claimed this sum of £110 as one of his heads of damage. The employers resisted the claim on the ground that as the plaintiff had not been required to pay these sums and as he had suffered no loss of pension rights he had therefore suffered no damage, and was not entitled to recover a sum that would be in the nature of a windfall rather than compensation for loss actually suffered. It was this issue that was reserved at the trial for a further hearing and which is now the subject of this appeal.

C The further argument was heard by Michael Davies J. who held that the plaintiff was entitled to recover the £55 which would have been contributed to the scheme out of his wages but that he was not entitled to recover the £55 that represented the employers' contribution.

D The employers appealed and the Court of Appeal unanimously allowed the appeal, albeit their reasoning differed. The plaintiff however did not cross-appeal against the finding that he was not entitled to include the employers' contribution in the claim for damages. This was perhaps a pity because in my view the resolution of the problem requires consideration of both the plaintiff's and the employers' contributions.

E It is a fundamental principle of English law that damages for personal injury are compensatory, and intended so far as money can to put the plaintiff in the same financial position as if the accident had never happened. It was the application of this fundamental principle that led the House of Lords in *British Transport Commission v. Gourley* [1956] A.C. 185 to hold that damages for loss of earnings were to be assessed at the net sum that would be available to the plaintiff after discharging his liability for tax, rather than his gross earnings before deduction of tax.

F If this fundamental principle is applied to the facts of this case the plaintiff is not entitled to recover the £55. If he had not been injured he would never have received this sum as under the terms of his contract of employment it would have been paid directly into the scheme, and therefore would not have been available to him to dispose of as he chose as part of his earnings. Furthermore because of the 18 months moratorium provided for by the scheme he suffered no loss of future pension. If therefore the plaintiff was to be paid this sum of £55 he would receive £55 more than if he had been in full employment and to that extent would be enriched at the expense of his employers, rather than compensated.

G Mr. Alexander acknowledges this result on the facts of this particular case but submits that it should be accepted as an anomaly for to do otherwise would breach a second fundamental principle that governs the award of damages for personal injury which is that it is no concern of the tortfeasor how the injured plaintiff chooses to dispose of his earnings. It does not lie in the mouth of the tortfeasor to argue that because he has put the plaintiff in a hospital bed for six months he must be given credit for the money that the plaintiff would have spent on his own amusement during that time if he had been able to do so. Applying this principle, as the plaintiff's wages include the 5.25 per cent. that was contributed on his behalf to the scheme, it is said that it is no concern of the employers in their capacity as a tortfeasor to inquire how that part

of the plaintiff's wages was spent, and he is entitled to be paid it as a part of his wages. A

This second principle cannot, however, be applied without some qualification. It has always been recognised that a deduction has to be made for the expenses of earning the income that has been lost: see *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174, 191, per Lord Scarman. There was some discussion before your Lordships as to whether a miner's travelling expenses to and from work should be deducted during the period he was off work and not incurring this expense. The National Coal Board never seek to make this deduction, and Mr. Alexander prays this in aid as showing the illogicality of their approach in seeking to deduct the pension contributions. The National Coal Board justify their position by pointing out that where a man chooses to live is no concern of his employers. If he chooses to live in the country far from his work and incurs substantial travelling expenses he will not be entitled to set the expense off for income tax purposes, and it is an example of expenditure on a way of life which is no concern of the tortfeasor. One is, however, left with the fact that wherever a man lives he is likely to incur *some* travelling expenses to work which will be saved during his period of incapacity, and they are strictly expenses necessarily incurred for the purpose of earning his living. It would, however, be intolerable in every personal injury action to have an inquiry into travelling expenses to determine that part necessarily attributable to earning the wage and that part attributable to a chosen life-style. I know of no case in which travelling expenses to work have been deducted from a weekly wage, and although the point does not fall for decision, I do not encourage any insurer or employer to seek to do so. I can, however, envisage a case where travelling expenses loom as so large an element in the damage that further consideration of the question would be justified as, for example, in the case of a wealthy man who commuted daily by helicopter from the Channel Islands to London. I have only touched on the question of travelling expenses to show that in the field of damages for personal injury principles must sometimes yield to common sense, and to acknowledge the force of Mr. Alexander's submission that the calculation of loss in personal injury cases should be kept simple as a matter of policy, particularly where the sums involved do not justify the costs likely to be incurred by elaborate investigations. B C D E F

There is another factor that has to be borne in mind when assessing damages that involve a claim for both loss of earnings and hospital or nursing home expenses. In order to avoid duplication of damages the "domestic element" in the cost of hospital and nursing home care is deductible. In so deciding, the House of Lords in *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174 applied the decision of the Court of Appeal in *Shearman v. Folland* [1950] 2 K.B. 43 and deducted the "domestic element" rather than an estimate of what the plaintiff might have spent on herself, as is done in a "lost years" calculation. Lord Scarman said, at p. 191: G H

"It is a simpler, more realistic, calculation and accords more closely with the general principle of the law that the courts in assessing compensation for loss are not concerned either with how the plaintiff would have used the moneys lost or with how she (or he) will use the compensation received."

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Lord Griffiths

A The problem is how best to reconcile these two fundamental principles. On the plaintiff's behalf it is submitted that the best solution would be to limit the deductions from earnings to those imposed upon the earnings by the general law of the land, for example by taxation, which is of universal application, and they rely in particular upon the passage in Earl Jowitt's speech in *British Transport Commission v. Gourley* [1956] A.C. 185, 200 in which he cited the judgment of Lord
B Sorn in *M'Daid v. Clyde Navigation Trustees*, 1946 S.C. 462, 464:

"It seems to me that, when you get a liability to which all earnings are subject and which depends not upon any circumstances peculiar to the individual but upon a general law of the land universal in its application, it would be wrong to ignore the existence of that liability."

C And in Lord Tucker's speech, at p. 215:

"but the difficulty is, I feel, in deciding what items of expenditure following the earning of profits are to be taken into consideration and which are to be ignored. Such items are clearly distinguishable from those which are incurred in the process of earning the profits and which have to be deducted in the computation thereof. I think
D the true answer is that expenditure which—although not actually a charge on earnings—is imposed by law as a necessary consequence of their receipt, is relevant to the ascertainment of the loss suffered by the party injured."

However, the analysis of the speeches in the *Gourley* case undertaken
E by Parker L.J. demonstrates convincingly that the majority including Lord Jowitt were founding their decision on the wider principle that damages are compensatory and are to be assessed upon a determination of what the plaintiff has *really* lost, rather than upon the narrow principle that deductions are limited to those imposed by the general law of taxation.

In my view the key to the solution of the present problem is to be
F found by recognising that in present day society people generally work with two principal aims in view; the first is to provide themselves with an income available for current spending and the second is to provide money that will be put into a pension scheme to provide them with an income after their retirement. When a plaintiff is injured and as a result is paid no wages his immediate real loss is that part of his net earnings that were available for current expenditure. In respect of this part of his
G earnings the object of which is to provide income available for current expenditure the tortfeasor is, subject to sums necessarily spent to earn the income, entitled to no credit for expenditure saved as a result of the injury; the principle that it is no concern of the tortfeasor how the plaintiff chooses to spend his income applies.

Different considerations, however, apply to the contributions to a
H retirement pension. This money is not intended to provide any immediate benefit and the plaintiff suffers no immediate loss as a result of the loss of his wages. He may, of course, as a result of a failure to pay contributions to the pension scheme suffer a future loss of pension. This loss he is entitled to recover. The measure of the loss will depend upon the terms of the particular scheme to which the plaintiff is contributing. In some schemes if the period of disability is relatively short it may be that the loss can be compensated for by paying to the plaintiff a sum

equivalent to the contributions that have not been paid during his disability, so that he can top up the contributions. But such a payment would have to include not only his own contributions to the scheme but also those of his employer. No doubt for fiscal reasons it is usual for the contributions to a pension scheme to be expressed as a percentage of the plaintiff's wages and a contribution, often a matching contribution, as in this case, from the employer; but both contributions are made as part of the consideration the employer pays for the plaintiff's work and in the example I have been considering the plaintiff would be entitled to recover a sum equivalent to both his own and the employer's contributions. However, if the plaintiff has been off work for a substantial period of time or is permanently disabled it is almost certain that payment of a sum equivalent to the lost contributions will not be sufficient to compensate for his lost pension rights and a more sophisticated calculation will be required to ascertain the loss.

What is certain however is that the plaintiff cannot recover both the contributions and the pension that those contributions would have purchased for that would be to allow double recovery. This is clearly demonstrated by the calculations made by the House of Lords in *Parry v. Cleaver* [1970] A.C. 1. Parry was a police officer who had been injured in an accident on 4 January 1963. He remained on full pay until he was discharged from police service on 30 June 1964. At the date of the accident his police pay was £21 18s. 3d. a week, out of which he contributed under a compulsory pension scheme the sum of £1 3s. 1d. On 6 October he obtained civilian employment. His weekly earnings were £13 16s. per week, out of which he contributed 14s. 8d. to a pension scheme.

If Parry had remained in the police until normal retirement age he would have received a pension of £10 a week. On retirement from his civilian employment at the age of 65 he would receive a pension of £5 13s. 6d. a week.

As a result of the accident, and after his discharge from the police, Parry became entitled to receive a disability pension of £3 18s. 4d. per week. The House of Lords decided by a majority that the disability pension should be disregarded for the purposes of calculating damage up to the date upon which he would have received his pension had he not been injured. The primary importance of *Parry v. Cleaver* is that it establishes the circumstances in which a disability pension is to be disregarded in calculating damages. It is nevertheless instructive to see how the plaintiff's contributions to the scheme were dealt with in assessing the damages which he was entitled to recover.

The loss was calculated in relation to four periods of time.

Period 1. From the date of his discharge from police service, 30 June 1964, to the date of trial, July 1966. This sum was calculated upon the difference between the net loss of earnings from police service and the net amount received from his civilian employment; in each case the earnings were calculated *after deduction of his pension contributions*; no account was taken of the police pension he received.

Period 2. From the date of trial to the date when, but for the accident, he would have retired from police service, 14 December 1975. The calculation was the same as for period 1.

Period 3. From 14 December 1975 to the date of his retirement from civilian employment at the age of 65. The damages were calculated as being the difference between the disability pension of £3 18s. 4d. and

A the £10 pension he would have received on his normal retirement from the force, namely £6 1s. 8d.

Period 4. From the age of 65 to the age of 75. The damages were calculated as the difference between the amount of pension that he was going to receive both from his civilian pension and his police employment and the amount of pension he would have received but for the accident.

B It is to be observed that whereas the disability pension is not to be taken into account until the date of his normal retirement from the police it is thereafter to be taken into account in that it is subsumed in the general retirement pension. Dealing with this Lord Reid said, at pp. 20-21:

C “As regards police pension, his loss after reaching police retiring age would be the difference between the full pension which he would have received if he had served his full time and his ill-health pension. It has been asked why his ill-health pension is to be brought into account at this point if not brought into account for the earlier period. The answer is that in the earlier period we are not comparing like with like. He lost wages but he gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the latter period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind.”

E The calculations in *Parry v. Cleaver* demonstrate that if the plaintiff in the present case had been off work for a number of years so that his pension rights were seriously affected, he would have been able to recover for loss of pension but he would not have been able to recover for contributions that were not made to the scheme during his period of disability. It is therefore a startling proposition that if the plaintiff is less
F gravely injured and suffers no loss of pension rights he is in these circumstances able to recover his contributions. I am satisfied that so bizarre a result cannot be acceptable and is avoided by applying separate considerations to that part of his earnings which is intended to provide income available for immediate expenditure and that part which is intended to provide a pension for his retirement.

G Adopting this approach I do not regard it as a critical feature that this was a compulsory pension scheme. If the evidence showed that a plaintiff had been regularly making contributions to a voluntary scheme in order to secure a pension so that, but for the accident, the probability pointed to a continuation of those contributions I would apply the same principle. It will, of course, be easier to apply the principle in a compulsory scheme because it is possible to say with certainty that the plaintiff would not have
H received that part of his wages for his immediate disposal and that it would have gone to the pension scheme. In the case of voluntary contributions the likelihood of the contributions having been continued will have to be taken into account. It may be that the plaintiff would satisfy the court that he was not going to continue with the contributions in which case he would be able to recover what he had hitherto paid as a contribution as a part of his damages. If, on the other hand, the plaintiff asserts that he was going to continue with the contributions and the probabilities support him then

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his loss is not the contributions but any diminution in his pension rights as a result of the discontinuance of the contributions.

For these reasons, my Lords, I would dismiss the appeal.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Griffiths. I agree with him that this appeal should be dismissed for the reasons which he has given.

Although the sum in issue in this appeal is small the question that falls to be decided is an important one and may affect a great number of cases. For this reason and out of respect for the full and able arguments to which we were treated I venture to add some observations. Both parties are agreed that it is a general principle in the assessment of damages according to English law that the plaintiff should recover "such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries:" *per* Earl Jowitt in *British Transport Commission v. Gourley* [1956] A.C. 185, 197.

It is also, in my opinion, generally true that a tortfeasor is in no way concerned with how a plaintiff might have spent the remuneration to which he would have been entitled had he not been injured. For example, if a tortfeasor could prove that but for the injury the plaintiff would have invested a part of his earnings in a way which, by the date of the trial, produced a loss to the plaintiff this would not be relevant to reduce the amount of damages payable to the plaintiff.

The question in this appeal is how these principles apply to the circumstances of this case.

Counsel for the plaintiff submits that his contribution to the pension scheme is part of the earnings to which, under his contract with his employers, he was entitled and the mere fact that he by contract agreed to dispose of it by investment in the pension scheme is no concern of the employers. Counsel for the employers maintains that the plaintiff is only entitled to be compensated for lost pecuniary benefits in so far as he would but for the injury have received and retained them. In this connection he makes reference to the use by judges of such phrases as "the pay packet" and "take-home pay" although he accepts that such phrases, while useful shorthand, should not be taken too literally since there is no magic in whether the sum in issue is deducted at source or becomes payable subsequently. Counsel for the plaintiff accepts that deductions required by the general law of the land such as the income tax statutes would fall to be taken into account as deductions in computing the plaintiff's loss but he points out that the pay packet test, particularly having regard to the point that it must not be taken too literally, is hardly a test at all. For example, a donation to charity which an employee agrees with his employer should be deducted at source and therefore never enters the employee's pay packet would not fall to be deducted in computing the plaintiff's loss of wages in consequence of an injury.

In my opinion, the tortfeasor is concerned with the disposal of any part of the plaintiff's remuneration which is applied to obtain benefits which may be affected by the plaintiff's injury and, if affected, would be a proper subject of claim against the tortfeasor. If a plaintiff is entitled to a benefit such as, for example, pension rights which is damaged as a result of his inability to work consequent upon an accident and the tortfeasor is bound to compensate him for the reduction in the value of

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of Clashfern

A that benefit the tortfeasor must be concerned with the extent to which the injured plaintiff's remuneration required to be devoted to obtaining that benefit. Otherwise, where a claim for such loss is made, there would be a double recovery. If an employer were entitled to the use of a car for his own purposes on payment out of his salary of a certain contribution and as result of an injury for which the tortfeasor was responsible he lost that benefit, the tortfeasor would be entitled to take B into account the payment which the employer required from the employee for the use of the car as a deduction from the total claim for loss of earnings plus loss of use of the car. In my opinion, therefore, the second general principle must suffer an exception to the extent to which the injured plaintiff's earnings are used to provide benefits whose loss of value in consequence of the injury to the plaintiff would form a proper claim against the tortfeasor.

C In the normal case one might expect failure to pay contributions to have the effect of diminishing pension rights. Where this happens the plaintiff cannot claim both loss of contribution and the diminution in value of pension rights consequent upon failure to pay contribution. Which will be the appropriate claim in any particular case will be a question of circumstances.

D The speciality of this case is that the failure to pay contributions because of the terms of the pension scheme does not produce any consequent diminution in pension rights. Counsel for the plaintiff says that this is analogous to an insurance arrangement. He submits that by the terms of the scheme the plaintiff has in effect made an arrangement under which he is insured against loss of pension rights in the event of his being unable to pay contributions due to absence from work for a limited period. He likened the position to that which would have obtained if the plaintiff had, out of his own resources, paid for an insurance to provide the contributions during such an absence from work. In my opinion, the situation is similar to that in which an injured plaintiff on going off work in consequence of an accident does not immediately suffer a loss of wages. In such a case the tortfeasor will not be required to compensate him for a loss of wages which he has not suffered even although the position resulting is similar to one in which the plaintiff himself had purchased an insurance to provide payment equal to his wages over this period. In my opinion the correct analysis is that the arrangement under which the plaintiff suffers no loss of pension rights although no contributions were paid during his period of absence from work is part of the arrangement for remuneration under which he worked at the time of the accident. Since viewing that arrangement as a whole he has suffered no loss in respect of the absence of contributions to the pension scheme during his period off work I agree that his claim fails.

H LORD ACKNER. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Griffiths and Lord Mackay of Clashfern. I agree with them, and for the reasons which they give I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Penningtons Ward Bowie for Raley & Pratt, Barnsley; R. V. Cowles for A. P. Cree, Doncaster.

M. G.

[COURT OF APPEAL]

A

CREST HOMES PLC. v. MARKS AND OTHERS

1987 Feb. 18, 19, 20

May, Croom-Johnson and Nourse L.JJ.

Practice—Discovery—Use of documents—Action for infringement of copyright—Documents discovered and affidavits sworn pursuant to Anton Piller order—Implied undertaking not to use documents or affidavits for other purposes—Whether applicable to contempt proceedings in separate action—Application for leave to use documents and affidavits in contempt proceedings—Whether leave to be granted—Supreme Court Act 1981 (c. 54), s. 72¹

B

In 1984 the plaintiff company and a subsidiary commenced an action against the first and second defendants alleging, inter alia, breach of copyright and obtained an *Anton Piller* order in respect of copies and originals of the plaintiff's documents relating to 60 of its house designs. That order having been executed it appeared to the plaintiff that only two of its designs had been copied by the defendants, and that they had retained no other documents relating to those designs. In 1985 the plaintiff, suspecting that another of its designs, not covered by the 1984 order, had been substantially copied by the defendants, commenced another action and obtained an *Anton Piller* order in that action in respect of 105 of its house designs, including all those covered by the 1984 order. On execution of the 1985 order, a number of allegedly infringing drawings were discovered, many of which the plaintiff claimed should have been disclosed pursuant to the 1984 order or were evidence of breaches of injunctions in that order. The plaintiff applied to the court for leave to use the documents obtained on the execution of the 1985 order and the affidavits sworn by the defendants in purported compliance therewith (i) in the general conduct of the 1984 action, and (ii) for the purpose of considering and, if so advised, taking proceedings for contempt of court in respect of the 1984 order. The judge refused the application in both respects.

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On the plaintiff's appeal, (1) the defendants having conceded that leave should be granted in respect of the general conduct of the 1984 action:—

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Held, allowing the appeal, that the use of documents disclosed in one action for the purposes of another, at least where there was no absolute identity both of parties and of causes of action, would constitute a breach of the implied undertaking given to the court not to use such documents for any collateral or ulterior purpose, unless the court modified the undertaking by giving leave for such use; and that in view of the defendants' concession the court should grant the leave sought in respect of the general conduct of the 1984 action (post, pp. 54E–F, 55B–D, 58D–E).

G

(2) That although section 72 of the Supreme Court Act 1981 had withdrawn the privilege against self-incrimination in respect of the use in proceedings for contempt of court of documents disclosed in proceedings relating to infringement of copyright and evidence given in such proceedings, it had not removed the court's discretion whether to give leave so to use such documents and affidavits to which the implied undertaking applied; and that the fact that the court would never make an order of discovery for the sole purpose of enabling proceedings for

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¹ Supreme Court Act 1981, s. 72: see post, pp. 56D–57B.

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contempt of court to be brought was not of itself sufficient ground for refusing such leave (post, pp. 56A-C, 57G-H, 58D-E).

(3) That, in view of the public interest in ensuring compliance with orders of the court and of the fact that the purpose of the implied undertaking was to encourage free and frank discovery by giving protection to those who made it, and since there was material which suggested that the first and second defendants had not complied with the 1984 order by giving such discovery, and many of the documents belonged to the plaintiff, the leave sought would be granted in respect of the contemplated proceedings for contempt of court (post, pp. 55E-G, G-H, 57H-58B, D-E).

Riddick v. Thames Board Mills Ltd. [1977] Q.B. 881, C.A.; *Home Office v. Harman* [1983] 1 A.C. 280, H.L.(E.) and *Sybron Corporation v. Barclays Bank Plc.* [1985] Ch. 299 applied.

Decision of Whitford J. reversed.

The following cases are referred to in the judgment of Nourse L.J.:

E.M.I. Records Ltd. v. Spillane [1986] 1 W.L.R. 967; [1986] 2 All E.R. 1016

Home Office v. Harman [1983] 1 A.C. 280; [1982] 2 W.L.R. 338; [1982] 1 All E.R. 532, H.L.(E.)

Rank Film Distributors Ltd. v. Video Information Centre [1982] A.C. 380; [1981] 2 W.L.R. 668; [1981] 2 All E.R. 76, H.L.(E.)

Riddick v. Thames Board Mills Ltd. [1977] Q.B. 881; [1977] 3 W.L.R. 63; [1977] 3 All E.R. 677, C.A.

Sybron Corporation v. Barclays Bank Plc. [1985] Ch. 299; [1984] 3 W.L.R. 1055

The following additional cases were cited in argument:

CBS Songs Ltd. v. Amstrad Consumer Electronics Plc. (unreported), 6 February 1986; Court of Appeal (Civil Division) Transcript No. 117 of 1986, C.A.

Comet Products U.K. Ltd. v. Hawtex Plastics Ltd. [1971] 2 Q.B. 67; [1971] 2 W.L.R. 361; [1971] 1 All E.R. 1141, C.A.

Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd. [1975] Q.B. 613; [1974] 3 W.L.R. 728; [1975] 1 All E.R. 41

Halcon International Inc. v. Shell Transport and Trading Co. [1979] R.P.C. 97, Whitford J. and C.A.

Hytrac Conveyors Ltd. v. Conveyors International Ltd. [1983] 1 W.L.R. 44; [1982] 3 All E.R. 415, C.A.

Redfern v. Redfern [1891] P. 139, C.A.

Universal City Studios Inc. v. Hubbard [1983] Ch. 241; [1983] 2 W.L.R. 882; [1983] 2 All E.R. 596; [1984] Ch. 255; [1984] 2 W.L.R. 492; [1984] 1 All E.R. 661, C.A.

APPEAL from Whitford J.

By an amended writ, originally issued on 25 November 1985, the plaintiff, Crest Homes Plc., claimed against the defendants, David Terrence Marks, Wiseoak Homes Ltd., Barry J. Best and Wiseoak Residential Ltd., inter alia, (1) an injunction restraining each defendant from infringing the plaintiff's copyright in its original drawings relating to its house designs, converting to their own use infringing copies of such drawings, or misusing confidential information belonging to the plaintiff; (2) delivery up or destruction on oath of all infringing copies of the plaintiff's copyright works in the possession, custody or power of any of the defendants; and (3) discovery on oath of all documents and

information relating to the defendants' allegedly wrongful acts. On the same day Whitford J. granted the plaintiff an *Anton Piller* order in respect of any of its drawings relating to certain of its house designs, any drawing or other document which represented the whole or any substantial part of any of the plaintiff's drawings relating to those house designs, including in particular all documents relating to the second defendant's "Larchvale" house design, documents relating to planning applications made by the second defendant which were founded upon or included any such document, and written instructions to and communications with the draftsmen of any such document. That order having been executed, Warner J. on 19 December 1985 made an order restraining the first defendant until judgment or further order from commencing to build any house or flat to any of nine of the defendants' designs copies of which had been removed from their possession pursuant to the *Anton Piller* order, or making or pursuing any planning application for permission to commence the building of any such house or flat, or parting with possession, custody or control of (other than to the plaintiff's solicitors), or hiding, defacing or destroying any document in their possession, custody or control relating to any such house or flat, or to any such planning application, or which was the property of the plaintiff (or a copy thereof); the second and fourth defendants gave an undertaking in the same terms.

By a notice of motion dated 24 January 1986 the plaintiff applied, inter alia, for orders (1) that the plaintiff and Crest Homes (Westerham) Ltd. be at liberty to make use of all documents removed by the plaintiff's solicitors from the second defendant's premises upon the execution of the *Anton Piller* order of 25 November 1985 for the purpose of their conduct of Chancery action 1984 C. No. 5743; (2) that the plaintiff be at liberty to make use of such documents for the purpose of considering and, if so advised, preparing, commencing and conducting proceedings in connection with breaches of orders made against, and undertakings given by, the first and second defendants in the 1984 action; (3) that for the purpose of making such uses of those documents the plaintiff's solicitors be released from the undertaking contained in the 1985 *Anton Piller* order that the documents obtained as a result of that order would be retained by them in safe custody; and (4) an order that the plaintiff be released from the implied undertaking not to make use of the documents except for the purpose of the conduct of the 1985 proceedings. On 28 February 1986 Whitford J. dismissed the motion and refused the plaintiff leave to appeal.

Pursuant to leave granted by Slade L.J. on 22 April 1986, the plaintiff, by a notice of appeal dated 30 April 1986, appealed seeking orders as set out in the notice of motion or, as an alternative to number (2), a declaration that the plaintiff's implied undertaking not to make use of the documents and affidavits did not extend to preclude their use for the purpose of contempt proceedings and in particular did not preclude the bringing of contempt proceedings in connection with contempts evidenced by such documents or affidavits. The grounds of the appeal were (1) that, if and in so far as the judge had held that the court had no discretion to permit the use of documents or affidavits disclosed pursuant to a court order to be used in contempt proceedings, he had erred in law, and he ought to have held that the court had a discretion, to be exercised according to the circumstances of the case; (2) that the judge had erred in law in holding that such a discretion

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P1

A might arise only in respect of a document which disclosed that a party had deliberately breached an order of the court, and any exercise of his discretion was therefore founded upon a mistake of law; (3) that the judge had wrongly disregarded the evidence before him of breaches of the orders in the 1984 action, and ought to have considered such evidence and to have held that a prima facie case of breaches of such orders had been made out; (4) that the judge had wrongly founded his decision on the fact that no proceedings for contempt by breaches of the orders in the 1984 action had at that time been instituted by the plaintiff, which was irrelevant to the exercise of the judge's discretion and ought to have been disregarded since the plaintiff could not have instituted such proceedings without the leave which it sought on the application; (5) that the judge had disregarded the fact that the defendants had complied without objection with the 1985 *Anton Piller* order without any claim of privilege, which fact was relevant to the exercise of his discretion; (6) that the judge had wrongly paid attention to the form of the plaintiff's application, and had been wrongly influenced to refuse the orders sought because of that form, which had been dictated by the need to obtain leave; (7) alternatively, that leave to use discovery documents and affidavits in contempt proceedings was not required; (8) that the judge had wrongly refused leave for the documents and affidavits to be used in connection with the 1984 action generally; that he ought to have held, in accordance with the evidence, that a case had been made out for the relevance of such documents, and their use in the 1984 action ought to have been permitted; (9) that the judge had wrongly held that if the documents had not been disclosed in the 1984 action the plaintiffs in that action would be able to secure discovery on a suitable application directed to the disclosure of specific documents, since those plaintiffs would have been able to make such an application without the leave sought on the application; (10) that the judge had wrongly held that, if there were to be any question of using affidavits sworn in the 1985 action in connection with the 1984 action, it was a matter which could only properly be determined by the judge at the trial as and when application to introduce such affidavits was made; (11) that the judge ought to have held, having regard to the common questions of law and fact which arose in both actions and since the rights to relief claimed in both actions arose out of the same transactions, that for the convenience of the parties generally free interchange of documents between the two actions ought to be permitted; (12) that the judge ought to have allowed an amendment to the notice of motion permitting the plaintiff to include within the scope of the application the affidavits sworn in purported compliance with the 1985 *Anton Piller* order; (13) that the judge had wrongly disregarded the fact that it was the plaintiff's case that, had full disclosure been made in accordance with the order in the 1984 action, the need for the application would not have arisen; and (14) that in the premises the judge had been wrong to refuse the leave sought by the plaintiff.

The facts are stated in the judgment of Nourse L.J.

Roger Henderson Q.C. and *Christopher Floyd* for the plaintiff.

Paul Dickens for the first defendant.

Geoffrey Hobbs for the second and fourth defendants.

NOURSE L.J. delivered the first judgment. This is an appeal from an interlocutory decision of Whitford J. given on 28 February 1986 in an

action for infringement of copyright in house designs and misuse of confidential information. Shortly stated, the sole question now in issue is whether the plaintiff can make use of documents obtained on the execution of an *Anton Piller* order for the purpose of considering and, if so advised, taking proceedings for contempt of court in respect of breaches of an earlier such order made in another action between much the same parties and covering much of the same ground. The outcome of that question depends primarily on the interaction between (1) the implied undertaking that the documents will not be used for any collateral or ulterior purpose; (2) the privilege against self-incrimination; and (3) the provisions of section 72 of the Supreme Court Act 1981.

The plaintiff in this action ("the 1985 action") is Crest Homes Plc. Both it and the second and fourth defendants, Wiseoak Homes Ltd. and Wiseoak Residential Ltd., are companies engaged in the development of residential land and the sale of residential properties. The first defendant, Mr. David Terrence Marks, was formerly employed by the plaintiff and he was a director of its subsidiary called Crest Homes (Westerham) Ltd. The third defendant, Mr. Barry J. Best, is not affected by the order appealed from and he is not a party to the appeal.

In November 1984 an earlier action ("the 1984 action") was commenced by the plaintiff and its Westerham subsidiary against Mr. Marks, Wiseoak Homes Ltd. and another individual who is not a party to the 1985 action. In June 1985 another individual and two other companies, none of whom is a party to the 1985 action, were joined to the 1984 action by amendment.

On 23 November 1984 Scott J. made an *Anton Piller* order in the 1984 action. It appears that at that date Mr. Marks was still technically an employee of the plaintiff, although he had handed in his resignation on 1 November and had left to join the second defendant.

The 1984 order was applied for because the plaintiff had discovered that planning applications had been made by the second defendant, using drawings which reproduced the plaintiff's own drawings for two of its house types called "Carrington" and "Linslade" and for which it claims copyright.

In paragraph 39 of an affidavit sworn on 11 December 1984, Mr. Marks agreed that the plans in question used the Carrington and Linslade designs of the plaintiff. He accepted that those plans were copied from the plaintiff's drawings, although he then made several points in mitigation.

The 1984 order, which was in a usual form, was executed at Mr. Marks' home and also at the second defendant's registered office. The plaintiff says that it was not aware that the second defendant had premises at any other location. The 1984 order was not restricted to the Carrington and Linslade designs. It extended to copies or originals of the plaintiff's documents relating to 59 house designs listed in an exhibited schedule and one further design.

The material provisions of the 1984 order were: (1) injunctions against—(a) making use of any of the relevant documents or the information derived therefrom, and (b) making planning applications which utilised drawings reproducing the designs of any of the 60 house types; (2) a power to search for and remove from Mr. Marks' home the relevant documents; (3) an order for the disclosure of the whereabouts of the relevant documents; (4) an order for delivery up within 24 hours of all relevant documents not already removed; (5) an order for the

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A swearing of affidavits of compliance by or on behalf of the defendants, including Mr. Marks.

On 30 November 1984, in response to the 1984 order, Mr. Marks swore a short affidavit in which he said that he was not in possession of any of the documents or information required by that order.

B In paragraphs 40 and 41 of the much longer affidavit which he swore on 11 December 1984, Mr. Marks said that he no longer had in his possession any originals or copies of the Crest book of house designs or brochures of various Crest developments containing details of Crest house designs. In paragraphs 64 and 65 he said:

C "64. I wish to deal with the allegations made about Crest documents that I allegedly have in my possession. As I have already indicated, the documents exhibited at D.T.M.1. are the only Crest documents I have in my possession. 65. I do not have any details of the Linslade and Carrington House type. I have not taken any documents relating to the internal costing and profit margin information of Crest, as set out in paragraphs 44 and 48 of Mr. Czezowski's affidavit. Nor do I have my own copy of the Crest book of House Designs, or any copies thereof."

D The documents contained in exhibit D.T.M.1. were those which had been removed from Mr. Marks' home on the execution of the 1984 order.

E The plaintiff says that it appeared to it from this evidence, first, that nothing other than Carrington and Linslade designs had been copied and, secondly, that no other documents relating to those designs were then retained by the defendants. The 1984 action proceeded, they say, upon that basis.

F However, in October 1985 the plaintiff discovered that another type of house, bearing similarities to one of their own, was being advertised by the second defendant under the name "Larchvale." It inspected the relevant planning applications and concluded that the design was substantially copied from its own "Versailles" design. That design was not one of the 60 which were covered by the 1984 order. Furthermore, it was possible that all relevant infringements and misuses of confidential information had occurred after the issue of the writ in the 1984 action. It was for that reason, says the plaintiff, that a second action, the 1985 action, was started. An *Anton Piller* order was made in that action by Whitford J. on 25 November 1985. On this occasion it extended to G documents relating to 105 of the plaintiff's house designs, including all of the 60 which had been covered by the 1984 order. Subject to that, the order was in much the same form.

H The 1985 order was executed at the second defendant's trading premises. The plaintiff claims that a large number of infringing drawings were there discovered, many of which it says either ought to have been disclosed pursuant to the 1984 order, or were compelling evidence of breaches of the injunctions contained therein. In particular, the plaintiff contends that certain documents which relate to the Carrington and Linslade types (including a specification for the former) fall within the terms of the 1984 order and that the continued possession of them was contrary to the first defendant's statements in his 1984 affidavits already referred to.

In paragraph 3(a) of an affidavit sworn in the 1985 action on 17 December 1985, the first defendant said:

"each and every document taken away by the plaintiff's representative pursuant to the order was in my possession when my own home was searched pursuant to an *Anton Piller* order made in 1984 and they were all then (in 1984) inspected by officers of the court and representatives of the plaintiff and were left with me as being of no relevance. I did not destroy or conceal those documents believing that if I had, the plaintiff may have subsequently claimed a breach of the order or used such destruction or concealment as an indication of 'guilt' in that 1984 action. I therefore took all the documents, save as below, to my office at 166, Main Road, Sundridge, as aforesaid where they have since lain undisturbed with my 'dead' filing. I respectfully ask the plaintiff's representative who searched my office to confirm this precise location."

That then is the background to this case. The plaintiff wished to make use of the documents obtained on the execution of the 1985 order, and also the affidavits sworn in purported compliance therewith, for the purposes of the 1984 action in two respects: first, in the general conduct of that action; secondly, for the purpose of considering and, if so advised, taking proceedings for contempt of court in respect of breaches of the 1984 order. However, it was advised that it could not take that course without applying to the court.

The plaintiff's application came before Whitford J. on 28 February 1986, when it was refused in both respects. The matter has to some extent been overtaken by events, because on 25 June 1986 the master made an order by consent for the 1984 and 1985 actions to come on for trial at the same time; and a date has been obtained for the autumn of this year. Early yesterday morning, the second day of the hearing in this court, while Mr. Henderson was still opening the appeal on behalf of the plaintiff, an agreement was arrived at between the parties in regard to the first part of the plaintiff's application. It is now agreed that the plaintiff may make use of the documents and affidavits in question in the general conduct of the 1984 action. In the light of that agreement it appears entirely proper that leave should be given by the court accordingly. As to that agreement, I need say no more than that it appears to be entirely in accordance with common sense and the practicalities of the matter, especially now that the two actions are to be heard together. It would be quite impracticable either to prepare for, or to conduct, the trial on any other basis.

In the circumstances, it remains for us to decide whether the plaintiff can make use of the 1985 documents and affidavits for the purpose of considering and, if so advised, taking proceedings for contempt of court in respect of breaches of the 1984 order.

The first point to be made is that the 1985 order contained the usual undertaking on the part of the plaintiff's solicitors to retain in safe custody any documents obtained as a result of the order. However, it is not suggested that that undertaking raises any additional impediment to the plaintiff's objectives. In other words, if its objectives are otherwise unobjectionable, there will be no objection to that undertaking being modified to the necessary extent. The question is then seen to depend in the first instance on the applicability of the implied undertaking by the plaintiff and its solicitors that neither the originals nor copies of the documents will be used for any collateral or ulterior purpose. The continued existence and force of that undertaking has been authoritatively

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A reaffirmed by the House of Lords in *Home Office v. Harman* [1983] 1 A.C. 280. Here it is worth pointing out that the part of an *Anton Piller* order which requires the delivery up of documents and the swearing of affidavits of compliance is nothing more nor less than an order for early discovery.

B The first question which arises is whether the implied undertaking applies at all in the circumstances of this case. Mr. Henderson submits that it does not. I reject that submission. In my judgment the use of documents disclosed in one action for the purposes of another action will usually, perhaps invariably, be a collateral or ulterior purpose. That, I think, is the view which has consistently been taken in the previous authorities, even where the parties to both actions are identical: see *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881. It is true that in
C that case the cause of action in the second proceedings was quite different from that in the first, but it does not at all follow that the undertaking will not apply even where there is an absolute identity of parties and causes of action. That is a state of affairs which does not obtain in the present case and on which it is neither necessary nor desirable to express a view. Here it is enough to say that there is no identity in either respect. Moreover, I think that the court should err on
D the side of maintaining the applicability of the undertaking unless it is clearly demonstrated that it can perform no useful function. I think that the judgment of Scott J. in *Sybron Corporation v. Barclays Bank Plc.* [1985] Ch. 299, where it was held that the undertaking applied to a case in which there was an identity of causes of action although not of parties, supports this approach.

E The next point to be made is that the implied undertaking, like any other undertaking, can be released or modified with the leave of the court. We were referred to a number of recent cases in which this course has been taken, of which I need only refer again to *Sybron Corporation v. Barclays Bank Plc.* and also to the recent decision of Sir Nicolas Browne-Wilkinson V.-C. in *E.M.I. Records Ltd. v. Spillane* [1986] 1 W.L.R. 967. Mr. Henderson has advanced a number of reasons
F for taking this course in the present case, including in particular the public interest in seeing that orders of the court are complied with. He also relies strongly on the fact that the purpose of the undertaking is to encourage full and frank discovery by giving a protection to those who make it. He says that there is enough material before the court in the present case, in particular the documents relating to the Carrington and
G Linslade designs and the first defendant's evidence in relation thereto, to suggest the possibility that full and frank disclosure has not been made. Therefore, says Mr. Henderson, the first and second defendants do not deserve and are not entitled to the protection. He also relies on the facts that this is not a case where it is desired to communicate the documents to a third party, that the property in them or many of them is the plaintiff's, and that the 1985 action was only started as a separate action
H because the plaintiff was in part misled by the first defendant's evidence.

There can be no doubt that there is great force in Mr. Henderson's submissions and, as at present advised, I think that they would certainly have been conclusive in regard to the first part of the plaintiff's application had it been necessary for them to argue it. But what we have to consider is whether the undertaking should be modified for the purpose of proceedings for contempt of court. Here Mr. Hobbs, for the second and fourth defendants (whose arguments were adopted by Mr.

Dickens on behalf of the first defendant) has raised a powerful argument based on the privilege against self-incrimination. He says, correctly, that proceedings for contempt of court, albeit for a civil contempt, are in the nature of criminal proceedings. Then he says, also correctly, that the court would never make an order for discovery for the purpose, pure and simple, of enabling such proceedings to be brought. From there he goes on to say that the 1985 order was superfluous in so far as it covered the 60 house designs which had already been covered by the 1984 order. Accordingly, if the court were now to modify the undertaking, the manifest result, so far as concerned documents already discoverable under the 1984 order, for example the Carrington and Linslade documents, would be that the 1985 order had become one for discovery for the purpose, pure and simple, of enabling proceedings for contempt to be brought. Therefore, says Mr. Hobbs, the necessary leave should not, as a matter of discretion, be given.

Again, it seems to me that there is great force in Mr. Hobbs' submissions standing on their own. I am prepared to assume that they might well have prevailed, had it not been for section 72 of the Supreme Court Act 1981, which was enacted following the decision of the House of Lords in *Rank Film Distributors Ltd. v. Video Information Centre* [1982] A.C. 380. Section 72, to which the marginal note is "Withdrawal of privilege against incrimination of self or spouse in certain proceedings," provides:

"(1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse, to proceedings for a related offence or for the recovery of a related penalty—(a) from answering any question put to that person in the first-mentioned proceedings; or (b) from complying with any order made in those proceedings. (2) Subsection (1) applies to the following civil proceedings in the High Court, namely—(a) proceedings for infringement of rights pertaining to any intellectual property or for passing off; (b) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off; and (c) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off. (3) Subject to subsection (4), no statement or admission made by a person—(a) in answering a question put to him in any proceedings to which subsection (1) applies; or (b) in complying with any order made in any such proceedings, shall, in proceedings for any related offence or for the recovery of any related penalty, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the spouse of that person. (4) Nothing in subsection (3) shall render any statement or admission made by a person as there mentioned inadmissible in evidence against that person in proceedings for perjury or contempt of court."

Subsection (5) is a definition provision which starts by defining the expression "intellectual property," to include any copyright. I read the next two definitions in full:

" 'related offence,' in relation to any proceedings to which subsection (1) applies, means—(a) in the case of proceedings within subsection (2)(a) or (b)—(i) any offence committed by or in the course of the

A infringement or passing off to which those proceedings relate; or (ii) any offence not within sub-paragraph (i) committed in connection with that infringement or passing off, being an offence involving fraud or dishonesty; (b) in the case of proceedings within subsection (2)(c), any offence revealed by the facts on which the plaintiff relies in those proceedings; 'related penalty,' in relation to any proceedings to which subsection (1) applies means—(a) in the case of proceedings within subsection (2)(a) or (b), any penalty incurred in respect of anything done or omitted in connection with the infringement or passing off to which those proceedings relate; (b) in the case of proceedings within subsection (2)(c), any penalty incurred in respect of any act or omission revealed by the facts on which the plaintiff relies in those proceedings."

C Although it requires some study to understand the effect of section 72, I think that once that has been done its effect for present purposes is clear. There can be no doubt that the 1984 and 1985 actions are civil proceedings within subsection (2)(a), and it appears that they are also within (b) and (c) as well. Mr. Henderson's first suggestion was that proceedings for contempt of the 1984 order would themselves fall within subsection (2) on the ground that they would be proceedings taken in proceedings of the kind there specified. I do not think that that can be right. Both on principle and on the true construction of subsections (2) and (4), it seems clear that proceedings for contempt are to be treated as separate proceedings. However, that does not invalidate Mr. Henderson's argument on section 72 as a whole, because when subsections (3) and (4) are read together it is clear that the withdrawal of the privilege which is effected by subsection (1) applies just as much to the proceedings mentioned in subsection (4) as it does to those mentioned in subsection (2).

E The argument has centred mainly on the effect of subsections (3) and (4). The general effect of subsection (3) is to make statements or admissions made in proceedings to which subsection (1) applies (i.e. those specified in subsection (2)) inadmissible in evidence against the maker of them in proceedings for any related offence or for the recovery of any related penalty. But then the effect of subsection (4) is to make such statements and admissions so admissible in proceedings for perjury or contempt of court based on such statements or admissions. Mr. Hobbs submits that the effect of subsection (4) is to preserve a discretion in the court as to whether the statements or admissions should be admitted in evidence. I do not think that that is correct as a matter of the construction of section 72. It seems clear from the double negative in subsection (4), when read with subsection (3), that the statements and admissions must be admitted. On the other hand, I would accede to Mr. Hobbs' alternative submission, which is that the provisions of section 72 cannot remove the discretion of the court as to whether the implied undertaking should be released or modified in the case to which the undertaking already applies. It is to that final question that I now turn.

H Mr. Henderson, while accepting that section 72 does not automatically conclude the point in the plaintiff's favour, nevertheless submits that its existence means that the court should usually exercise its discretion in favour of the necessary release or modification. I do not find it necessary to accept the proposition in that form, although it is impossible to ignore the fact that the clear purpose of the section was to withdraw the

privilege against self-incrimination in intellectual property cases. It seems to me that, as with every discretion, each case must depend on its own facts. In the present case it becomes necessary to return to the reasons advanced by Mr. Henderson, as I have already recorded them. After considering those reasons and all the contrary arguments which have been put forward by Mr. Hobbs, I have come to a clear conclusion that this is a case where the plaintiff's application should succeed.

In general I accept the reasons advanced by Mr. Henderson, and it is I think unnecessary to consider them separately or in any greater detail. I will, however, record that it appears to me that the material on which he relies establishes that there is a question of contempt to be investigated. It is not appropriate to put it higher than that.

It seems clear that the case was not as fully argued before Whitford J. as it has been before us. I do not think that the effect of section 72 can have been fully explored. The judge seems to have been favourably disposed towards the application in regard to contempt proceedings, although he did not refer to section 72. He refused that part of the application on the ground that it was premature. He thought that the plaintiff ought first to institute its proceedings for contempt. However, I respectfully agree with Mr. Henderson that that would have been impracticable, if only because the notice of motion would have had to specify with particularity the alleged breaches of the 1984 order. That is something which the plaintiff and its advisers could not have done unless and until they had been able to make full use of the documents in respect of which this application is made.

For the reasons which I have given I would allow this appeal.

CROOM-JOHNSON L.J. I entirely agree and have nothing to add.

MAY L.J. I also agree that this appeal should be allowed for the reasons given by Nourse L.J. Although we are differing from the judge below, I do not think it necessary to add any further comments of my own.

*Appeal allowed with costs in Court
of Appeal and below.
Leave to appeal refused.*

3 March. The court granted a stay of the order pending hearing of the first, second and fourth defendants' petitions for leave to appeal and, if allowed, of any appeal.

19 March. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Ackner) allowed petitions by the first, second and fourth defendants for leave to appeal.

Solicitors: Lovell White & King; William J. Stoffel & Co., Beckenham; Jaques & Lewis.

[Reported by CLIVE SCOWEN, ESQ., Barrister-at-Law]

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Société Aerospatiale v. Lee Kui Jak (P.C.)

A

[PRIVY COUNCIL]

SOCIÉTÉ NATIONALE INDUSTRIELLE AÉRO-
SPATIALE

APPELLANTS

AND

LEE KUI JAK AND ANOTHER

RESPONDENTS

B

[APPEAL FROM THE COURT OF APPEAL OF BRUNEI DARUSSALAM]

1987 April 6, 7, 8, 9;
May 14Lord Keith of Kinkel, Lord Griffiths,
Lord Mackay of Clashfern, Lord Goff of Chieveley
and Sir John Megaw

C

*Injunction—Jurisdiction to grant—Restraint of foreign proceedings—
Brunei resident killed in helicopter crash in Brunei—Proceedings
commenced in Brunei and Texas against French helicopter
manufacturer—Manufacturer seeking indemnity against third
parties in Brunei proceedings—Whether plaintiffs to be restrained
from continuing with proceedings in Texas*

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A helicopter manufactured by a French company S., owned by an English company, and operated and serviced by a Malaysian company, crashed in Brunei. The deceased, who was a passenger, was killed. He and his family were resident in Brunei, and he was a successful businessman providing in particular catering services for oil rigs operating off Brunei. The plaintiffs, the deceased's widow and administrators of his estate, instituted proceedings in Brunei against the Malaysian company and S., in France against S., and in Texas against, inter alia, S. and its associated companies and the Malaysian company and its associates. The Texas court had jurisdiction over S. because S. carried on business there. The French proceedings against S. were discontinued, and the plaintiffs' claim against the Malaysian company was settled. S. and its associated companies applied to the Texas court for dismissal of the plaintiffs' action there on the ground of forum non conveniens, and although other issues were also raised the judge dismissed the application without giving reasons. The plaintiffs' Texas attorneys commenced pre-trial discovery and trial was eventually fixed for 1 July 1987 in Texas. Meanwhile S. applied to the High Court of Negara Brunei Darussalam for an order restraining the plaintiffs from continuing with the Texas proceedings. The application was dismissed and S. appealed. The plaintiffs gave undertakings that they would agree to trial by judge alone in Texas, and they accepted that on trial in Texas the law of Brunei was applicable as to liability and quantum so that no claim lay against S. on the basis of strict liability or for punitive damages. S. gave undertakings to protect the position of the plaintiffs and their Texas attorneys in Brunei, and to facilitate trial of the action there in autumn 1987. A contribution notice was served by S. on the Malaysian company, which intimated that it would submit to Brunei but not Texas jurisdiction, and that it would accept service of a third party notice issued by S. in Brunei. S. accepted service in Brunei of a writ issued by the owners and insurers of the helicopter. The Court of Appeal of Brunei Darussalam dismissed S.'s appeal against the refusal to grant an injunction holding that having regard to the work done by the plaintiffs' Texas attorneys Texas had become the appropriate and natural forum.

On appeal by S.:—

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[1987]

Held, allowing the appeal, (1) that in considering whether an injunction should be granted to restrain a plaintiff beginning or pursuing an action in another jurisdiction, the court did not proceed on the same principles as those applied when granting a stay of proceedings on the ground of forum non conveniens; that the authorities showed that an injunction would be granted where justice required that a plaintiff amenable to the jurisdiction of the court should be restrained from proceeding in a foreign jurisdiction; and that, although the question of whether the plaintiff's action was oppressive or vexacious was material in determining whether the interests of justice required the plaintiff to be restrained from proceeding in the foreign jurisdiction, the court had also to consider the injustice to the plaintiff if restricted to the natural forum for determining the dispute if that restriction would unjustly deprive him of advantages available in the foreign forum (post, pp. 70G, 73D–G, 74D–H).

(2) That Brunei not Texas was the natural forum for the trial of the plaintiffs' action against S. and the work already undertaken by the lawyers in the Texas proceedings was not sufficient to make that court the natural forum for the determination of the dispute; that it would be oppressive for the plaintiffs to continue the Texas proceedings because of the serious injustice to S. in not being able to claim in those proceedings indemnity or contribution from the Malaysian company for any liability S. might have to the plaintiffs; and that, since the undertakings entered into by S. were sufficient to ensure that any advantage to the plaintiffs in proceedings in Texas would be available in the proceedings in Brunei, no injustice would be caused to the plaintiffs by being restrained from proceeding in Texas and, accordingly, an injunction would be granted on terms set out in the undertakings (post, pp. 76F–77A, C, 80A–E).

McHenry v. Lewis (1882) 22 Ch.D. 397, C.A. and *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225, C.A. applied.

Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557, H.L.(E.) and *Spiliada Maritime Corporation v. Cansulex Ltd.* [1986] 3 W.L.R. 972, H.L.(E.) distinguished.

Quaere. Whether a foreign judgment gives a right to seek contribution from others in respect of the same damage (post, p. 79H–80A).

Decision of the Court of Appeal of Brunei Darussalam reversed.

The following cases are referred to in the judgment of their Lordships:

British Airways Board v. Laker Airways Ltd. [1984] Q.B. 142; [1983] 3 W.L.R. 544; [1983] 3 All E.R. 375, Parker J. and C.A.; [1985] A.C. 58; [1984] 3 W.L.R. 413; [1984] 3 All E.R. 39, H.L.(E.)

Bushby v. Munday (1821) 5 Madd. 297

Carron Iron Co. v. Maclaren (1855) 5 H.L. Cas. 416, H.L.(E.)

Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.)

Cohen v. Rothfield [1919] 1 K.B. 410, C.A.

Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd. (unreported), 19 March 1987, H.L.(Sc.)

Harris v. Empress Motors Ltd. [1984] 1 W.L.R. 212; [1983] 3 All E.R. 561, C.A.

Hyman v. Helm (1883) 24 Ch.D. 531, C.A.

MacShannon v. Rockware Glass Ltd. [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.)

McHenry v. Lewis (1882) 22 Ch.D. 397, C.A.

North Carolina Estate Co. Ltd., In re (1889) 5 T.L.R. 328

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- A *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225, C.A.
Pickett v. British Rail Engineering Ltd. [1980] A.C. 136; [1978] 3 W.L.R. 955; [1979] 1 All E.R. 774, H.L.(E.)
South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V. [1987] A.C. 24; [1986] 3 W.L.R. 398; [1986] 3 All E.R. 487, H.L.(E.)
Spiliada Maritime Corporation v. Cansulex Ltd. [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)
- B *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, C.A.
Young v. Barclay (1846) 8 Dunl. (Ct. of Sess.) 774

The following additional cases were cited in argument:

- C *Armstrong v. Armstrong* [1892] p. 98
Atlantic Star, The [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, H.L.(E.)
Bank of Tokyo Ltd. v. Karoon (Note) [1987] A.C. 45; [1986] 3 W.L.R. 414; [1986] 3 All E.R. 468, C.A.
Bethell v. Peace (1971) 441 F. 2d 495
Bremen (The) v. Zapata Off-Shore Co. (1972) 407 U.S. 1
Cargill Inc. v. Hartford Accident and Indemnity Co. (1982) 531 F.Supp. 710
- D *Chase Manhattan Bank v. State of Iran* (1980) 484 F.Supp. 832
Cole v. Cunningham (1890) 133 U.S. 107
Distin, In re (1871) 24 L.T. 197
Donovan v. City of Dallas (1964) 377 U.S. 408
Graham v. Maxwell (1849) 1 Mac. & G. 71
Hoover Realty Co. v. American Institute of Marketing Systems Inc. (1970) 179 N.W. 2d 683
Kline v. Burke Construction Co. (1922) 260 U.S. 226
- E *Laker Airways Ltd. v. Sabena, Belgian World Airlines* (1984) 731 F. 2d 909
Logan v. Bank of Scotland (No. 2) [1906] 1 K.B. 141, C.A.
Metall und Rohstoff A.G. v. ACLI Metals (London) Ltd. [1984] 1 Lloyd's Rep. 598, C.A.
Midland Bank Plc. v. Laker Airways Ltd. [1986] Q.B. 689; [1986] 2 W.L.R. 707; [1986] 1 All E.R. 526, C.A.
Moore v. Moore (1896) 12 T.L.R. 221, C.A.
- F *Seattle Totems Hockey Club Inc. v. National Hockey League* (1981) 652 F. 2d 852
Settlement Corporation v. Hochschild [1966] Ch. 10; [1965] 3 W.L.R. 1150; [1965] 3 All E.R. 486
Smith Kline & French Laboratories Ltd. v. Bloch [1983] 1 W.L.R. 730; [1983] 2 All E.R. 72, C.A.
Thornton v. Thornton (1886) 11 P.D. 176, C.A.
- G *Unterweser Reederei GMBH, In re* (1970) 428 F. 2d 888

APPEAL (No. 13 of 1987) with leave of the Court of Appeal of Brunei Darussalam by Société Nationale Aerospatiale (S.N.I.A.S.) from the judgment of the Court of Appeal of Brunei Darussalam (Briggs P., Kempster and O'Connor, Judicial Commissioners) given on 20 March 1987 dismissing an appeal by S.N.I.A.S. from the judgment of Mr. Commissioner Rhind in the High Court of Negara Brunei Darussalam at Bandar Seri Begawan on 22 December 1986, written reasons being delivered on 16 January 1987, whereby S.N.I.A.S.' application for an order that the plaintiffs, Lee Kui Jak and Yong Joon Kim (both suing as administrators of the estate of Yong Joon San, deceased, and Lee Kui Jak also suing in her personal capacity as widow of Yong Joon San) be restrained from further prosecuting the suit filed in the 61st Judicial District Court of Harris County, Texas, against S.N.I.A.S.

The facts are stated in the judgment of their Lordships.

A

Ian Hunter Q.C. and *David Joseph* for S.N.I.A.S.

Nicholas Chambers Q.C. and *Raymond Sztetu* (of the Brunei and Malaysian Bars) for the plaintiffs.

Cur. adv. vult.

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14 May. The judgment of their Lordships was delivered by LORD GOFF OF CHIEVELEY.

There is before their Lordships an appeal by the appellants, Société Nationale Industrielle Aerospatiale (whom their Lordships will refer to as "S.N.I.A.S."), from a judgment of the Court of Appeal of Brunei Darussalam delivered on 20 March 1987, in which the Court of Appeal dismissed an appeal from a decision of Mr. Commissioner Rhind (delivered orally on 22 December 1986 and in writing on 16 January 1987) declining to grant an injunction restraining the plaintiffs from continuing proceedings commenced by them in the 61st Judicial District Court of Harris County, Texas.

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The matter has arisen as follows. On 16 December 1980 a Puma 330J helicopter crashed near Kuala Belait in Brunei. There were 12 people on board: all were killed. Among those killed was Yong Joon San.

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Yong Joon San was a very successful businessman. His home was in Brunei, where he lived with his wife and children. His main business (carried on by him under the name of Yong Joon San General Contractor) was a business in his sole proprietorship concerned with providing catering services to oil rigs and other structures operating off Brunei. He also had a much smaller business in Malaysia called Yong & Co., which was likewise in his sole proprietorship. It appears from the evidence presently available that Yong Joon San was making a very substantial income from his business activities, and especially from his catering business in Brunei; and that in addition he was making substantial sums on the New York Stock Exchange. One estimate given of his income in the year before his death was over U.S.\$1,800,000. It has also been stated that, by the time of his death, he had accumulated a fortune in the region of U.S.\$20,000,000.

E

The Puma helicopter which crashed was manufactured by S.N.I.A.S. in France in 1978. S.N.I.A.S. is a French company in the ownership of the French state. The helicopter in question was owned by an English company, British and Commonwealth Shipping Co. (Aviation) Ltd. ("British and Commonwealth"); but it was at all material times operated and serviced by Bristow Helicopters Malaysia Sdn. Bhd. ("Bristow Malaysia"), an associated company of Bristow Helicopters Ltd. ("Bristow U.K."), and was under contract to Sarawak Shell Bhd. and so was based at Miri Airport in Sarawak. The Bristow companies are ultimately owned by British and Commonwealth.

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The Brunei Government ordered an inquiry into the accident. The inquiry was conducted by the Brunei Chief Inspector of Accidents, Mr. J. M. Holden. His report was submitted to the Director of Civil Aviation of Brunei on 20 July 1982. The main conclusion of the report was as follows:

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"the most likely cause of the accident was a planetary gear failure in the second stage of the two stage epicyclic main gear box reduction

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A gear; the associated metal debris caused jamming within the rotating assemblies, generating forces which fractured the common epicyclic ring gear and the main gearbox casing. This resulted in a gross instability in the rotor system which caused blades to strike the fuselage."

It was further concluded:

B "The initial cause of the accident was due to the mistaken health monitoring of the gearbox leading to a deterioration of the mechanical condition of the gearbox components."

(Another possible cause was briefly mentioned, but their Lordships were informed that this is no longer regarded as a serious possibility and it can therefore be disregarded).

C The point about "mistaken health monitoring of the gearbox" is explained in the body of the report. The maintenance practices to be followed in the event of gearbox contamination are set out in the S.N.I.A.S. Maintenance Manual, which refers to nickel or carbon steel particles taken from the filter and magnetic plug, and lays down a procedure to be followed in the event of over 50 square millimetres of such particles being collected. As is pointed out in the report, this implies that debris from the filter and magnetic plug should be laid out and measured on a cumulative basis until the maximum allowable measured area (50 square millimetres) is reached; at that stage, the relevant component (either main gearbox or main rotor head) should be returned to the factory and a new component fitted. The report continues:

E "On 30 January 1980 instructions had been received at Miri from Bristow Helicopters Ltd. in the United Kingdom, following advice from Aerospatiale, that 'metal particles which are less than 50mm sq., i.e. 6 x 8mm are acceptable.' This was attempting to confirm the information contained in the Standard Practices Manual.

F "Despite the above clarification, all the engineers concerned with the maintenance of Puma 9M-SSC at Miri misinterpreted the maximum allowable area of particles of 50mm² (50 square millimetres) and in all cases it was understood to mean the area of a square with 50mm sides (2,500 square millimetres).

G "According to Bristow's Deputy Chief Engineer at Miri, the practices recommended in the Maintenance and Standard Practices Manuals were carried out but there is no written record of the daily measured or cumulative total area of particle debris obtained from the filter and the magnetic plug. However, the actual debris was retained and subsequently handed over to the investigators who assessed the total area as 1,580mm² (1,580 square millimetres) or over 30 times the maximum allowable area."

It was however later stated in the report:

H "although the Standard Practices Manual is categorical in stating that a gearbox which has produced more than 50mm² of metal should be removed and returned to the factory, the Miri engineers had some justification for thinking that this instruction was not to be taken too literally."

In paragraph 3 of the report headed "Conclusions," finding 2 is as follows:

"Gross contamination of the main gearbox magnetic plug and filter had occurred during the six weeks preceding the accident. The particles had undoubtedly originated from the second stage planet pinion bearing surfaces. Maintenance personnel had wrongly interpreted the amount of allowable debris as defined in the Aerospatiale Standard Practices Manual, due to the mistaken interpretation of an unfamiliar metric term."

And in paragraph 4, headed "Recommendations," the first recommendation is as follows:

"Any possibility of misinterpretation of the terms used in the Puma Standard Practices Manual, on the allowable areas of debris from the main gearbox, should be corrected."

Proceedings were started by Yong Joon San's widow, Lee Kui Jak, on her own behalf as widow and (with her husband's brother) as administrator of her husband's estate; they are the respondents to the present appeal. For convenience their Lordships will refer to them as "the plaintiffs." Three sets of proceedings were started, in December 1981, in Brunei, France, and Texas respectively. The Brunei proceedings were issued on 9 December 1981 against Bristow Malaysia as first defendants and S.N.I.A.S. as second defendants; they were served on S.N.I.A.S. in December 1982. It was alleged that Bristow Malaysia were solely responsible for the accident; as against S.N.I.A.S., allegations were made of negligent design and manufacture, but no particulars were given. The French proceedings were against S.N.I.A.S. alone. No further steps were taken in those proceedings, and they have been discontinued long ago. The Texas proceedings were also issued on 9 December 1981. Among the plaintiffs was a Richard J. Kittrell; it appears that he is a New York attorney who was appointed administrator for the purpose of the proceedings, and was as such simply a nominal plaintiff. There were eight defendants in the Texas proceedings, who fall into three groups: (1) S.N.I.A.S., together with two United States associates of S.N.I.A.S.—Aerospatiale Helicopter Corporation ("A.H.C."), a Texas corporation, and European Aerospace Corporation ("E.A.C."), a Delaware corporation. (2) Bristow Malaysia, together with two United States associated companies—Bristow Helicopters Inc., Connecticut corporation, and Bristow Offshore Helicopters Inc., a Texas corporation. (3) Sarawak Shell Bhd., together with Shell Oil Co., a Delaware corporation. The plaintiffs' claim against S.N.I.A.S. was advanced under the Texas Wrongful Death Statute (section 71.031 of the Texas Civil Practice and Remedies Code), which can apparently be invoked notwithstanding that the deceased had no connection with Texas and that the accident causing death occurred elsewhere, jurisdiction being asserted on the basis that S.N.I.A.S. were doing business in Texas by selling their products to purchasers in Texas, i.e. to their subsidiary A.H.C.. The lawyers responsible for launching the Texas proceedings were Messrs. Speiser, Krause and Madole of New York, a specialist firm of aviation lawyers, acting on the instructions of the plaintiffs' Brunei lawyer, Mr. Szetu. The reasons for launching them were subsequently stated by Mr. Szetu (in an affidavit dated 30 January 1984) to be (1) the more favourable Texas law on product liability, and (2) the higher level of damages awarded in courts in the United States. Shortly after the Texas proceedings were commenced, the Texas lawyers acting for

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A S.N.I.A.S. attempted to have the case removed to the Federal Court; but in mid-1982 the Federal Court remitted the case back to the state court.

B In the course of 1983, an agreement was reached whereby all proceedings as between the plaintiffs on the one hand, and the Bristow companies and the Shell companies on the other hand, were settled. A general release was granted to these companies by the plaintiffs and by
C plaintiff Kittrell. The amount payable, and no doubt paid, to the plaintiffs under the settlement was U.S.\$430,000; of this sum, U.S.\$107,500 was to go to Messrs. Speiser, Krause and Madole, and Mr. Kittrell. The settlement, together with an apportionment between the widow and her three children, was approved by the Chief Registrar in Brunei on 20 June 1984. S.N.I.A.S. were not parties to the settlement, and their Lordships were told that they were never invited to be parties to it.

Meanwhile, it appears that little progress was being made in the Texas proceedings against S.N.I.A.S. and their associated companies. However in March 1985 the plaintiffs decided to instruct fresh attorneys in the United States, changing from Messrs. Speiser Krause and Madole of New York to a Mr. Mithoff and Mr. Jacks, members of two comparatively small firms which practise in Houston, Texas, and which specialise in personal injury claims. Thereafter, it seems that they proceeded to obtain discovery with a view to establishing jurisdiction over the three Aerospatiale defendants. However in February 1986 a vigilant computer drew the attention of the Texas court to the lack of progress in these proceedings, and the court of its own motion took the formal step of listing the case for dismissal for want of prosecution. On
E 14 March 1986, the plaintiffs filed a motion to retain; and on 28 May 1986 the defendants filed a motion to dismiss on the ground of forum non conveniens. The court decided not to dismiss the action for want of prosecution, but fixed a trial date for 10 November 1986. Briefs were filed on the motion to dismiss on the ground of forum non conveniens. This motion was opposed by the plaintiffs on two grounds: (1) that
F where a claim is made under the Texas Wrongful Death Statute, as a matter of construction the doctrine of forum non conveniens has no application; and (2) that, in the alternative, the court should in any event exercise its discretion to refuse the defendants' motion on the ground of forum non conveniens. On 14 August 1986, the Texas court refused the defendants' motion. In accordance with the practice of that
G court, no reasons were given for the decision; it is impossible therefore to know whether the decision was made on the first or the second ground advanced by the plaintiffs, nor, if the decision was made on the second ground, for what reasons it was held that the Texas court should not give effect to the doctrine of forum non conveniens. Furthermore, under the procedure of the Texas court, no appeal lay from this decision. An attempt was made to have the decision reviewed by
H petitioning the Court of Appeals for a writ of mandamus; but this failed, the petition being dismissed on 2 October 1986. A further petition to the Texas Supreme Court was dismissed on 5 November 1986; and a petition for a rehearing was dismissed on 3 December 1986. By then, the defendants had exhausted their remedies in Texas. Meanwhile the plaintiffs' new Texas attorneys had turned their attention to the substantive issues in the case, taking depositions from a number of employees of A.H.C. in Texas. The trial date of 10 November 1986 was

vacated as impracticable; and a new date was fixed for February 1987. That date, too, has since been vacated; the trial in Texas is at present fixed for 1 June 1987. Between December 1986 and March 1987, a number of depositions were taken by the plaintiffs' Texas attorneys in France from employees of S.N.I.A.S..

In December 1986, having failed in their attempts to obtain dismissal of the proceedings against them and their associated companies in Texas, S.N.I.A.S. turned their attention to the possibility of obtaining an injunction from the Brunei court restraining the plaintiffs from continuing the Texas proceedings. Having taken advice from English and Brunei solicitors, it was decided to make an immediate application because it transpired that a judge would be available until 23 December 1986 but that thereafter no judge would be available until late January 1987. Accordingly, the application was made to Mr. Commissioner Rhind on 20 December 1986; on 22 December, he refused to grant an injunction, giving his reasons in writing later, on 16 January 1987. It is now accepted on both sides that, due to the limited time available, the evidence laid before the commissioner was inadequate and, to some extent, misleading. Their Lordships trust that, in these circumstances, they will not be thought to be lacking in courtesy if they do not refer to his judgment.

S.N.I.A.S. then lodged a notice of appeal and, having regard to the urgency of the matter, a Court of Appeal was specially assembled to hear the appeal in March 1987. The hearing began on 10 March. Substantial further evidence was put in by both sides in the course of the hearing of the appeal: indeed it was common ground between the parties that the Court of Appeal should consider the matter de novo. An additional reason for taking this course was that a full report of the decision of the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1986] 3 W.L.R. 972 was available to the Court of Appeal; no such report had been available to Mr. Commissioner Rhind. Furthermore, during the hearing undertakings were given by both sides, no doubt with a view to fortifying their respective positions. The plaintiffs first stated that, if S.N.I.A.S. wished for trial by judge alone in Texas, the plaintiffs would agree to such a trial. Second, they accepted that, the law of Brunei being applicable both as to liability and quantum in respect of the trial of the matter in Texas, no claim lay against S.N.I.A.S. either (a) in consequence of strict liability, or (b) for punitive damages. In their turn, S.N.I.A.S. gave a number of undertakings. These run to nearly three pages; the full text is appended to this opinion. The most important are the following:

"1. To provide the plaintiffs within 28 days with two irrevocable letters of credit drawn in their favour and confirmed by a first class bank within Brunei in the terms annexed hereto . . .

"5. That the Texas proceedings shall be permitted to continue until completion of pre-trial discovery. (S.N.I.A.S.' position is that they are willing to undertake that they will procure A.H.C. to make any further documentary discovery of documents in the possession custody or power of A.H.C. which plaintiffs may require. S.N.I.A.S. are unwilling to accept further deposition-taking in Texas unless the court takes the view that no injunction will be granted in the absence of such undertaking).

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- A "6. To agree to a trial date in September/October 1987 or as soon thereafter as may be convenient to the court and to cooperate in every way practicable to keep such date effective.
- "7. To cooperate in every practicable way in the admission to the Bar of Brunei Darussalam as ad hoc members for the purposes of this action of: William Thomas Jacks and Richard Warner Mithoff.
- B "8. To take all such steps as may be necessary to obtain all relevant consents for the use in this action of any documents obtained by discovery in the Texas action."

The undertakings of S.N.I.A.S. included in addition two alternative clauses regarding the payment of the costs of the plaintiffs' Texas attorneys.

- C In addition, there were certain developments regarding the position of Bristow Malaysia. In the course of the hearing before the Court of Appeal, a contribution notice was served on Bristow Malaysia by S.N.I.A.S.. It has been suggested that this was in fact too late, because Bristow Malaysia were no longer parties to the action. But this was disputed, and in any event Bristow Malaysia have indicated their readiness to accept service within the jurisdiction of the Brunei court of
- D any third party notice issued by S.N.I.A.S.. It appears that, whereas Bristow Malaysia are vigorously resisting Texas jurisdiction on the ground that they have never done business in Texas, they have indicated their readiness to submit to the jurisdiction of the courts in Brunei to enable the whole case to be determined there. On the same day, 18 March 1987, S.N.I.A.S. accepted service of a writ issued against them
- E on 16 December 1986 (one day before the expiry of the limitation period) by the owners of the crashed helicopter together with the insurers of the hull.

- Their Lordships now turn to the judgments of the Court of Appeal. The leading judgment was delivered by Mr. Commissioner Kempster. He referred first to the speech of Lord Scarman in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557. In his speech, at p. 573, Lord
- F Scarman recognised that, in a case where a party seeks to enjoin another party from proceeding against him in another jurisdiction, such an injunction can be granted "where it is appropriate to avoid injustice." He then said, at p. 574:

- G "I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings."

- Next, he referred, at p. 575, to a much quoted passage from Lord Diplock's speech in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 812, concerning the circumstances in which a stay of proceedings
- H may be granted:

"In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical

advantage which would be available to him if he invoked the jurisdiction of the English court.’”

Lord Scarman continued, at p. 575:

“Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction.”

Mr. Commissioner Kempster then proceeded to apply the principle thus stated by Lord Scarman. He first considered a submission advanced by Mr. Hunter for S.N.I.A.S. that justice could be done in Brunei at substantially less expense to them because, if held liable to the plaintiffs, they intended to seek contribution or indemnity from Bristow Malaysia who were not amenable to the jurisdiction of the court in Texas, and one set of proceedings in Brunei involving the plaintiffs, S.N.I.A.S. and Bristow Malaysia would be less expensive than two sets of proceedings, one between the plaintiffs and S.N.I.A.S. in Texas and another between S.N.I.A.S. and Bristow Malaysia in Brunei. Mr. Commissioner Kempster declined to accept this submission. He considered that a “desperate flurry of procedural steps” had been “procured” by S.N.I.A.S. to support this argument. He said:

“The contribution point does not appear to have been argued before Mr. Commissioner Rhind, though the convenience of Brunei for Bristows was urged, and had only belatedly been mentioned in the course of the attempts to challenge the jurisdiction of the Texan courts. A party seeking a discretionary remedy must get his tackle in order and proceed with due expedition and Aerospatiale had no good reason to defer the service of a contribution notice on Bristows in Brunei particularly after receipt of a letter in April 1983 telling them of the settlement between the plaintiffs and Bristows. A fortiori after their objections to the Texan jurisdiction had to all intents and purposes failed in August 1986. Securing the promise of Bristows to submit to the jurisdiction after inquiry by this court as to the real state of play comes, in my view, too late to allow a real rather than a hypothetical possibility of proceedings both in Texas and Brunei (*lis alibi pendens*) to weigh in the balance.”

He then turned to consider “personal or juridical advantages” redounding to the advantage of the plaintiffs by continuing the suit in Texas. He recognised that the plaintiffs no longer maintained that they had the advantage of strict liability or the prospect of higher damages in Texas; though he considered that there was a prospect of an early hearing in Texas. He further referred to “substantial pre-trial discovery of documents and witnesses” which had taken place and continued to take place due to the industry of the Texan attorneys acting for the plaintiffs, and to the fact that these attorneys were familiar with the case. He concluded:

“In my opinion the prospects of an early trial and the availability of a skilled professional team, both in Texas, constitute personal and juridical advantages of which the plaintiffs should not lightly be deprived.”

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A On a submission by S.N.I.A.S. that the Brunei courts were better able to apply Brunei law on liability and quantum, he declined to query the competence of the Texas judiciary on these matters. Costs he regarded as a neutral factor; so also, in the light of S.N.I.A.S.' undertaking to open letters of credit to cover a possible award of damages and costs, did he regard the availability of assets to satisfy any judgment against S.N.I.A.S.. He took into account the other undertakings of S.N.I.A.S.. On this aspect of the case, he concluded:

B "It transpires that no witnesses relevant to liability are presently to be found in Brunei and only a few relevant to damages. That the helicopter crashed here rather than in Malaysia was fortuitous; the only real links with this country being the residence of the deceased and his family, the applicability of its law and the fact that a report on the accident was prepared here. Applying the principles enunciated by Lord Scarman in *Castanho* in the light of the foregoing conclusions and undertakings I am satisfied that Aerospatiale has failed to demonstrate that justice can be done in Brunei at substantially less inconvenience and expense than in Texas and, in so far as it is necessary so to determine, that the injunction sought would deprive the plaintiffs of legitimate personal and juridical advantages."

D Mr. Commissioner Kempster then turned to consider whether, and if so how, the principles outlined in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 had been affected by the subsequent decision of the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd.* E [1986] 3 W.L.R. 972. He said:

F "It remains to consider whether and if so how the principles outlined in *Castanho* have been affected by the subsequent decision of the House of Lords in *Spiliada* when, as in the instant case, 'parties to a dispute have chosen to litigate in order to determine where they shall litigate.' Lord Goff's speech does not purport to deal with the grant or refusal of an injunction restraining the continuance of proceedings overseas but it does, I think, nonetheless require us to consider the application to the material facts of the 'forum non conveniens' doctrine. After all it would be inelegant and anomalous to say the least if similar principles did not fall for consideration in the three related types of application giving rise to the authoritative decisions already cited. Which then is the 'appropriate' or 'natural' forum in the sense that litigation there is the more likely to secure the ends of justice? If it is Brunei, the jurisdiction with which, in 1981, the dispute might have been thought more closely connected, it will be proper to consider the exercise of our discretion but if, for the reasons already given when seeking to apply the *Castanho* principles, it is or has since become, as I believe, Texas it will be wrong in principle to consider such exercise. Likewise if we were not satisfied that any forum was 'appropriate' or 'natural.' However the problem is approached I am satisfied that Mr. Commissioner Rhind was right in finding that Texas is presently the 'appropriate' and 'natural' forum and that Aerospatiale fail in their application. The relief sought is not necessary in the interests of justice. I would dismiss the appeal accordingly."

Mr. Commissioner O'Connor delivered a concurring judgment to the same effect. The President of the Court, Sir Geoffrey Briggs, agreed.

It is plain from their judgments that the Court of Appeal were concerned, and understandably concerned, about the relationship between the decisions of the House of Lords in *Castanho's* case [1981] A.C. 557 and *Spiliada's* case [1986] 3 W.L.R. 972. Since a proper identification of the applicable legal principles lies at the heart of the present case, their Lordships consider that their first duty is to identify those principles, giving due consideration to those two decisions. That they should undertake this task is, they consider, all the more necessary because certain observations of Lord Scarman in *Castanho's* case [1981] A.C. 557 are substantially founded on the much-quoted dictum of Lord Diplock in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 812, which has to a considerable extent been overtaken by the subsequent development of the law in *Spiliada's* case [1986] 3 W.L.R. 972, 984-987, and 991-993. For this purpose, no material distinction is to be drawn between the law of Brunei and the law of England.

The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far as the early 19th century. From an early stage, certain basic principles emerged which are now beyond dispute. First, the jurisdiction is to be exercised when the "ends of justice" require it: see *Bushby v. Munday* (1821) 5 Madd. 297, 307, *per* Sir John Leach V.-C.); *Carron Iron Co. v. Maclaren* (1855) 5 H.L. Cas. 416, 453, *per* Lord St. Leonards (in a dissenting speech, the force of which was however recognised by Lord Brougham, at p. 459). This fundamental principle has been reasserted in recent years, notably by Lord Scarman in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 and by Lord Diplock in *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, 81. Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. As Sir John Leach V.-C. said in *Bushby v. Munday*, 5 Madd., 297, 307:

"If a defendant who is ordered by this court to discontinue a proceeding which he has commenced against the plaintiff, in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceeding, this court does not pretend to any interference with the other court; it acts upon the defendant by punishment for his contempt in his disobedience to the order of the court; . . ."

There are, of course, many other statements in the cases to the same effect. Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy: see, e.g. *In re North Carolina Estate Co. Ltd.* (1889) 5 T.L.R. 328, *per* Chitty J. Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution: see e.g., *Cohen v. Rothfield* [1919] 1 K.B. 410, 413, *per* Scrutton L.J., and, in more recent times, *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, 573, *per* Lord Scarman. All of this is, their Lordships think, uncontroversial; but it has to be recognised that it does

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A not provide very much guidance to judges at first instance who have to decide whether or not to exercise the jurisdiction in any particular case.

B The decided cases, stretching back over a hundred years and more, provide however a useful source of experience from which guidance may be drawn. They show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories. Their Lordships were helpfully taken through many of the authorities by counsel in the present case. One such category of case arises where an estate is being administered in this country, or a petition in bankruptcy has been presented in this country, or winding up proceedings have been commenced here, and an injunction is granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of certain foreign assets. In such cases, it may be said that the purpose of the injunction is to protect the jurisdiction of the English court. Indeed, one of their Lordships has been inclined to think that such an idea generally underlies the jurisdiction to grant injunctions restraining the pursuit of foreign proceedings: see *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.* [1987] A.C. 24, 45, *per* Lord Goff of Chieveley; but their Lordships are persuaded that this is too narrow a view. Another important category of case in which injunctions may be granted is where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter both in this country and overseas, and the defendant has asked the English court to compel the plaintiff to elect in which country he shall alone proceed. In such cases, there is authority that the court will only restrain the plaintiff from pursuing the foreign proceedings if the pursuit of such proceedings is regarded as vexatious or oppressive: see *McHenry v. Lewis* (1882) 22 Ch.D. 397 and *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225. Since in these cases the court has been presented with a choice whether to restrain the foreign proceedings or to stay the English proceedings, we find in them the germ of the idea that the same test (i.e. whether the relevant proceedings are vexatious or oppressive) is applicable in both classes of case, an idea which was to bear fruit in the statement of principle by Scott L.J. in *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, 398, in relation to staying proceedings in this country, a statement of principle now overlaid by the adoption in such cases of the Scottish principle of *forum non conveniens*, which has been gratefully incorporated into English law.

G The old principle that an injunction may be granted to restrain the pursuit of foreign proceedings on the grounds of vexation or oppression, though it should not be regarded as the only ground upon which the jurisdiction may be exercised, is of such importance, and of such apparent relevance in the present case, that it is desirable to examine it in a little detail. As with the basic principle of justice underlying the whole of this jurisdiction, it has been emphasised that the notions of vexation and oppression should not be restricted by definition. As H Bowen L.J. said in *McHenry v. Lewis*, 22 Ch.D. 397, 407–408:

"I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general

principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case."

In *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225, 230, Jessel M.R. gave two examples of vexatious proceedings. One, which he called pure vexation, occurs when the proceedings are so utterly absurd that they cannot possibly succeed. Another occurs when the plaintiff, not intending to annoy or harass the defendant, but thinking he could get some fanciful advantage, sues him in two courts at the same time under the same jurisdiction. He went on to say that similar, although not perhaps the same, considerations apply in a case where the actions are brought, one in a foreign country and one in this country. Referring to *McHenry v. Lewis*, 22 Ch.D. 397, he summed up the position as follows: that it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. Now, it is easy to see why in many cases this is so, as indeed the 19th century cases show. For example, there may be assets available for execution in a foreign country, or another party may only be amenable to the jurisdiction of the courts of the foreign country. Indeed, it has been stressed that there is no presumption that a multiplicity of proceedings is vexatious (see e.g. *McHenry v. Lewis*, 22 Ch.D. 397, 400 *per* Jessel M.R.) and that proceedings are not to be regarded as vexatious merely because they are brought in an inconvenient place: see *Hyman v. Helm* (1883) 24 Ch.D. 531, 537, *per* Brett M.R. But their Lordships, bearing in mind the words of caution expressed by Bowen L.J. in *McHenry v. Lewis*, 22 Ch.D. 397, 407-408, quoted above, think it wise to remember the breadth of the jurisdiction. In particular, the possibility must be borne in mind that foreign proceedings may be restrained not only where they are vexatious, in the sense of being frivolous or useless, but also where they are oppressive; and also that, as Bowen L.J. observed, everything depends on the circumstances of the particular case, and new circumstances have emerged which were not, perhaps, foreseen by our Victorian predecessors. Their Lordships refer, in particular, to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer such great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there. In normal circumstances, application of the now very widely recognised principle of *forum non conveniens* should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction, especially as the existence of any particular advantage to the plaintiff in that jurisdiction (e.g. availability of assets for execution within the jurisdiction) can usually be protected, if thought appropriate, by granting a stay upon terms. But a stay may not be granted; and if, in particular, the English court concludes that it is the natural forum for the adjudication of the relevant dispute, and by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court. As Bowen L.J. said in *Peruvian Guano Co. v. Bockwoldt*, 23 Ch.D. 225, 233, the court will interfere when a party is acting under

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A colour of asking for justice "in a way which necessarily involves injustice" to others.

Now, as already recorded, in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, Lord Scarman expressed the opinion that it was no longer necessary to examine the earlier case law. He said, at p. 574:

B "I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings."

C He then, at p. 575, proceeded to refer to the much-quoted dictum from the speech of Lord Diplock in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 812, and said, at p. 575:

D "Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience or expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction."

E Now it is to be observed, in the first place, that that approach has been overtaken by events in the form of the decision of the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1986] 3 W.L.R. 972. If Lord Scarman's approach in *Castanho's* case were to be adapted to take account of the statement of principle expressed in *Spiliada's* case as applicable in cases of stay of proceedings, it would presumably read as follows. To justify the grant of an injunction, the defendant must show: (a) that the English court is the natural forum for the trial of the action, to whose jurisdiction the parties are amenable; and (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.

F In practice, however, the principle so stated would have the effect that, where the parties are in dispute on the point whether the action should proceed in an English or a foreign court, the English court would be prepared, not merely to decline to adjudicate by granting a stay of proceedings on the ground that the English court was forum non conveniens, but, if it concluded that England was the natural forum, to restrain a party from proceeding in the foreign court *on that ground alone*. Their Lordships cannot think that this is right. Not only does it conflict with the observation of Brett M.R. in *Hyman v. Helm*, 24 Ch.D. 531, 537, referred to above: but it leads to the conclusion that, in a case where there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court can arrogate to itself, by the grant of an injunction, the power to resolve that dispute. Indeed, in a passage in his speech in *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, 80, Lord Diplock appears to have been ready to give credence to this approach. But, with all respect, such a conclusion appears to their Lordships to be inconsistent with comity, and indeed to disregard the fundamental requirement that an injunction will only be granted where the ends of justice so require. Furthermore, if it were right, it would lead to the remarkable conclusion that, in a case such as *MacShannon v. Rockware Glass Ltd.* [1978] A.C.

795, the Scottish court, having concluded that Scotland was the natural forum for the trial of the action, might for that reason alone grant an interdict restraining the plaintiffs from proceeding in England. Their Lordships are fortified in their opinion by the fact that, upon examining a number of authorities from the United States (for the citation of which they are much indebted to counsel), a country where the principle of forum non conveniens is recognised as applicable in cases of stay of proceedings, and also authorities from the law of Scotland in which that principle has long been so applicable, they can find no trace of any suggestion that the principles applicable in cases of stay of proceedings and in cases of injunctions are the same. On the contrary, the principles applicable in those countries in cases of injunctions to restrain foreign proceedings bear a marked resemblance to those which have been applicable for many years in this country. Certainly, this has long been the law in Scotland: see, e.g. *Young v. Barclay* (1846) 8 Dunl. (Ct. of Sess.) 774, where an interdict was granted restraining the pursuit of proceedings overseas on the ground that they were oppressive. There are numerous cases in the United States to the like effect. It is enough for present purposes to refer to *Moore's Federal Practice*, 2nd ed. (1986), vol. 7, part 2, para. 65.19.

For all these reasons, their Lordships are of the opinion that the long line of English cases concerned with injunctions restraining foreign proceedings still provides useful guidance on the circumstances in which such injunctions may be granted; though of course the law on the subject is in a continuous state of development. They are further of the opinion that the fact that the Scottish principle of forum non conveniens has now been adopted in England and is applicable in cases of stay of proceedings provides no good reason for departing from those principles. They wish to observe that, in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1986] 3 W.L.R. 972, care was taken to state the principle of forum non conveniens without reference to cases on injunctions: see especially, at p. 989, *per* Lord Goff of Chieveley. They cannot help but think that the suggestion in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, 574, that the principle is the same in cases of stay of proceedings and in cases of injunctions finds its origin in the fact that the argument of counsel before the House of Lords appears to have proceeded very substantially upon that assumption. In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction upon appropriate terms; just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is,

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A prima facie, inappropriate, can likewise often be solved by granting a stay upon terms.

It follows that, through no fault of theirs, the Court of Appeal did not proceed upon the correct principles in considering whether or not to grant an injunction in the present case. It is necessary therefore for their Lordships to consider de novo, upon the applicable principles as stated by them, whether the decision to refuse an injunction should stand.

B Now if a question (which their Lordships accept could only be hypothetical) had arisen shortly after the commencement of proceedings by the plaintiffs in Brunei whether those proceedings should be stayed on the ground that there existed another forum, i.e. Texas, which was clearly more appropriate for the trial of the action, there can be no doubt that such a question would have been answered unhesitatingly
C in the negative. Obviously, there were strong connecting factors with Brunei as a forum. The fatal accident had happened there. In a sense that was fortuitous; but it carried with it the consequence that the applicable law governing the claim was the law of Brunei. Moreover that was by no means insignificant in the circumstances because, as compared with the law of Texas, no question arises under the law of Brunei of strict product liability; no question arises under
D the law of Brunei of punitive damages; and, perhaps most important of all, the problem does arise under the law of Brunei of an award of damages for the so called "lost years," a matter which, in the experience of some of their Lordships, has proved to be difficult enough even for those judges who have experience of it: see, in particular, *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136, and *Harris v. Empress Motors Ltd.* [1984] 1 W.L.R. 212. In addition,
E the deceased was resident in Brunei and carried on his principal business there; and the plaintiffs, his widow and her co-administrator, are likewise resident in Brunei. Again, having regard to the very substantial income of the deceased, and the volatile nature of the oil industry upon which his business depended, it is plain that witnesses of fact, experienced in the conditions of that industry in Brunei, are likely to be called on the issue of quantum. As against these factors,
F there was absolutely nothing to connect the action with Texas at all.

Yet the Court of Appeal, like Mr. Commissioner Rhind, concluded that, by the time the matter came before them, Texas has become the natural forum for the trial of the action. In order to test that proposition it is necessary to examine what had happened to bring about, in their opinion, that change.

G It is primarily on the basis of the steps taken by the plaintiffs' Texas attorneys, in late 1986 and early 1987, that the Court of Appeal considered that the natural forum for the trial of the action had become Texas. In reaching that conclusion, they decided to disregard the question of proceedings by S.N.I.A.S. against Bristow Malaysia; as to that they were, in the opinion of their Lordships, in error, for reasons
H which will appear later. But they placed particular reliance on the work done in Texas by the plaintiffs' new Texas attorneys. In placing reliance on this factor, there is no doubt that they were influenced by the importance attached by the trial judge in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1986] 3 W.L.R. 972 to the so-called "Cambridgeshire factor," a matter which was also recognised as relevant by the House of Lords: see p. 994-995, *per* Lord Goff of Chieveley. But, with all respect, the two cases are poles apart. In *Spiliada's* case the question at

issue was the effect of wet sulphur upon the holds of ships. This question was of profound importance, not only to the shipping industry, but to the whole sulphur exporting industry in British Columbia. The first case in which the question was investigated in depth was concerned with a ship called the *Cambridgeshire*, and was plainly recognised as in the nature of a test case. Armies of lawyers and experts were engaged. An enormous amount of preparatory work was undertaken; the documentation was voluminous in the extreme. The scientific investigation was of a most fundamental kind, and indeed approached the limits of scientific knowledge. The trial of the *Cambridgeshire* action was begun and had proceeded for about a month when the application was made for a stay of proceedings in *Spiliada's* case, a parallel case raising the same profound scientific questions as those which had arisen in the *Cambridgeshire*. The application came on for hearing before Staughton J., the trial judge in the *Cambridgeshire* action. In these somewhat unusual circumstances, it is scarcely surprising that he regarded the building up of expertise and understanding among the teams of lawyers and experts in England as being a relevant factor to be taken into account when deciding whether or not to order a stay of the English proceedings in *Spiliada's* case; this view was shared by the House of Lords, where it was pointed out that, in addition, the parties in both actions were substantially the same—Cansulex Ltd. being defendants in both actions, and the plaintiff shipowners in both actions being insured by the same P. and I. club who were financing and controlling both sets of proceedings, and instructing the same lawyers in both.

Now compare that case with the present. Here there are no previous proceedings in Texas involving substantially the same parties. Here the issues do not begin to approach in complexity those involved in the *Cambridgeshire* and the *Spiliada*. Their Lordships do not wish for one moment to belittle the expertise or competence of Mr. Mithoff or Mr. Jacks; but the engineering issues which arise in the present case do not appear to be, in degree, of greater complexity than those which many lawyers, in England and in the United States, are very competent to deal with and can very readily assimilate. What has happened is simply that, during and after the period when S.N.I.A.S. was seeking to obtain dismissal of the Texas proceedings on the ground of forum non conveniens, the plaintiffs' Texas lawyers were, in accordance with the procedure in the United States (as to which their Lordships make no criticism) seeking, by means of the generous United States procedure of pre-trial oral discovery, evidence upon which they could found a case of negligence against S.N.I.A.S.. The extent of their success in this activity will no doubt be judged at the trial of the action. The nature of the case which they wish to advance against S.N.I.A.S. has now been made known and, although of course contested by them, is recognised by S.N.I.A.S. to be arguable. But their Lordships do not consider that the fact that the Texas lawyers have been so engaged during the period in question can possibly have the effect of now rendering Texas the natural forum for the trial of the action instead of Brunei. In truth, the matters relied upon by the plaintiffs (viz. superior means of gathering evidence to mount a case against S.N.I.A.S.; availability of expert counsel; the contingency fee system; prospects of an early trial) are not so much connecting factors with Texas which now render Texas the natural forum as advantages available to the plaintiffs in Texas of which, they submit, it would be unjust to deprive them. In any event, these points

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A have effectively been neutralised by undertakings given on behalf of S.N.I.A.S. that such evidence as has been obtained by Mr. Mithoff and Mr. Jacks will be available in the Brunei proceedings, that every effort will be made by S.N.I.A.S. to enable Mr. Mithoff and Mr. Jacks to have rights of audience in Brunei, and that they will cooperate in obtaining an early trial date there. No doubt both American attorneys
B would feel more at home in the courts in Texas; but that cannot be a matter of any relevance, especially as, in a case involving a claim assessed by the plaintiffs at many millions of dollars, they may well wish to instruct leading counsel from England, a course which they have indeed already taken in the injunction proceedings in Brunei and, of course, before their Lordships.

C It follows that, in their Lordships' opinion, the Court of Appeal, in concluding that Texas had replaced Brunei as the natural forum, took into account matters which they ought not to have taken into account. In the opinion of their Lordships, for reasons which are already apparent, the natural forum for the trial of the action remains, as it always has been, the courts of Brunei.

D It is against that background that their Lordships have to consider the crucial question, which is whether in the circumstances of this case an injunction should be granted to restrain the plaintiffs from further proceeding in Texas. The mere fact that the courts of Brunei provide the natural forum for the action is, for reasons already given, not enough of itself to justify the grant of an injunction. An injunction will only be granted to prevent injustice, and, in the context of a case such as the present, that means that the Texas proceedings must be shown in
E the circumstances to be vexatious or oppressive.

Now it can no longer be suggested that the Texas proceedings are vexatious or oppressive on the ground that the plaintiffs are seeking, in an inappropriate forum, to impose a strict liability or liability for punitive damages which would not be available in the natural forum. These points have been effectively neutralised by the plaintiffs' undertaking that neither of them will be pursued, and by their further
F undertaking that they will not invoke jury trial which, coupled with the effect of the contingency fee system, might lead to a substantial enhancement of an award of damages. These points have therefore ceased to have such relevance as they might otherwise have had. There remains however a matter to which their Lordships attach great importance; and that is the question of a claim by S.N.I.A.S. over
G against Bristow Malaysia.

As to that, the position is as follows. First, it is plain that the American lawyers first instructed by the plaintiffs regarded Bristow Malaysia as the plaintiffs' prime target. This is scarcely surprising in the light of the conclusions contained in the report submitted to the Brunei Department of Civil Aviation by Mr. Holden; and it is evidenced by the fact that, in the settlement of 1984, the plaintiffs did not invite
H S.N.I.A.S. to contribute to that settlement, or indeed to be party to it. It was not until Mr. Mithoff and Mr. Jacks were instructed, some time after that settlement, that any serious effort was made to pursue the proceedings against S.N.I.A.S.. In these circumstances, it seems to their Lordships inevitable that, if the proceedings are brought to trial, S.N.I.A.S. will wish to seek contribution from Bristow Malaysia, rather than expose themselves to the possibility of being held wholly to blame for an accident for which, if they are responsible at all, their responsibility

may prove to be relatively small as compared with that of Bristow Malaysia; and the necessity for their so proceeding is underlined by the fact that the claim now made by the plaintiffs amounts to well over U.S.\$20,000,000, and the amount of the settlement between the plaintiffs and the Bristow and Shell companies, which would no doubt have to be taken into account in reduction of the plaintiffs' damages, amounts to no more than U.S.\$430,000. In addition, S.N.I.A.S., having been served with proceedings in Brunei by the owners and insurers of the hull of the helicopter, wish to claim contribution or indemnity from Bristow Malaysia in respect of that claim.

The Court of Appeal did not regard the expressed desire of S.N.I.A.S. to seek contribution from Bristow Malaysia as sincere. They were impressed by the number of procedural steps taken shortly before the hearing before them: these, they considered, had been "procured" by S.N.I.A.S., and were "hardly suggestive of a long-held or sincere concern." Their Lordships do not however consider that the Court of Appeal were justified in so regarding them. There was no evidence before the court that the steps taken by Bristow Malaysia were "procured" by S.N.I.A.S.. True it is that the steps so taken were taken very late in the day; but having regard to the obvious desirability, in the interests of S.N.I.A.S., that it should be open to them to claim over against Bristow Malaysia in the Brunei proceedings, their Lordships do not consider that the mere lateness of those steps is productive of the inference drawn by the Court of Appeal, especially when it is borne in mind that, until December 1986, the attention of S.N.I.A.S. and their advisers was concentrated upon the Texas proceedings. Their Lordships do not doubt that the intention of S.N.I.A.S. in claiming over against Bristow Malaysia is sincere and, indeed, of great importance to them.

So their Lordships are faced with the following situation. Bristow Malaysia are contesting the jurisdiction of the Texas court; and there is nothing before their Lordships to suggest that the grounds upon which they are contesting that jurisdiction are other than substantial. On the other hand, Bristow Malaysia are prepared to accept service of third party proceedings in Brunei served upon them by S.N.I.A.S.. It follows that, if the plaintiffs are permitted to proceed with the Texas proceedings, on the evidence before their Lordships it is at least possible that Bristow Malaysia will not be party to those proceedings, with the effect that S.N.I.A.S., if held liable in Texas, will have to commence separate proceedings, presumably in Brunei, in order to seek an indemnity or contribution from Bristow Malaysia. This itself would involve multiplicity of proceedings. There are however two additional factors. First, Bristow Malaysia have already entered into a settlement with the plaintiffs, to which settlement S.N.I.A.S. are not party. If S.N.I.A.S. seek contribution or indemnity from Bristow Malaysia, Bristow Malaysia may wish to invoke that settlement as against the plaintiffs. Their Lordships do not wish to pre-empt any arguments which may be founded upon the settlement by Bristow Malaysia; but it is obviously desirable that, if Bristow Malaysia do take any such point, they should be able to do so in proceedings in which all three parties, the plaintiffs, S.N.I.A.S. and Bristow Malaysia, are involved.

The second complicating factor is of even greater importance. In seeking contribution from Bristow Malaysia, S.N.I.A.S. will have to invoke the relevant Brunei legislation which, their Lordships were

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A informed, is in the same terms as section 6 of the English Law Reform (Married Women and Tortfeasors) Act 1935. Section 6(1)(c) provides:

“(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—. . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . .”

B Now, let it be supposed that the proceedings in Texas against S.N.I.A.S. are allowed to continue to proceed, and that in those proceedings S.N.I.A.S. are held liable to the plaintiffs. Then let it be further supposed that S.N.I.A.S. claim contribution or indemnity from Bristow Malaysia in Brunei, relying upon a judgment of the Texas court as showing that they, S.N.I.A.S., were *liable* in respect of the relevant damage. Would that judgment provide conclusive evidence that S.N.I.A.S. were so liable? Or would S.N.I.A.S. have to satisfy the Brunei court, independently of that evidence, that they were in law liable for such damage? If the latter were the case, S.N.I.A.S. would be exposed to two sets of proceedings in which the same issue of liability would have to be tried, and so would be exposed to the danger of inconsistent conclusions on that issue, with the conceivable result that they might be held liable to the plaintiffs in Texas without any right over against Bristow Malaysia in that court, and might be held not liable to the plaintiffs in Brunei, in which event they would have no claim over against Bristow Malaysia, even though negligence on the part of Bristow Malaysia may in fact have been a substantial cause of the accident.

E The point has arisen in Scots law in the recent House of Lords case of *Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd.* (unreported), 19 March 1987. In Scotland, the applicable statutory provision is section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, which is not in identical terms to section 6 of the English Act of 1934. The right of contribution there arises, under section 3(2), “Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid . . .” the words “any such action as aforesaid” refer back to the words in section 3(1):

“any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions” in which “two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses. . . .”

G The House of Lords held that the words “any such action as aforesaid” in section 3(2), read in context, and in particular with reference to the words quoted from section 3(1), applied only to an action in the Scottish courts. It does not, of course, follow that a similar construction would be placed on different words in section 6 of the English Act of 1934, as applied in Brunei. But there is a danger that such a construction might be placed upon them, as is evidenced by the fact that, in *Clerk & Lindsell on Torts*, 15th ed. (1982), pp. 144–145, the view is expressed, with regard to section 1 of the Civil Liability (Contribution) Act 1978, which likewise refers to “any person *liable* in respect of any damage suffered by another person,” that “a foreign judgment, it seems, gives no right to seek contribution from others liable in respect of the same damage.” This is a point which it is impossible for their Lordships to

resolve on an interlocutory application such as the present; but in all the circumstances their Lordships do not consider that it can be dismissed as being without substance.

So S.N.I.A.S. are now, it appears, in the unenviable position that, if the plaintiffs are not restrained from continuing their proceedings in Texas, S.N.I.A.S. may well be unable to claim over against Bristow Malaysia in those proceedings; and that, if held liable to the plaintiffs in the Texas court, they may have to bring a separate action in Brunei against Bristow Malaysia in which they may have to establish their own liability to the plaintiffs before they can be entitled to claim contribution from Bristow Malaysia, with all the attendant difficulties which this would involve, including the possibility of inconsistent conclusions on the issue of liability.

Their Lordships are of the opinion that for the plaintiffs to be permitted to proceed in a forum, Texas, other than the natural forum, Brunei, with that consequence, could indeed lead to serious injustice to S.N.I.A.S., and that the plaintiffs' conduct in continuing with their proceedings in Texas in these circumstances should properly be described as oppressive. Furthermore, no objection to the grant of an injunction to restrain the plaintiffs from continuing with these proceedings can be made by them on the basis of injustice to them, having regard to the undertakings given by S.N.I.A.S.. It follows that, in their Lordships' opinion, an injunction should be granted.

For these reasons their Lordships are of the opinion that the appeal should be allowed, and that an injunction ought to be granted restraining the plaintiffs from further proceeding with their action against S.N.I.A.S. in the Texas court, either by themselves or by any other person on their behalf, such an injunction to be granted upon terms. As at present advised, their Lordships consider that such terms should be those contained in the following undertakings of S.N.I.A.S. set out in the appendix to this opinion, viz. 1; 2 (omitting the final parenthesis); 3; 4; 5 (omitting the final parenthesis); 6; 7; 8; 9B (substituting "20 March 1987" for "today's date" in both places where these words appear, and omitting the final parenthesis); and 12. Their Lordships wish to comment that, although the first of the letters of credit referred to in paragraph 1 of the undertakings is in a sum considerably less than that stated to be the amount of the plaintiffs' claim, nevertheless they were informed that the sum specified in the letter of credit was regarded by the plaintiffs' advisers as realistic; and further that they are prepared to allow the plaintiffs to continue the Texas proceedings until completion of pre-trial discovery simply because such discovery has already gone so far, and the trial in Brunei is likely to take place so soon, that it appears in any event to be unrealistic not to allow such discovery to be completed. If either party has any objection to the terms proposed by their Lordships, any such objection must be notified to their Lordships within 14 days, in which event their Lordships will give consideration to it; failing any such objection within such a period, the terms proposed by their Lordships will become final. So far as costs are concerned, the plaintiffs must pay the costs of S.N.I.A.S. before their Lordships and before the Court of Appeal. As regards the hearing before Mr. Commissioner Rhind, however, since it is apparent that neither party was fully prepared for that hearing, and that some misleading evidence was placed before the commissioner, their Lordships consider that each party should bear their own costs. Their Lordships will humbly advise Her Majesty accordingly.

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A

Appendix

Undertakings by S.N.I.A.S.

1. To provide the plaintiffs within 28 days with two irrevocable letters of credit drawn in their favour and confirmed by a first class bank within Brunei in the terms annexed hereto (Annexure A).
- B 2. Within 28 days to provide the plaintiffs' attorneys (Law Offices of Richard Warner Mithoff referred to herein as the attorneys) with the documents set out in the schedule hereto (Annexure B) in accordance with the agreement between Winstol D. Carter and Tommy Jacks referred to in paragraph [sic.] of the affidavit of Tommy Jacks. (S.N.I.A.S. say this is subject to confirmation from Carter of Fulbrights that such agreement exists with Jacks. No difficulty anticipated in this respect).
- C 3. In addition to the documents set out in Annexure B, to produce as discovery by list within 21 days all documents relevant to the matters in question between the parties in accordance with the Brunei Rules of Court save where already disclosed. Inspection to be within 14 days thereafter. All copies requested by the plaintiffs to be supplied within 14 days of such request. Plaintiffs to pay all reasonable copying charges.
- D 4. If and in so far as any representations are necessary to the French Ministry of Justice or any other authority to obtain permission for any act referred to herein, to make all such representations vigorously and with minimum delay and to inform the plaintiffs' attorneys upon their requests of the steps so taken.
- E 5. That the Texas proceedings shall be permitted to continue until completion of pre-trial discovery. (S.N.I.A.S.' position is that they are willing to undertake that they will procure A.H.C. to make any further documentary discovery of documents in the possession custody or power of A.H.C. which plaintiffs may require. S.N.I.A.S. are unwilling to accept further deposition-taking in Texas unless the court takes the view that no injunction will be granted in the absence of such undertaking).
6. To agree to a trial date in September/October 1987 or as soon thereafter as may be convenient to the court and to cooperate in every way practicable to keep such date effective.
7. To cooperate in every practicable way in the admission to the Bar of Brunei Darussalam as ad hoc members for the purposes of this action of: William Thomas Jacks and Richard Warner Mithoff.
- F 8. To take all such steps as may be necessary to obtain all relevant consents for the use in this action of any documents obtained by discovery in the Texas action.
- 9.A. *Plaintiffs' proposed clause*
To pay all reasonable costs of the firms Law Offices of Richard Warner Mithoff and Doggets, Jacks, Marston & Perlmutter, P.C (the two firms) relating to the Texas action and the Brunei action (in this appeal). Thereafter to accept as costs in the cause all costs reasonably incurred by the two firms in connection with Brunei action, it being understood that the two firms will have the main responsibility for the preparation and carriage of that action.
- G B. *S.N.I.A.S.' proposed clause*
To treat all reasonable costs of the firms Law Offices of Richard Warner Mithoff and Doggets, Jacks, Marston & Perlmutter, P.C (the two firms) relating to the substantive issues (but not the jurisdiction issues) incurred in the Texas action up to today's date as costs in cause in the Brunei action. In relation to costs incurred by the two firms after today's date, to treat all costs reasonably so incurred in connection with the Brunei action (other than any appeal by the plaintiffs from the decision of the Brunei Court of Appeal) as costs in cause in the Brunei action, it being understood that the two firms will have the main responsibility for the preparation and carriage of the Brunei action.
- H (Plaintiffs seek clause A. S.N.I.A.S. are prepared to agree to clause B, but if the court were to take the view that acceptance of clause A by S.N.I.A.S. were

a condition precedent to the grant of the injunction they seek, they would agree to give an undertaking in the form contained in clause A).

10. There shall be liberty to apply to the High Court.

11. S.N.I.A.S. to seek leave forthwith to issue a third party notice and assuming such leave to be given, to serve a third party statement of claim on Bristow Malaysia within seven days hereof. Application for third party directions to be made immediately following service of third party statement of claim.

12. All prior agreements made by S.N.I.A.S.' Texas lawyers regarding authentication of documents or supplying information, to be filled in blank spaces left in the oral depositions to remain in effect.

13. S.N.I.A.S. will join in any application to the Brunei courts for the initiation of any procedures available in Brunei for obtaining the foregoing oral evidence before trial in France. (S.N.I.A.S. does not agree to this but will do so if the court directs that such undertaking ought to be given by S.N.I.A.S. if an injunction is granted).

Annexure A

Letter of Credit No. 1

We Bank hereby irrevocably undertake to pay you on demand any sum together with interest thereon not exceeding U.S.\$5,000,000 which may either be agreed to be due to you in respect of the liability of Société Nationale Industrielle Aerospatiale in Suit No. 187 of 1981 as a result of the crash of a Puma 330 helicopter at Kuala Belait on 16 December 1980 or which may be adjudged due to you in respect thereof from Société Nationale Industrielle Aerospatiale.

Letter of Credit No. 2

We Bank hereby irrevocably undertake to pay you on demand any sum not exceeding U.S.\$500,000 which may either be agreed to be due to you in respect of costs incurred in relation to Brunei Suit No. 187 of 1981 or which may be adjudged due to you in respect of such costs from Société Nationale Industrielle Aerospatiale.

Annexure B

The documents in question are as follows:

1. The design calculations and drawings referred to in that certain letter of January 1987 from Tommy Jacks to Winstol D. Carter.
2. The documents described in the Letter of Request for International Judicial Assistance of 30 January 1987 (except that, as to certain documents pertaining to sensitive current engineering projects, S.N.I.A.S. may provide a description of each of said documents so that the plaintiffs' attorneys may better determine how essential they are to the case, and the parties will attempt to work in good faith toward the resolution of any disagreement about these documents).
3. The documents ordered to be produced by A.H.C. by the order of the Harris County, Texas, District Court dated 1987.

Solicitors: Brymer Marland & Co.; Norton Rose Botterell & Roche.

S. S.

3 W.L.R.

A

[PRIVY COUNCIL]

JOSEPH HAYIM HAYIM AND ANOTHER . . . APPELLANTS
 AND
 CITIBANK N.A. AND ANOTHER . . . RESPONDENTS

B

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1987 March 23, 24, 25, 26; Lord Bridge of Harwich, Lord Templeman,
 May 5 Lord Oliver of Aylmerton, Lord Goff of Chieveley
 and Sir Robert Megarry

C

Trusts—Trustee—Duty of trustee—Trustee of Hong Kong will holding property on trust for sale for trustee of American will—Hong Kong trustee postponing sale on instructions of American trustee—Whether breach of trust by Hong Kong trustee—Whether beneficiaries under American will having right of action against Hong Kong trustee

D

The testator appointed the first defendant executor and trustee of his American will which applied to all his American estate and all property which thereafter should become added to it. The plaintiffs, who were the testator's sons, and a charity were the beneficiaries under that will. By clause 10 the testator directed that if at the time of his death he owned a residence in Hong Kong and his brother or sister or both survived him, the first defendant "shall have no responsibility or duty with respect to such property . . . and my executor's and trustee's only duty and responsibility with respect thereto shall arise upon its receipt of the proceeds of said residence or upon the death of the survivor of my said brother and my said sister, whichever shall first occur . . ."

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The testator appointed the second defendant executor and trustee of his Hong Kong will, by which the residue of his property outside the United States was to be held on trust for sale, with power to postpone sale, for the first defendant to be held upon the trusts of the American will. When the testator died his elderly brother and sister were living in his house in Hong Kong, and they continued to reside there rent free. In June 1981 the plaintiffs instructed the second defendant to sell the house, but in the interests of the testator's brother and sister, who were not beneficiaries under either will, the first defendant directed the second defendant not to sell the house although that was not in the interests of the beneficiaries of the American estate. Sale was postponed and the value of the house fell. The plaintiffs instituted proceedings claiming, *inter alia*, damages against the second defendant for breach of trust in delaying the sale of the house after June 1981. The judge awarded damages and the house was sold in 1985. On appeal by the second defendant the Court of Appeal of Hong Kong set aside that award and dismissed the plaintiffs' action.

On the plaintiffs' appeal to the Judicial Committee:—

Held, dismissing the appeal, that by the terms of the Hong Kong will the second defendant held the house on trust for the first defendant and not the beneficiaries interested under the American will, so that the second defendant was under a duty to exercise its powers to sell or postpone sale pursuant to the lawful instructions of the first defendant; that clause 10 of the American will absolved the first defendant from any duty to the beneficiaries with regard to the house thus

enabling the first defendant to disregard the interests of the beneficiaries and direct the second defendant to postpone sale in the interests of the testator's brother and sister, and in so doing the first defendant committed no breach of the trusts of the American will; and that, therefore, since the first defendant had properly carried out its duties in relation to the house as trustee of the American will, there were no special circumstances entitling the plaintiffs to bring proceedings directly against the second defendant, but that in any event no breach of the trusts of the Hong Kong will had been committed by the second defendant in implementing the lawful instructions of the first defendant, and the plaintiffs' action had properly been dismissed (post, pp. 87D-E, 88A, G-89B, 90D-E, 91C, D, 92G-H).

Decision of the Court of Appeal of Hong Kong affirmed.

The following cases are referred to in the judgment of their Lordships:

Beningfield v. Baxter (1886) 12 App.Cas. 167, P.C.

Field, decd., In re [1971] 1 W.L.R. 555; [1971] 1 All E.R. 1104

Hastings-Bass, decd., In re [1975] Ch. 25; [1974] 2 W.L.R. 904; [1974] 2 All E.R. 193, C.A.

Meldrum v. Scorer (1887) 56 L.T. 471

Sharpe v. San Paulo Railway Co. (1873) L.R. 8 Ch.App. 597

Travis v. Milne (1851) 9 Hare 141

Wong Yu Shi v. Wong Ying Kuen (No. 1) [1957] H.K.L.R. 420

Yeatman v. Yeatman (1877) 7 Ch.D. 210

The following additional cases were cited in argument:

Baden, Delvaux and Lecuit v. Société General pour Favoriser le Développement du Commerce et de l'Industrie en France S.A. [1983] B.C.L.C. 325

De Bussche v. Alt (1878) 8 Ch.D. 286, C.A.

Lee v. Sankey (1872) L.R. 15 Eq. 204

Powell & Thomas v. Evan Jones & Co. [1905] 1 K.B. 11, C.A.

APPEAL (No. 17 of 1986) with leave of the Court of Appeal of Hong Kong by the plaintiffs, Joseph Hayim Hayim and George Isaac Hayim, from the judgment of the Court of Appeal of Hong Kong (Huggins V.-P., Cons and Fuad JJ.A.) given on 26 July 1985 allowing an appeal by the second defendant, Hong Kong Bank Trustee Ltd., from the judgment of Deputy Judge Barnett given in the High Court of Hong Kong on 16 January 1985. The Court of Appeal of Hong Kong dismissed the claims of the plaintiffs against the second defendants. The first defendant, Citibank N.A., took no part in the proceedings. The deputy judge had ordered that the property known as 41, Island Road, Deep Water Bay, Hong Kong, being property held by the second defendant as trustee of the Hong Kong will of Ellis Joseph Hayim deceased upon trust for sale, be sold by the second defendant; that inquiries should be made as to the date after 25 June 1981 by which the house should have been sold by the second defendant and the net loss (if any) of capital and income occasioned to the testator's estate by reason of the second defendant's failure to sell the house by that date; and that the second defendant should pay to the first defendant as trustee of the testator's American will upon trust for the second plaintiff half of that loss of income and for such persons as might be interested in the first plaintiff's interest and rights in the trusts under the American will half the loss of income up to his

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A death on 14 October 1984. The second plaintiff was appointed the representative of the interests of the persons interested in the first plaintiff's interest and rights in the trusts under the Hong Kong and American wills of the testator.

The facts are stated in the judgment of their Lordships.

B

E. G. Nugee Q.C. and *B. K. Levy* for the plaintiffs.

Andrew Morritt Q.C. and *W. D. Ainger* for the second defendant.

The first defendant did not appear and was not represented.

Cur. adv. vult.

C

5 May. The judgment of their Lordships was delivered by LORD TEMPLEMAN.

D In the year 1959 the testator, Ellis Joseph Hayim, purchased a house for his residence at 41, Island Road, Deep Water Bay, Hong Kong. The testator had two sons the plaintiffs, Joseph Hayim Hayim and George Isaac Hayim, who were then about 40 years of age. The Hong Kong house was occupied by the testator, his wife who died in 1966, his mother who also died in 1966, his brother Albert, his sister Maisie and Maisie's husband Reubin David Abraham who died in 1970. By his American will dated 13 July 1972 the testator disposed of his American estate defined as all his property in the United States of America and:

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"all property which, pursuant to any inter vivos or any other testamentary disposition, shall at any time be added to and become a part of my American estate."

F The testator appointed the first defendant, Citibank N.A., to be the executor and trustee of his American will and directed the first defendant to divide the residue of his American estate into two equal moieties, one to be held upon protective trusts for the benefit of his son Joseph during his life and the other upon protective trusts for the benefit of his son George during his life. Subject to these dispositions and to legacies bequeathed to the sons' widows the residue of the American estate was given by the American will to the American Jewish Joint Distribution Committee Inc. in furtherance of its charitable purposes. Clause 10 of the American will was in these terms:

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"At the time of my death I may be the owner of a residence in Hong Kong. If either of my brother, Albert Joseph Hayim, and my sister, Maisie Ruby Abraham, shall survive me, then I direct that my executor and trustee shall have no responsibility or duty with respect to such property, including, without limitation, any duty to take title to such property, to collect the proceeds from its sale or to collect any rent from said property; and my executor's and trustee's only duty and responsibility with respect thereto shall arise upon its receipt of the proceeds of said residence or upon the death of the survivor of my said brother and my said sister, whichever shall first occur, and shall extend only to such property as it exists at the time of the death of such survivor or to the proceeds thereof."

By his Hong Kong will dated 25 April 1975 the testator appointed the second defendant, Hong Kong Bank Trustee Ltd., to be the executor and trustee of his Hong Kong will and gave all the residue of his property outside the United State of America to the Hong Kong Bank:

"Upon trust to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as my trustee shall in its absolute discretion think fit without being liable for loss upon trust to pay or transfer the proceeds of such sale calling in and conversion to [the first defendant] or other the executor or trustee for the time being of my American will to be held by such executor or trustee upon the trusts of my American will or such of the same as shall then be subsisting and capable of taking effect."

The testator died on 6 June 1977 possessed of considerable wealth and his American will and his Hong Kong will were duly proved by the first defendant and the second defendant respectively. The Hong Kong residue included the Hong Kong house which became vested in the second defendant upon trust for sale with power to postpone sale and to hold the net proceeds of sale and rents and profits until sale upon trust for the first defendant to be held by the first defendant upon the trusts of the American will. Albert who was about 92 and Maisie who was about 87 in 1977 when the testator died remained in occupation of the Hong Kong house at first with the consent in writing of the first defendant, the plaintiffs and the Jewish charity. On 1 June 1981 however the plaintiffs by their legal advisers directed the second defendant to sell the Hong Kong house because the house was providing no income for the plaintiffs and the value of the house, which had been valued at HK\$3,000,000 at the date of the testator's death in 1977 and had risen to HK\$18,000,000 in 1981, was likely to diminish having regard to the uncertainties in 1981 of the future of Hong Kong real estate. It was argued that the second defendant had no right to postpone the sale of the Hong Kong house in order to provide a home for Albert and Maisie who were not beneficiaries interested in the trusts of the house. The plaintiffs offered to find alternative accommodation for Albert and Maisie where they would be better looked after. Albert was however opposed to any move and the first defendant took the view that it would be cruel to Albert and possibly fatal to Maisie whose health was declining to require them to leave the house. The Jewish charity on being apprised of the views of the first defendant was content to rely on the discretion of the trustees. The second defendant was instructed by the first defendant not to sell the house. The plaintiffs protested that the second defendant owed a duty to the plaintiffs and was not entitled to obey the instructions given by the first defendant.

On 4 November 1982 the testator's sister Maisie died aged about 92. On 15 January 1983 the plaintiffs began proceedings in the High Court of Hong Kong against the first and second defendants for an order that the house be sold and for damages to be awarded against the second defendant for breach of the trusts of the Hong Kong will by the delay of the second defendant in selling the house since June 1981. No relief was sought against the first defendant. The testator's son Joseph died on 14 October 1984 aged 65 and the action was

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A continued by George and by the personal representatives of Joseph. On 16 January 1985 Deputy Judge Barnett made the order sought by the plaintiffs against the second defendant. The testator's brother Albert died in May 1985 aged about 99. On 26 July 1985 the Court of Appeal of Hong Kong (Huggins V.-P., Cons and Fuad JJ.A.) allowed an appeal by the second defendant, set aside the orders made by Deputy Judge Barnett and dismissed the action brought by the plaintiffs on the ground that the second defendant had not committed any breach of trust. The house was sold on 18 September 1985 for HK\$10,000,000. George and the personal representatives of Joseph now appeal to Her Majesty in Council to restore the order made by Deputy Judge Barnett for the assessment and payment by the second defendant of damages for breach of trust in postponing the sale of the house between 1981 and 1985.

C For the purposes of these proceedings the laws of the United States applicable to the American will and the laws of Hong Kong applicable to the Hong Kong will are assumed, in the absence of any evidence to the contrary, to be of the same effect as the laws of England.

D The first question is whether the second defendant owed a duty to the beneficiaries interested under the American will not to obey the instructions of the first defendant to postpone the sale of the Hong Kong house in the interests of Albert and Maisie. Subject to the payment of or provision for the funeral and testamentary expenses and debts of the testator, administration costs and remuneration, the second defendant held the residue of the testator's property in Hong Kong and elsewhere outside the United States of America and the proceeds of sale upon trust for the first defendant. The power of the second defendant to postpone the sale was also held in trust for the first defendant and could only be exercised by the second defendant in accordance with the lawful directions of the first defendant. The interests and powers of the first defendant relating to the Hong Kong property were held by the first defendant upon the trusts and with and subject to the powers and provisions of the American will including clause 10 and the beneficiaries interested under the American will were the plaintiffs and the Jewish charity. The residue of the Hong Kong property consisted of the Hong Kong house valued at HK\$3,000,000 and stocks shares and other investments valued at HK\$10,000,000. The second defendant had no power or duty to decide whether any of the Hong Kong property should be sold or retained in the interests of the first defendant. It was for the first defendant to decide whether having regard to the trusts powers and provisions of the American will the Hong Kong property held by the second defendant in trust for the first defendant should be retained or sold. In the case of Hong Kong investments to which clause 10 of the American will did not apply the first defendant owed a duty to the beneficiaries interested under the American will to take advice and to decide whether the investments should be sold or retained in the best interests of the beneficiaries without regard to the interests of Albert and Maisie. The first defendant was under a duty to the beneficiaries interested in the American will to communicate its decisions to the second defendant and to ensure that those decisions were carried out even if necessary by obtaining the removal of the second defendant as trustee of the Hong Kong will or by obtaining a transfer of the Hong

Kong property from the second defendant to the first defendant or as the first defendant directed. The second defendant had no power or duty to interfere in the administration of the trusts of the American will. The second defendant was bound to give effect to the lawful decisions of the first defendant in relation to Hong Kong property. The second defendant was not however entitled or bound to give effect to any decision of the first defendant which constituted a breach of the duty owed by the first defendant to the beneficiaries interested under the trusts of the American will. In the absence of clause 10, the decision of the first defendant to direct postponement of the sale of the Hong Kong house in the interests of Albert and Maisie and contrary to the interests of the beneficiaries interested under the American will would have been a breach of the duty owed by the first defendant as trustee of the American will to the beneficiaries under the American will and would have been unlawful. The second defendant knew that Albert and Maisie were not beneficiaries and knew that the decision made by the first defendant to direct postponement of the sale of the house was taken in the interests of Albert and Maisie and against the interests of the beneficiaries. In the absence of clause 10, the second defendant would have known or should have known that the instructions by the first defendant to postpone sale of the house were unlawful. The second defendant would have been liable to the beneficiaries under the American will for unlawfully complying with the unlawful decision of the first defendant. But if clause 10 entitled the first defendant to ignore the interests of the beneficiaries under the American will in the Hong Kong house and to make a decision in the interests of Albert and Maisie then the second defendant was bound to accept that decision and comply with the directions given by the first defendant to postpone the sale of the house.

The second and crucial question therefore is whether the first defendant in giving directions to the second defendant to postpone the sale of the Hong Kong house in the interests of Albert and Maisie was in breach of the duty owed by the first defendant to act in the best interests of the beneficiaries interested under the American will. Without clause 10 the first defendant would have owed a duty to the beneficiaries to decide whether the house should be sold or retained in the interests of the beneficiaries. The first defendant would have been under a duty to ignore the interests of Albert and Maisie.

Clause 10 did not deprive the first defendant of the power to decide and direct the second defendant to sell or retain the house. Clause 10 did not extinguish or modify the duty of the second defendant to give effect to any lawful decision of the first defendant in respect of the house. Clause 10 relieved the first defendant of any "responsibility or duty with respect to" the house. The only responsibilities and duties of the first defendant under the American will were responsibilities and duties owed to the beneficiaries interested under the American will. Clause 10 relieved the first defendant of any responsibility or duty owed to the beneficiaries in respect of the house. The first defendant, relieved of any responsibility or duty to the beneficiaries, was entitled to decide to direct the second defendant to postpone the sale of the house in the interests of Albert and Maisie. In considering whether to decide to direct the second defendant to postpone sale the first defendant was entitled to consider the beneficiaries but owed no duty to the beneficiaries

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A under the American will to consider them or decide in their favour and
accordingly as against those beneficiaries the first defendant committed
no breach of trust. If the first defendant made a decision to direct the
sale of the house to be postponed in the interests of Albert and Maisie
this was a decision which the first defendant was entitled to make by
clause 10 of the American will and it was a decision to which the second
B defendant holding the house and the proceeds of the house and the
power to postpone sale of the house in trust for the first defendant was
bound to accept and implement. It is of course unusual for a testator to
relieve the trustee of his will of any responsibility or duty in respect of
trust property, but a testator may do as he pleases and in the present
case the provisions of clause 10 are explicable and understandable.

C When the testator made his American will in 1972 and when the
testator made his Hong Kong will in 1975 it was plain that if (as
happened) the Hong Kong house remained a home for the testator and
for Albert and Maisie and if the testator predeceased Albert and Maisie,
someone must decide whether and when Albert and Maisie, who were
in the event about 92 and 87 years of age respectively at the death of
the testator, should be obliged to leave the house. There were several
D courses of action open to the testator if he did not wish to give an
interest in the house to Albert and Maisie. First the testator could have
conferred on his two sons power to decide whether and when Albert
and Maisie should be dispossessed. By his American will or his Hong
Kong will the testator could have directed that the house be not sold
without the consent of his sons or of one of his sons. The testator did
not confer any power of decision on both or either of his sons. Secondly
E the testator could have allowed any decision with regard to Albert and
Maisie and the house to be made by the beneficiaries interested in the
American estate. If the testator had not inserted clause 10 of the
American will, Maisie and Albert could have been allowed to remain in
the Hong Kong house rent free with the consent of all the beneficiaries
namely the plaintiffs and the Jewish charity. There would have been no
need to exonerate the first defendant from any responsibility or duty in
F respect of the house. Clause 10 is inconsistent with any intention on the
part of the testator to leave Albert and Maisie to the mercy of the
beneficiaries. Thirdly the testator could have allowed the decision with
regard to Albert and Maisie and the house to be made by the second
defendant, but in that case something like clause 10 would have been
inserted in the Hong Kong will. Fourthly the testator could have allowed
G the decision with regard to Albert and Maisie and the house to be made
by the first defendant. It was logical that the first defendant should make
a decision which must necessarily concern the plaintiffs on the one hand
and Albert and Maisie on the other hand. The first defendant would
know whether the income of the American estate was sufficient to
provide for the plaintiffs without calling in aid any income from the
Hong Kong house or from the proceeds of sale of the Hong Kong
H house. The inevitable conclusion is that clause 10 was intended to enable
the first defendant to decide that although Albert and Maisie were not
beneficially interested in the house nevertheless Albert and Maisie
should be allowed to remain in the house. The testator gave effect to
that intention by a provision which relieved the first defendant from all
responsibility and duty to the beneficiaries in respect of the house.

Mr. Nugee submitted that the only object and effect of clause 10 was
to enable the first defendant to wash its hands of any problems

concerning the house so long as Albert and Maisie survived. But if the beneficiaries agreed, there was no need to relieve the first defendant from responsibility. And if the beneficiaries did not agree then the first defendant would have to decide. If one beneficiary wished Albert and Maisie to occupy the house free of rent while the second beneficiary wished Albert and Maisie to occupy the house but to pay a rack rent and the third beneficiary wished the house to be sold with vacant possession, then the second defendant holding in trust for the first defendant and only concerned under the trusts of the Hong Kong will would be entitled and bound to apply to the first defendant for a decision. Clause 10 of the American will and the terms of the Hong Kong will are not apt to transfer from the first defendant to the second defendant power to decide whether the Hong Kong house should be sold or retained in the interests of the beneficiaries under the American will or otherwise. If the testator had wished to place responsibility for a decision on the second defendant he would have provided by the Hong Kong will that the second defendant should hold the proceeds of sale of the house in trust for the beneficiaries. In fact the testator by the Hong Kong will directed the second defendant to hold the proceeds of sale of the house in trust for the first defendant and it was for the first defendant to decide when the house should be sold. Clause 10 relieved the first defendant of any responsibility or duty with respect to the house and therefore authorised the first defendant to make a decision that the sale of the house should be postponed without regard to the interests of the beneficiaries—an unusual but understandable provision if the testator wished the first defendant and no one else to decide whether and when Albert and Maisie should be required to leave the house. The first defendant did not commit a breach of the trusts of the American will by directing the second defendant to postpone sale. The second defendant did not commit a breach of the trusts of the Hong Kong will in complying with the lawful directions of the first defendant.

On behalf of the plaintiffs, Mr. Nugee disputes these conclusions. He argues in the first place that the first defendant committed a breach of trust of the American will by deciding to postpone the sale of the house. He says that clause 10 could not have been intended to absolve the first defendant from any duty to the beneficiaries, because in that event the first defendant could have used the house for its own purposes or allowed the second defendant to commit a breach of duty with respect to the house, for example, the duty to insure. But clause 10 in express terms relieved the first defendant from any duty in respect of the house. No doubt the testator was content to trust the first defendant. If the second defendant failed to insure or failed to implement any decision of the first defendant then the first defendant would have been entitled but not bound to take proceedings against the second defendant. Clause 10 enabled the first defendant to ensure that the house was retained by the second defendant yielding no rent during the lives of Albert and Maisie though under the trusts of the American will Albert and Maisie were not beneficiaries. Clause 10 was in the circumstances designed to enable Albert and Maisie to remain in the house as long as the first defendant thought fit. If clause 10 were exploited for any other purpose the beneficiaries could complain and the court could find that the first defendant had not properly exercised the discretion conferred on the first defendant to postpone the sale of the house either in the interests of the beneficiaries or in the interests of Albert and Maisie: see *In re*

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A *Hastings-Bass, decd.* [1975] Ch. 25, 41. In the circumstances which prevailed at the date when the testator made his American will, clause 10 was intended to enable the first defendant to be kind to Albert and Maisie without breach of any duty owed to the beneficiaries.

B If the first defendant did not commit a breach of trust of the American will by directing the second defendant to postpone sale, nevertheless Mr. Nugee submits in the second place that the second defendant committed a breach of trust by complying with those directions. The second defendant, he said, was not absolved by clause 10 of the American will. Under the trusts of the Hong Kong will, it was submitted, the second defendant owed a duty to administer the trusts of the house in the interests of the beneficiaries interested in the house under the American will; the second defendant knew that those beneficiaries did not include Albert and Maisie. Their Lordships take the view that under the trusts of the Hong Kong will the house was not held by the second defendant on the trusts of the American will. The house was held by the second defendant in trust for the first defendant. If for example Albert and Maisie had predeceased the testator, the power to decide whether the sale of the house should be postponed would have been exercised by the second defendant in accordance with the directions of the first defendant. It would have been for the first defendant as trustee of the American will to decide whether the house should be retained as an investment or sold and converted into cash available for reinvestment. The trusteeship of the American will cannot be duplicated. The only trustee of the American will was the first defendant. The second defendant owed a duty to the first defendant and not a duty to the beneficiaries under the American will.

E The authorities cited by Mr. Nugee only demonstrate that when a trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances a beneficiary may be allowed to sue a third party in the place of the trustee. But a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner.

F In *Travis v. Milne* (1851) 9 Hare 141, 150, Turner V.-C. observed that beneficiaries interested in the estate of a deceased partner can only sue the surviving partners in

G “special circumstances . . . where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners.”

In that case the executors were accused of breach of trust in carrying on business in partnership with the surviving partners and with the capital of the deceased partner. The executors could not prosecute proceedings against the surviving partners without involving themselves in conflicts of interest and duty.

H In *Sharpe v. San Paulo Railway Co.* (1873) L.R. 8 Ch.App. 597, 609–610, James L.J. said:

“a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the cestui que trust was to file his bill against the trustee for the execution of the trust, or for the

realisation of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action, or the proper suit in this court."

In *Yeatman v. Yeatman* (1877) 7 Ch.D. 210 it was held that a mere refusal by a personal representative to sue for recovery of a debt owed to the estate would not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the debtor. Hall V.-C., at p. 216, said that the court would have to be satisfied that "it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful."

In *Beningfield v. Baxter* (1886) 12 App.Cas. 167, 178-179, Lord Selborne said:

"When an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty."

In *Meldrum v. Scorer* (1887) 56 L.T. 471, 473, Kay J. considered "it to be quite settled that a mere refusal to sue on the part of a trustee does not entitle a cestui que trust to sue in his own name." A beneficiary under a settlement inter vivos of a legacy of £8,000 was allowed to sue the personal representatives who, with notice of the settlement, paid the legacy, to one out of two of the settlement trustees and therefore did not obtain a good receipt from the trustees. The sole trustee who had been paid the legacy absconded.

In *Wong Yu Shi v. Wong Ying Kuen (No. 1)* [1957] H.K.L.R. 420 the estate of a son included a share in the estate of his father. A beneficiary interested in the son's estate obtained an order for an account against the personal representatives of the father and against the personal representatives of the son on the basis of wilful default but only because both sets of personal representatives had been guilty of breaches of trust.

In *In re Field, decd.* [1971] 1 W.L.R. 555 a plaintiff was allowed to sue on a cause of action vested in personal representatives where the personal representatives refused to sue and there was no one interested in the estate except the plaintiff and the widow of the deceased and the widow had a personal interest in the defeat of the action.

These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate. By the Hong Kong will the testator conferred on the first defendant the power to give instructions binding on the second defendant to sell or to retain the Hong Kong house. By clause 10 of the American will the testator relieved the first defendant from any responsibility to the beneficiaries interested in the American estate in respect of the Hong Kong house. As a result of clause 10 the first defendant did not therefore owe any duty to the beneficiaries. The first defendant lawfully instructed the second defendant to postpone sale and the second defendant lawfully complied with those instructions. Mr. Nugee referred

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Hayim v. Citibank N.A. (P.C.)

A to principles which applied to trusts, bailments, contracts and torts respectively. In the view of their Lordships the principles relied upon are not inconsistent with the principles which their Lordships consider to be applicable to the present appeal. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

B

Solicitors: Slaughter & May; Norton, Rose, Botterell & Roche.

5 May. When their Lordships delivered their reserved judgment, counsel for the plaintiffs sought to apply for an order that the costs of the appeal to Her Majesty in Council be paid out of the testator's Hong Kong estate. Their Lordships refused the application.

C

LORD TEMPLEMAN said that, unlike the House of Lords, the hearing of an appeal in the Privy Council was a single hearing and counsel should have raised the matter at the hearing of the appeal while the facts were fresh in the recollection of the court and while any special circumstances could be considered. The remaindermen ought to have been joined. Finally there was no merit in the application.

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S. S.

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[COURT OF APPEAL]

REGINA v. GALVIN

1987 April 3;
May 1

Lord Lane C.J., Farquharson
and Gatehouse JJ.

F

Crime—Official secrets—Communication—Information communicated to recipient—Lack of authorisation of communicator to communicate information to recipient—Onus on Crown—Whether authorisation implied—Official Secrets Act 1911 (1 & 2 Geo. 5 c. 28), s. 2(1)(a)(aa) (2) (as amended by Official Secrets Act 1920 (10 & 11 Geo. 5 c. 75), ss. 9(1), 10, Sch. 1)

G

The appellant, who dealt in spare parts for military ships and aircraft, wished to supply spare parts as required for Olympus marine engines; in order to do so he needed to be able to refer to the manufacturer's manual of the aero version of the engine. The Ministry of Defence, which had classified that manual as "restricted," had disseminated without restriction certain of its relevant information in documents of tender and had supplied copies of the manual to purchasers of aircraft containing the engine. The appellant, through a colleague, obtained the loan from a service man of the manual and was charged with unlawful reception of a document, contrary to section 2(2) of the Official Secrets Act 1911¹. The jury were directed, in effect, that the appellant's guilt depended on what the service man had authorised the defendant's colleague to do

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¹ Official Secrets Act 1911, as amended, s. 2(1)(a): see post, pp. 97H—98A. S. 2(2): see post, p. 97F.

and how the service man wanted dissemination of the manual to be restricted. The appellant was convicted. A

On appeal against conviction:—

Held, allowing the appeal, that the onus was on the Crown under section 2(1)(a) of the Act of 1911 to prove that the communicator of the information, the appellant's colleague, was not authorised to communicate it to the recipient appellant so that the true question for the jury was whether the Ministry of Defence, by wide dissemination of the manual and its information without restriction on further use, had or might have impliedly authorised anyone to use it as he thought fit on coming into possession of it; that a proper approach for the jury was for them to inquire whether they were sure that the Ministry of Defence had not by its actions impliedly authorised the general dissemination of the manual to anyone who might be interested; that, therefore, what the service man himself might have thought was only a part of the evidence and was not the governing factor; and that, accordingly, the jury had been misled and the conviction would be quashed (post, pp. 99D, 100B-C, 101B, D). B

Rex v. Crisp and Homewood (1919) 83 J.P. 121 approved. C

Boyer v. The King (1948) 94 C.C.C. 195 considered.

The following cases are referred to in the judgment:

Boyer v. The King (1948) 94 C.C.C. 195 D

Franchi v. Franchi [1967] R.P.C. 149

Interfirm Comparison (Australia) Pty. Ltd. v. Law Society of New South Wales [1977] R.P.C. 137

Rex v. Crisp and Homewood (1919) 83 J.P. 121

The following additional cases were cited in argument:

Attorney-General v. Observer Newspapers Ltd. (unreported), 25 July 1986; E

Court of Appeal (Civil Division) Transcript No. 696 of 1986, C.A.

Reg. v. Toronto Sun Publishing Ltd. (1979) 47 C.C.C. (2d.) 535

APPEAL against conviction.

The appellant, Peter Anthony Galvin, on 10 July 1986 in the Crown court at Warwick before Judge Harrison-Hall and a jury was convicted on one count charging unlawful reception of a document, namely, Air Publications No. AP 102C/0402/3A, the manufacturer's manual of the Olympus aero engine, contrary to section 2(2) of the Official Secrets Act 1911, as amended and another count charging conspiracy to use information for the benefit of a foreign power, namely, Argentina, contrary to section 2(1)(aa) of the Act of 1911, as amended, and section 1(1) of the Criminal Law Act 1977. He was sentenced to six months' imprisonment on the count under section 2(2) and to one day's imprisonment on the count under section 2(1)(aa). In addition he pleaded guilty to a count of corruption, for which he was sentenced to 18 months' imprisonment and to a count of handling, for which he was sentenced to two years' imprisonment. He was found not guilty by direction on a count charging unlawful reception of another document. Counts charging five co-defendants of the appellant do not call for report. He applied for and was granted leave to appeal against conviction on the grounds that the evidence showed that the information in the manual was already within the public domain; that the Crown had failed to prove that the manual was "official information" and/or not already lawfully within the public domain so as to constitute a wrongful communication; that the trial judge erred in rejecting a submission that F

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Reg. v. Galvin (C.A.)

A the counts (other than the counts to which the appellant pleaded guilty) should be withdrawn from the jury on the grounds that no case to answer has been established; and that the trial judge had failed (i) to remind the jury of the evidence that the information was already within the public domain; and (ii) to direct the jury that they could convict only if they were satisfied that the information was not already lawfully within the public domain.

B The facts are stated in the judgment.

Jonathan Caplan (assigned by the Registrar of Criminal Appeals) for the appellant.

Jeremy Roberts Q.C. and *David Farrer Q.C.* for the Crown.

C *Cur. adv. vult.*

1 May. LORD LANE C.J. read the following judgment of the court. On 10 July 1986 in the Crown Court at Warwick the appellant, as he now is, leave having been given by this court, was convicted on one count of unlawful reception of a document, contrary to section 2(2) of the Official Secrets Act 1911, in respect of which he was sentenced to six months' imprisonment, and one count of conspiracy to use information for the benefit of a foreign power (Argentina), contrary to section 2(1)(aa) of the Official Secrets Act 1911 and section 1(1) of the Criminal Law Act 1977, in respect of which he received one day's imprisonment to run concurrently.

E The indictment originally contained 13 counts. Six defendants in all were involved. The appellant also pleaded guilty to one count of corruption and one of handling, for which he was sentenced to 18 months' and 2 years' imprisonment respectively to run concurrently. His total sentence is therefore one of 2 years' imprisonment. He was acquitted on the judge's direction of another count of unlawful reception of a document.

F This appeal is only concerned with the first two counts, namely unlawful reception which became count 5 and conspiracy which became count 9. He appeals against the conviction on each of those counts.

The case against the appellant on these two counts concerned the document called Air Publications No. AP102C/0402/3A, a manufacturer's manual relating to the Rolls-Royce Olympus aero engine, a document hereinafter referred to as the Olympus AP.

G The Olympus engine was used to power the Vulcan Bomber which was operated by the Royal Air Force ("R.A.F.") until the aircraft became obsolete in 1980, and is still used in Concorde. There is a marine version of the same engine, which was and is used to power naval vessels of as many as 14 nations, including Argentina and Libya. Many of the parts were common to both the aero and marine versions. Spare parts manuals relating to the marine version would have been supplied to anyone using the engines. Those manuals would contain the Rolls-Royce, but not the Ministry of Defence ("M.o.D.") or North Atlantic Treaty Organisation ("N.A.T.O.") reference numbers. No restriction was placed by Rolls-Royce or the United Kingdom Government on republication of these marine manuals. However the Olympus AP was officially classified as "Restricted," a word which was printed on every page of the publication. The Argentines have never used the Olympus aero version.

In 1981, on the demise of the Vulcan aircraft, the M.o.D. sold a large quantity of Olympus aero engine parts to a company dealing in secondhand aero engine spares—Taylors of Stafford. The tender document contained Rolls-Royce part numbers and the corresponding M.o.D./N.A.T.O. reference numbers. Some of the parts themselves had the M.o.D. and N.A.T.O. numbers indelibly stamped upon them.

At about the time of and after the Falklands war, Argentine wanted spares for its Olympus marine engines. Despite the fact that, surprisingly, no statutory embargo existed, Rolls-Royce refused to supply spares directly or indirectly to the Argentines. Eventually the Argentines started negotiations, at first indirectly, and then later directly, with a company called Aviation and Marine International (“CAS”) to get spares for their Olympus marine engines. CAS were buyers and sellers of spares for military ships and aircraft. The appellant was the managing director and in effect the owner of CAS. A man called Bonfield was general manager. Another man called Tucker was manager of military projects in the same company.

The Argentines supplied to CAS lists of the parts which they required. CAS tried to obtain the necessary spares from various sources. Rolls-Royce refused point blank to supply them with any spares. CAS obtained a small quantity from a company called Sky Trade International Ltd. These were sold through various devious channels by CAS to the Argentines.

Finally CAS tried Taylors of Stafford. Here they met a difficulty. Taylors still had large quantities of Olympus parts but it proved impossible, without a copy of the Olympus AP, which they did not have, to identify whether they had those parts required by the Argentines. CAS therefore set about obtaining the document by somewhat recondite means, no doubt believing, wrongly, that by supplying these parts to the Argentines they were committing a criminal offence, and so wishing to conceal as far as possible the nature of their business.

The method they adopted was as follows. Tucker had a friend called Colin Bain. Bain was in the spring of 1984 employed by APME Ltd.—a subsidiary of Pall Europe Ltd. Both APME and Pall Europe had contracts with the M.o.D., which meant that Bain himself had R.A.F. contacts, one of whom was Chief Technician Owen, at the old War Office building, which houses a technical library. One of the items in that library was a copy of the Olympus AP. Tucker brought Bain to see the appellant and Bain agreed to supply the necessary manual which he would obtain from Government Technical Libraries. The appellant knew the manuals were classified and no doubt thought that he was not entitled to possess them.

On 11 May 1984 Bain got Owen to lend him the Olympus AP for a few days on the pretext that it was required by APME or Pall Europe. Owen would not have lent the manual if he had known of the true purpose. Owen’s commanding officer, Squadron Leader Ball who was present at the time, would also have refused to lend the documents had he known the truth.

Bain gave the manual to Tucker and Tucker gave it to the appellant, who entrusted it to his wife as he, the appellant, was off to the Sudan. It was then photocopied at the CAS offices, the word “Restricted” having first been obliterated from all the pages on which it appeared. The original then went back to Owen, who had no idea what had been

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A happening to it meanwhile. Owen of course got no reward. Bain did. The amount is not clear.

B As will become apparent, it is important to see the extent to which by early summer 1984 the Olympus AP had become available to people outside the circle of those to whom publication had originally be restricted. Squadron Leader Ball gave evidence that he himself had "declassified" the document in 1980 on the demise of the Vulcan. There was however evidence that Squadron Leader Ball was in no position to declassify a document such as this, this being the privilege of a different body altogether.

C As already explained, Taylors of Stafford had been supplied by the M.o.D. with the large tender document containing both the Rolls-Royce and the M.o.D. and N.A.T.O. reference numbers of all the parts to be sold, and no doubt other companies in the spare parts trade who were interested in the Olympus spare part sale would have received a similar tender document. No restrictions were placed by the M.o.D. on resale by Taylors or upon dissemination of the tender document. Indeed the object of Taylors' purchase was obviously resale to anyone interested and the reference numbers would be an essential element in that process of resale.

D In February 1983 the trustees of the Midland Air Museum bought from the M.o.D. one of the obsolete Vulcan aircraft complete with its four Olympus engines. Four months later, in June, the trustees were sent a copy of the Olympus AP. Although that copy was marked "restricted," no condition was imposed by the M.o.D. upon its use or distribution.

E In February 1984 another Vulcan aircraft with its engines and a copy of the Olympus AP was sold to a private individual. The word "Restricted" on the manual gave him, he said, no concern. No limitations were put upon his use of the information contained in the manual.

Those being in outline the facts, we turn to the law in order to see how the two matched. Section 2(2) of the Official Secrets Act 1911 reads as follows (omitting the irrelevant words):

F "If any person receives any [secret official code word, or pass word, or] . . . document, or information, knowing, or having reasonable ground to believe, at the time when he receives it, that the . . . document, or information is communicated to him in contravention of this Act, he shall be guilty of an offence . . ."

G We should perhaps add here that the words in square brackets were added by the Official Secrets Act 1920. Mr. Caplan for the appellant did not pursue his original contention that the word "secret" governed more than the remaining words within those brackets.

H The prosecution put their case as follows. When Bain communicated the Olympus AP to CAS, he was acting in contravention of section 2(1)(a) of the Act, and Galvin knew or had reasonable ground to believe that that was the case. So one turns to section 2(1)(a), as amended, which provides, so far as is material:

"If any person having in his possession or control any . . . document, . . . which he has obtained owing to his position as a person who holds . . . a contract made on behalf of [Her] Majesty, or . . . who is . . . employed under a person who holds . . . such . . . contract,— (a) communicates the . . . document . . . to any person, other than

a person to whom he is authorised to communicate it, . . . shall be guilty of an offence.”

The contention of the prosecution continues in this way. (a) The document—the Olympus AP—was obtained by Bain as described in section 2(1)(a) because—(i) Bain obtained it from Owen owing to his, Bain’s, employment with APME who were indisputably under contract to the M.O.D. (i.e., a contract made on behalf of Her Majesty); (ii) there was evidence on which the jury could properly come to the conclusion so as to feel sure that he was not authorised to communicate it to CAS or the appellant; (iii) he communicated it to CAS and the appellant. (b) The appellant, to turn back to section 2(2), had reasonable ground to believe that the document was communicated to him in contravention of section 2(1)(a).

Mr. Caplan submitted to the trial judge that there was no case for the appellant to answer. The judge rejected that submission. Mr. Caplan contends before us that that decision was wrong. He based much of his argument on the fact that, if the contentions of the prosecution are correct, the reception of all sorts of documents and information may well fall foul of the Act when the information or document may be freely available to all and sundry and could not possibly be regarded as either “official” or “secret.”

He suggests that Parliament cannot have intended that these sections of the Act should cast their net so wide. In support of his argument he draws attention to the long title of the Official Secrets Act 1889, which was the precursor of the Act of 1911. That title reads as follows: “An Act to prevent the Disclosure of Official Documents and Information.” Mr. Caplan contends that one is entitled to have regard to those words in construing the Act, and that the title makes it clear that the document or information which Parliament intended to protect was that of an official nature and once the document or information gets into the “public domain,” as he describes it, it ceases to be official information and ceases to be within the mischief of these sections.

One can have regard to the title of a statute to help solve an ambiguity in the body of it, but it is not, we consider, open to a court to use the title to restrict what is otherwise the plain meaning of the words of the statute simply because they seem to be unduly wide.

We were referred to the decision of Avory J. in *Rex v. Crisp and Homewood* (1919) 83 J.P. 121. Crisp was a clerk in the War Office. He gave to Homewood, the director of a firm of tailors, documents containing particulars of army clothing contracts between the War Office and clothing manufacturers. The two men were charged under section 2(1)(a) and (2) of the Act of 1911. The defendants advanced arguments similar to those of Mr. Caplan. Avory J. held that the enacting words of the statute were not to be cut down or limited by the title of the Act; that the Act of 1911 was intended to go much further than its predecessor; that it was sufficient for the prosecution to prove that Crisp had obtained the documents owing to his position as a person holding office under His Majesty; and that section 2 applied to any document or information of an official character obtained in that way, provided that he communicated it to some person to whom he was not authorised to communicate it. Avory J. accordingly rejected a submission of no case.

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A Mr. Caplan seeks to derive help from the Canadian case, *Boyer v. The King* (1948) 94 C.C.C. 195, a decision of a five-judge Quebec Court of King's Bench (Appeal Side). Marchand J. said at p. 244:

"I would add that the Official Secrets Act, by its very title, indicates that its provisions are not applicable to what is already published or made public and coming within the public domain."

B The Canadian Official Secrets Act was in very similar terms to our own. However the observations of Marchand J. were not echoed by any of the other four judges; the dictum was obiter; Marchand J.'s judgment dissented from the judgments of the majority; in any case what he said does not accord with the judgment of Avory J. in *Rex v. Crisp and Homewood*, 83 J.P. 121, which in our view correctly expresses the law.

C In our judgment the words of these sections of the Act of 1911 are not susceptible to the interpretation which the appellant seeks to put upon them. They unambiguously define the type of material which is protected, the type of person who is under a duty not to communicate it, the circumstances under which the recipient of such communication may be guilty of an offence and the matters which may offer him an excuse.

D However desirable it might be for these sections to be construed in the way that Mr. Caplan invites us to construe them, it would be going beyond our proper powers to do so.

E That is not the end of the matter however. One of the matters which the prosecution must prove under section 2(1)(a) is that the communicator (Bain) of the information was not authorised to communicate it to the recipient (the appellant).

F Authorisation may be either express or implied. No difficulty arises over the express aspect. Implied authorisation is not so easy to define. There are obvious parallels with the situation in civil law where a person who has received confidential information from another is under an obligation, enforceable by action, not to disclose that information or use it for his own or someone else's benefit. The "owner" of such information cannot enforce the duty of confidence if he himself has already disclosed the information to the public.

G Two cases in point were cited to us. *Franchi v. Franchi* [1967] R.P.C. 149. In that case Cross J. was faced with the problem of deciding to what extent an application by the plaintiffs for a Belgian patent amounted to such a disclosure to competitors in the United Kingdom.

The following dictum appears at p. 152:

"Clearly a claim that the disclosure of some information would be a breach of confidence is not to be defeated simply by proving that there are other people in the world who know the facts in question besides the man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them."

H We were also referred to the decision of Bowen C.J. sitting in the Supreme Court of New South Wales in *Interfirm Comparison (Australia) Pty. Ltd. v. Law Society of New South Wales* [1977] R.P.C. 137, in which Bowen C.J. made it clear that the mere disclosure of a secret to a member of the public by the plaintiffs would not suffice to destroy the confidentiality of a document, and that it required disclosure to the world before such confidentiality would be destroyed.

It will be clear already that the provisions of the Act of 1911 cause enough trouble without additional complications. There were in the present case two such complications. First, the Argentine situation. All or almost all of those concerned with these transactions were, it seems, under the erroneous impression that the sale of spare parts for the Olympus engine to the Argentines was illegal. There was as a result some understandable confusion on the part of defendants, civilian witnesses and the police witnesses as to what Bain was or was not authorised to do with the manual. Secondly, chief technician Owen took the view that he had only "authorised" Bain to use the manual for the purpose which Bain had, falsely, said he was borrowing it and that Bain was therefore not authorised to pass on the manual to the appellant.

In our judgment that was not the real issue in the case. The true question for the jury was, leaving aside the feeling that this information should not have been used for the benefit of the Argentines, and leaving aside what Owen thought he was authorising, whether the M.o.D. by disseminating the manual and the information contained in it as widely as they already had done, and without restriction as to its further use, had or may have impliedly authorised anyone who came into possession of it to make such use of it as that person saw fit.

This was a question of fact for the jury. As the evidence stood the jury might have decided the point either way. There was certainly sufficient evidence to justify them finding that there was no such implied authorisation. The judge was correct to reject the submission of no case.

The question that remains is whether the jury were given a sufficiently clear direction on the point in issue. The material passage in the summing up reads:

"So far as this count is concerned, the Crown case is that he was offered the document and although for this purpose the information might have been available to him without restriction the communication of the document itself was subject to restriction in the sense that what you have to do is look and say what was the understanding at the time this document was handed over by Owen to Bain? As far as that is concerned, you may well think at the end of the day that so far as Owen was concerned, he was not interested in any of the confidentiality or restricting disclosure of the part numbers, and so forth, in the document because none of those matters were confidential, but so far as the document is concerned, it was something that belonged to the Ministry which was not a lending library, and he did not want it to go further than the restricted circle of Mr. Bain and, as it were, his employers, and that 'if Mr. Bain wanted to part with it he should have asked me and told me why and then I would have considered it further,' but it would be fair to say that both parties knew that at the time although nothing was said it was not intended that the document should go out of Bain's possession in this way. Thus, say the Crown, and rightly, this was a communication in breach of the Act because it is being communicated to someone else not authorised to receive it even though the information in it is not dangerous or confidential, it is just a document. How many people tell you things but they will not lend you their books?"

We hasten to say that the judge has our sympathy. He was faced with the unenviable task of trying to explain these sections in a way

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A which the jury could understand, and he was relying on the way in which the prosecution had advanced their propositions. We do not criticise him in any way at all.

The result was, as is apparent from the passage cited, however, that everything was said to hinge on what Owen authorised Bain to do and on how Owen wanted any dissemination of this manual to be restricted. On that basis the result was a foregone conclusion.

B A proper approach was for the jury to inquire whether they were sure that the M.o.D. had not by their actions impliedly authorised the general dissemination of the document to any one who might be interested. What Owen himself may have thought was only a part of the evidence and was not the governing factor. In our judgment this was a fatal misdirection.

C It only remains to deal with the conspiracy count, which alleged that Galvin and Bonfield conspired together and with CAS to use information which was in their possession and which had been obtained in contravention of the Official Secrets Act 1911 for the benefit of a foreign power, namely, Argentina.

It is agreed on all hands that the same considerations apply to this count as applied to the former.

D The result is that the appeal may be allowed and the conviction on each of these two counts must be quashed.

*Appeal allowed.
Convictions quashed.*

E *Solicitors: Crown Prosecution Service, Warwick.*

L. N. W.

[COURT OF APPEAL]

A

FAYED v. AL-TAJIR

[1983 F. No. 596]

1986 Dec. 9, 10, 11, 15;

Kerr, Croom-Johnson and Mustill L.JJ.

1987 Feb. 19

B

Conflict of Laws—Sovereign immunity—Diplomatic immunity—Embassy internal memorandum—Memorandum severely critical of plaintiff—Action by plaintiff for damages for libel—Memorandum disclosed on discovery—Whether memorandum protected by absolute privilege

The defendant was a former ambassador of a friendly foreign state. At the material time he was not an accredited diplomat, but he was regarded by the embassy staff and by his government as having authority. He was subsequently re-appointed ambassador. His name was subscribed to an internal embassy memorandum, which was later admitted to have been sent on his orders, although not written or sent by himself, addressed to the counsellor at the embassy. The memorandum pointed out the counsellor's misconduct in granting the plaintiff embassy concessions and informed him of his transfer to another post. It was severely critical of the plaintiff. The plaintiff brought an action claiming damages for libel allegedly contained in the memorandum, alleging publication to, *inter alios*, the *chargé d'affaires* at the embassy and to the country's foreign affairs ministry. The defendant accepted responsibility for the memorandum and pleaded diplomatic immunity, but purported to waive the immunity for the action. He also pleaded that the memorandum was the subject of absolute privilege. The judge held that there had been no publication outside the embassy, accepted the plea of absolute privilege and dismissed the action.

C

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On appeal by the plaintiff:—

Held, dismissing the appeal, that where an action was based on the contents and publication of an embassy document the court faced conflicting aspects of public policy, namely, the need to confine to a minimum curtailment of a litigant's right to seek redress for a wrong committed in England and the need to confine to a minimum meddling by the court in the affairs of a foreign sovereign; that normally the latter aspect should prevail unless the circumstances of a particular case warranted its disregard (post, p. 116A–B, C–D); that the concept of international comity and inviolability of diplomatic documents led to the conclusion that the dispute was not justiciable in English courts; and that, accordingly, the judge had rightly held that the memorandum was protected by absolute privilege (post, pp. 117H, 118F, 120A–C).

F

G

Chatterton v. Secretary of State for India in Council [1895] 2 Q.B. 189, C.A. and *Rose v. The King* [1947] 3 D.L.R. 618 considered.

Per Kerr L.J. The waiver of the immunity from suit of the defendant did not destroy the claim for immunity of the document, since that was justified by the character of the document, irrespective of the defendant's submission to the court's jurisdiction against him personally (post, p. 121G–H).

H

Decision of Stocker L.J. sitting as an additional judge of the Queen's Bench Division affirmed.

The following cases are referred to in the judgments:

Anderson v. Hamilton (Note) (1816) 8 Price 244

Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.)

3 W.L.R.

Fayed v. Al-Tajir (C.A.)

Chatterton v. Secretary of State for India in Council [1895] 2 Q.B. 189, C.A.
Congreso del Partido, I [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064, H.L.(E.)

Dickinson v. Del Solar [1930] 1 K.B. 376

Gibbons v. Duffell (1932) 47 C.L.R. 520

Hart v. Gumpach (1872) L.R. 4 P.C. 439, P.C.

Hasselblad (G.B.) Ltd. v. Orbinson [1985] Q.B. 475; [1985] 2 W.L.R. 1; [1985] 1 All E.R. 173, C.A.

Home v. Lord Bentinck (1820) 2 Brod. & B. 130

Isaacs (M.) and Sons Ltd. v. Cook [1925] 2 K.B. 391

Jackson v. Magrath (1947) 75 C.L.R. 293

Merricks v. Nott-Bower [1965] 1 Q.B. 57; [1964] 2 W.L.R. 702; [1964] 1 All E.R. 717, C.A.

Peerless Bakery Ltd. v. Watts [1955] N.Z.L.R. 339

Reg. v. Lewes Justices, Ex parte Secretary of State for Home Department [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.)

Richards v. Naun [1967] 1 Q.B. 620; [1966] 3 W.L.R. 1113; [1966] 3 All E.R. 812, C.A.

Rose v. The King [1947] 3 D.L.R. 618

Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson [1892] 1 Q.B. 431, C.A.

Szalatnay-Stacho v. Fink (1945) 174 L.T. 191; [1947] K.B. 1; [1946] 2 All E.R. 231, C.A.

The following additional cases were cited in argument:

Alcom Ltd. v. Republic of Colombia [1984] A.C. 580; [1984] 2 W.L.R. 750; [1984] 2 All E.R. 6, H.L.(E.)

Baccus S.R.L. v. Servicio Nacional del Trigo [1957] 1 Q.B. 438; [1956] 3 W.L.R. 948; [1956] 3 All E.R. 715, C.A.

Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. [1983] 2 Lloyd's Rep. 171 C.A.

Empson v. Smith [1966] 1 Q.B. 426; [1965] 3 W.L.R. 380; [1965] 2 All E.R. 881, C.A.

Mellenger v. New Brunswick Development Corporation [1971] 1 W.L.R. 604; [1971] 2 All E.R. 593, C.A.

Mighell v. Sultan of Johore [1894] 1 Q.B. 149, C.A.

Reg. v. Mudan [1961] 2 Q.B. 1; [1961] 2 W.L.R. 231; [1961] 2 All E.R. 588, C.C.A.

APPEAL from Stocker L.J., sitting as an additional judge of the Queen's Bench Division.

On 3 May 1983 the plaintiff, Mr. Muhammed Fayed, issued a writ seeking damages for libel contained in a memorandum dated 7 September 1982 which was published, or caused to be published by the defendant, Mr. Muhammed Mahdi al-Tajir, to Mr. Nabil Hijazi who was counsellor at the Embassy of the United Arab Emirates. The defendant was the head of the embassy at the time pending his re-appointment as the ambassador. Copies of the memorandum were sent to the chargé d'affaires and the foreign affairs ministry of the Emirates. The defendant, in his defence, pleaded that he had diplomatic status but stated that he waived it for the present proceedings. He also pleaded that the memorandum, being an internal document of the embassy of his country, was privileged. However, the memorandum was disclosed on discovery in the proceedings.

Stocker L.J. dismissed the action holding that the memorandum was protected by absolute privilege.

By a notice of appeal dated 14 March 1986 the plaintiff appealed on the grounds, inter alia, that (1) the judge erred in law in holding that the

communication by the defendant of the words complained of to Mr. Nabil Hijazi was protected by absolute privilege, the sole reason why he did not give judgment for the plaintiff; (2) the judge erred in apparently holding, for the first time, that the class of absolute privilege applied by the Court of Appeal in *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189, 190, 192–193, to “officers of state” and to communications “relating to matters of state,” in the context of the British Crown, would extend to cover communications between the diplomats or other servants of a foreign state, that being the only class of absolute privilege relied upon by the defendant; (3) in particular, the judge erred in law in apparently treating the memorandum complained of in that action as a communication “relating to matters of state” and the individuals concerned, the defendant and Mr. Nabil Hijazi, as being “officers of state” within the *Chatterton* principle; (4) whether or not absolute privilege should be so extended was a question best left to Parliament, in the absence of any case law directly in point, particularly in view of the foreign policy implications which would in effect require to be assessed de novo; (5) In any event, even if, contrary to the plaintiff’s submissions, communications passing between the ambassador of a friendly foreign state and one of the senior embassy officials ordinarily did require to be protected by absolute privilege, the judge erred on the facts before him in upholding the defence because at the time the memorandum was published the defendant, it was conceded, was neither the ambassador nor accredited to the Court of St. James in any other capacity; (6) the appropriate test to apply in deciding whether to extend the *Chatterton* principle was whether there were “overwhelmingly strong reasons of public policy” which rendered it necessary so to do: *Gibbons v. Duffell* (1932) 47 C.L.R. 520, 534, and thus the judge erred in holding that there was such a necessity for the hitherto very limited and special protection of absolute privilege in the circumstances confronting him; (7) in particular, no such necessity could be demonstrated in circumstances where (a) qualified privilege would ordinarily attach to official embassy documents and (b) the authors of such documents would be protected by diplomatic immunity from suit arising under the Vienna Convention, as embodied in the Diplomatic Privileges Act 1964, which the instant case the sovereign state concerned had chosen to waive; (8) The judge further failed to take any or any sufficient account of the following considerations: (a) the principle described by Lopes L.J. in *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431, 451, to the effect that “[absolute privilege] seems rather to attach to the person or character of the person writing or speaking the defamatory matter, whereas [qualified privilege] to the occasion when the defamatory matter is written or spoken,” (b) the doubts expressed by the Court of Appeal in *Szalatnay-Stacho v. Fink* [1947] 1 K.B. 1 and *Richard v. Naum* [1967] 1 Q.B. 620 as to whether the absolute privilege enjoyed by communications relating to matters of state would extend to documents published by the officials of foreign governments, (c) the unchallenged evidence of Mr. Nabil Hijazi that it would not have been within the scope of the defendant’s authority, even if he had been ambassador at the material time, to order Mr. Hijazi’s transfer back to the United Arab Emirates, which purported to be the object of the memorandum complained of; and (9) the judge misdirected himself as to the effect of the passages cited from the speech of Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer* [1932] A.C. 888, 930–932. Those related to the entirely separate question of jurisdiction to review the transactions of sovereign states, which was so remote from the

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A present issue of absolute privilege as to afford no guidance one way or the other and in the present case it was not disputed that the judge had jurisdiction to determine the issues in accordance with English law.

B By a respondent's notice the defendant sought to have the judge's judgment affirmed on the grounds, inter alia, that (1) if, contrary to the judge's decision and to the defendant's submissions, the public interest of the United Kingdom did not require that absolute privilege should be attached to the communication of the words complained of to Mr. Nabil Hijazi, absolute privilege should nonetheless attach to that communication as an aspect of the state immunity which was enjoyed by the United Arab Emirates in respect of all documents and archives of its embassy in the United Kingdom and in particular communications emanating from that embassy concerning the employment of the officers of that embassy and the absolute privilege claimed in the defence survived the waiver of the diplomatic immunity on whichever of those two bases that privilege was properly to be founded; and (2) if, as was the plaintiff's submission, only a qualified privilege were to be attached to the communication of the words complained of to Mr. Nabil Hijazi, that privilege would be defeasible upon proof of malice yet an inquiry as to the presence or absence of malice would involve an examination of the motives of the United Arab Emirates in the person of its officers in effecting Mr. Nabil Hijazi's transfer from its embassy in London to its foreign affairs ministry in Abu Dhabi and that was not an inquiry on which a United Kingdom court should embark.

The facts are set out in the judgment of Mustill L.J.

David Eady Q.C. and *Stephen Suttle* for the plaintiff.

E *E.C. Evans-Lombe Q.C.*, *Geoffrey Shaw* and *Lady Hazel Fox* for the defendant.

Cur. adv. vult.

19 February. The following judgments were handed down.

F MUSTILL L.J. This curious case springs from a dispute within the London Embassy of the United Arab Emirates.

G The defendant is Mr. Muhammed Mahdi al-Tajir. For some years he was ambassador of the United Arab Emirates ("the Emirates") to the Court of St. James. The Emirates are a federation of Arab states, one of which is the Emirate of Dubai. At the material time, H. H. Sheikh Rashid was ruler of Dubai and vice-president of the Emirates. During August 1982 the defendant resigned as ambassador of the Emirates in London, for reasons which suggest that it was contemplated throughout that in due course he would resume his office. For about the next 12 months he continued to concern himself with the affairs of the Emirates in two ways. First, he maintained his position as adviser to the ruler of Dubai, a role which he had performed for many years. Second, he appears to have acted H for internal purposes as de facto head of mission. During this period there was no person occupying the office of ambassador. Although, upon the defendant's resignation as ambassador, he ceased to be on the list of those recognised as diplomats accredited to the Court of St. James, his status was such that, in the words of the trial judge, he was regarded both by the foreign ministry in the United Arab Emirates and by the staff at the embassy in London as having authority. On 15 November 1983 the defendant was re-appointed as ambassador in London, and he continued to

hold that post until November 1986, when he once more resigned: an event which occurred after the trial of the present action but before the argument of the appeal.

During the interregnum between the resignation of the defendant in August 1982 and his re-appointment in November 1983 there was no ambassador in post. The senior official in the embassy and formal chef de mission was Mr. Mirza al-Sayegh, the chargé d'affaires. The second in command was the counsellor, Mr. Nabil Hijazi. The third secretary was Mr. Al Hashimi.

The plaintiff, Mr. Muhammed Fayed, is a businessman with substantial interests in the United Kingdom. He had for a number of years been prominent in the affairs of the Emirates, and had been on close terms with the defendant. One of the fruits of this relationship had been the procurement by the defendant on his behalf of certain privileges at Heathrow Airport, notably concerning the use of the V.I.P. lounge, and access for his limousines to various restricted areas. These privileges had been renewed for him from year to year through the intermediacy of Mr. Nabil Hijazi.

In course of time the relationship between the plaintiff and the defendant took a turn for the worse: so much so that on 7 September 1982, during the interval between the resignation of the defendant as ambassador and his subsequent re-appointment, a memorandum came into existence in terms sharply critical of the plaintiff. I return at a later stage to the circumstances in which this document came to be written. It is sufficient for present purposes to say that it was addressed to Mr. Nabil Hijazi (the counsellor), with copies to Mr. Mirza al-Sayegh (the chargé d'affaires) and to the ministry of foreign affairs in Abu Dhabi. The document was subscribed with the word "ambassador" followed by the Arabic equivalent of "per pro," then the signature of Mirza al-Sayegh, and finally the name of the defendant.

Since this memorandum is the document in suit in the present action I must set out its text in full. In translation, it read:

"EMBASSY OF THE UNITED ARAB EMIRATES

"Inter-departmental memorandum

"From: H.E. The Ambassador

"To: Counsellor Nabil Hijazi

"Ref:

"Date 7/9/1982

"Greetings,

"I was dismayed to learn that you have contacted the airport authorities for the purpose of granting Mr. Muhammed Fayed two passes to enter Heathrow Airport in his car in the name of the embassy. I was extremely annoyed to receive such a report as I have personally warned you of the consequences of having any dealings with that person under the name of the embassy. You have promised to cancel all the arrangements made by the embassy in his favour. You made that promise several weeks ago in the presence of Mr. Mirza Al-Sayegh. However, this has not been fulfilled. I was surprised to learn from my colleagues in the embassy that Mr. Fayed started to use the V.I.P. lounge at the airport impersonating the identity of the adviser of Sheikh Zayed. In addition he used two car passes. This has caused great embarrassment to me and to the embassy staff, as it happened without their knowledge. The matter has come to the notice

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A of the British Foreign Office and also to the notice of the ministry of
foreign affairs in Abu Dhabi. We have rectified the situation by
withdrawing the above status and cancelling the tickets. You are well
aware of the outcome if Mr. Fayed had managed to enter prohibited
goods into this country using the above capacity and in the name of
the embassy. This could have caused deterioration in the relationship
B between the embassy and the authorities concerned, relationships
which we were able to strengthen since the establishment of this
embassy till the present, let alone the deterioration of the relationship
between the embassy and H.H. Sheikh Zayed as a result of
impersonating the identity of the adviser of His Highness by an
unknown person.

C "Therefore, I have decided to transfer you to the head office of
the ministry of foreign affairs in Abu Dhabi, referring the whole
matter to the ministry to take whatever action they deem necessary. I
have informed the departments concerned in the embassy that your
diplomatic status has now been withdrawn and instructed them to
claim any possessions under your charge which are the property of the
embassy, such as the car and the house leased for your use.

D "This takes effect from today's date.

"I have also notified the British Foreign Office of this action.

"Finally, would you please accept my sincere thanks and
appreciation of your previous service in this Embassy which I hope
will continue in the ministry of foreign affairs in the future,

"Ambassador

E "p.p. (Signature)

"Mahdi Al-Tajir

"Copy to Mr. Mirza Sayegh, Chargé d'Affairs to put this into
effect and then take full charge of the responsibilities of Mr. Nabil
Hijazi.

F "Copy to the ministry of foreign affairs in Abu Dhabi to complete
the arrangements of transfer in accordance with normal procedure."

G As contemplated by its terms, this document was delivered to and read
by Mr. Nabil Hijazi, and also by certain officials in the ministry at Abu
Dhabi. This led to the temporary recall of Mr. Nabil Hijazi for discussions,
but ultimately he returned to his post as counsellor in London. Meanwhile,
Mr. Nabil Hijazi has shown the memorandum to the plaintiff. His motives
for doing so were controversial, but there is no suggestion that his act was
the consequence of any express authorisation by the defendant or anyone
else.

H On 3 May 1983, the plaintiff issued the writ in the present action,
claiming damages for libel contained in the memorandum, and alleging
publication to Mr. Nabil Hijazi. An injunction was also claimed. The writ
was followed on 27 May 1983 by a statement of claim also alleging that the
defendant wrote and published the letter to Mr. Nabil Hijazi or caused it
to be so written and published. It was pleaded that the plain and ordinary
meaning of the words was that:

"(i) The plaintiff had obtained two passes to enter Heathrow Airport
in his car under false pretences, that is to say by pretending to be
acting on behalf of the embassy of the United Arab Emirates. (ii) The
plaintiff had impersonated the identity of an adviser Sheikh Zayed in

the V.I.P. lounge at Heathrow Airport. (iii) The plaintiff had been using these devices with a view to importing unlawfully prohibited goods into the United Kingdom.”

Next, on 28 June the defendant swore an affidavit setting out that he had in the past resigned as ambassador, but that his re-appointment was awaiting confirmation from the United Kingdom authorities. He went on to summarise his relationship with the ruler. He concluded:

“10. It will be observed from the statement of claim that the plaintiff complains of a document purporting to be an inter-departmental memorandum published within the [United Arab Emirates] embassy and dated 1 September 1982. At that date I was no longer ambassador and had left the country the previous month to return to Dubai, and I was at that time visiting Germany with H.H. Sheikh Rashid who was undergoing medical treatment in Baden Baden. I neither wrote nor signed the memorandum. I have no knowledge of the circumstances in which it came to be written.

“11. I am advised that, since I have arrived in this country to take up my appointment as ambassador, the Foreign Office having been notified of my appointment, I am immune from the jurisdiction of this court . . .

“13. In any event it is my respectful submission that this . . . court should decline to investigate in these libel proceedings or at all an internal communication made within a foreign embassy. If there are to be proceedings in respect of such a communication, then in my respectful submission they would be more conveniently dealt with, with less oppressive consequences for me, in the courts of Dubai where, so my solicitors advise me having made inquiries of their own, civil remedies for falsehoods and penal provisions for defamation exist, in addition to the remedies available via the Sharia or religious law where a person's reputation has been injured.”

This affidavit was followed by an application to a Queen's Bench master for an order to set aside service on the ground:

“the defendant having been out of jurisdiction when the writ was issued and/or serving and striking out the endorsement on the writ and/or the statement of claim and/or dismissing or staying this action, upon the grounds that the defendant is immune from the jurisdiction of this . . . court and/or that it is oppressive for this action to be brought in England when it would be dealt with conveniently by a court in the United Arab Emirates and/or that the content and circumstances of publication of the memorandum complained of in this action are such that its author is protected by an absolute privilege and/or that this . . . court cannot or should not inquire into it, should be dismissed.”

The application was dismissed on 11 July 1983, and although a notice of appeal was lodged, it appears that this was never proceeded with. One month later the defendant's reinstatement as ambassador became effective.

The next step took place during January 1984, when a defence was served, denying that the defendant had written or published or caused to be written or published the letter in question. The pleading concluded:

“6. Further or in the alternative, the document reproduced in paragraph 1 of the statement of claim appears on its face to be an

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A interdepartmental memorandum of the embassy of the United Arab Emirates. Communications relating to matters of state, made by one officer of state to another, are absolutely privileged and cannot be made the subject of an action for libel.

B “7. The defendant was the ambassador of the United Arab Emirates to the Court of St. James until 1 August 1982, and since his reappointment in 1983 is again the ambassador of the United Arab Emirates. For the avoidance of doubt, and for the purpose of this action only, he hereby expressly waives any claim of his to diplomatic immunity.

C “8. Further or in the further alternative, this . . . court should decline jurisdiction upon the ground that it is not the convenient or appropriate forum for the resolution of this action. Each party is a citizen of the United Arab Emirates and ordinarily resident in Dubai. The plaintiff’s complaint is in respect of a document which appears on its face to be in his own language and to have passed from one fellow countryman of his to another, within the embassy of his own country. The Emirate of Dubai has courts and a law of defamation.”

D Nothing of any materiality then happened until 15 November 1985, when the plaintiff re-amended his statement of claim to allege publication to a list of 12 persons: it is unnecessary to state the details. Soon afterwards, in response to an interrogatory the defendant deposed:

E “As to Nabil Hijazi I did not send the said memorandum to him. A memorandum containing the said words was written and sent to Nabil Hijazi by Mirza Al-Sayegh Chargé d’Affaires on or about 7 September 1982. At a meeting between, inter alia, myself and the said Mirza Al-Sayegh he sought my advice as to whether such a memorandum should be sent. I advised him that he should act in what he considered to be the best interests of the United Arab Emirates and its embassy for which, after my resignation as ambassador he was then responsible and did not seek to dissuade him from his proposed course. I have therefore given instructions to my solicitors to amend my defence so as to accept responsibility for publication of the said memorandum to Nabil Hijazi.”

There was then a consequential amendment to the defence, maintaining the denial that the defendant wrote or sent the letter, but admitting that he caused it to be sent.

G Thus matters stood when the action came to trial. A substantial issue which had to be explored by the judge, but which did not arise before us, was whether there was publication in the United Kingdom to any of the persons named in the list added to the statement of claim by re-amendment: for it was conceded that the defence of absolute privilege could not be established if such wider publication occurred and was a natural consequence of the initial publication to the addressee. In the event, the judge held that so far as there was any publication outside the embassy, this was neither intended by the defendant nor the natural and probable consequence of the publication by him to Mr. Nabil Hijazi. There was no appeal against this finding.

H Accordingly, the issue left for decision was whether the publication by a person acting as ambassador although not accredited as such, to the counsellor of the embassy with a copy to chargé d’affaires, of a document concerning the conduct of the addressee in his official capacity, and the

termination of his posting, was actionable at the suit of the plaintiff in the English court. The judge held that it was not, on the ground set out in paragraph 6 of the defence—namely that the document, being a communication by one officer of state to another, relating to a matter of state, was the subject of absolute privilege and could not be made the subject of an action for libel.

On the hearing of the appeal, the arguments on both sides were cast in wider terms than before the judge. Accordingly, it is convenient to begin with a survey of the statutes and reported decisions touching on this branch of the law. These may be arranged according to subject matter, as follows.

1. The immunity from production of certain categories of state documents. It is unnecessary to enter here into the complexities, not yet fully resolved, of “class privilege.” It is sufficient to say that since the 18th century the courts have recognised the need to abstain from requiring the production of communications addressed by or to high officers of state relating to matters within their competence. As Lord Ellenborough C.J. said, in relation to letters from the Under Secretary of State for the Colonial Department to the Secretary of State, “I do not like the breaking in upon this correspondence”: *Anderson v. Hamilton (Note)* (1816) 8 Price 244, 246.

2. The refusal by the court to allow certain categories of documents, or copies of them, to be proved and put in evidence at the trial: see *Home v. Lord Bentinck* (1820) 2 Brod. & B. 130 and *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189.

3. The recognition, by treating the publication as the subject of absolute privilege, that the publication of certain categories of state documents does not found a cause of action in damages. Such publication has been referred to as an “act of state.” That documents of this kind may be the subject of absolute privilege is undoubted, and it is clear that the court must take into account the position occupied by the sender and the recipient, and the nature and subject matter of the communication. The precise boundaries of the protection have, however, yet to be established: contrast *Chatterton v. Secretary of State for India in Council* (despatch by Secretary of State to Under-Secretary concerning the removal of the plaintiff to the half pay list); *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431 (oral report by member of London County Council to a meeting of the council concerning the grant of licences); *M. Isaacs and Sons Ltd. v. Cook* [1925] 2 K.B. 391 (report by Australian High Commissioner to Prime Minister on commercial matters involving the interests of the Commonwealth); *Gibbons v. Duffell* (1932) 47 C.L.R. 520 (report on subordinate by police inspector to superintendent); *Jackson v. Magrath* (1947) 75 C.L.R. 293; *Peerless Bakery Ltd. v. Watts* [1955] N.Z.L.R. 339 (communication by Minister of Industry and Commerce to the Secretary of the Wheat Commission); *Merricks v. Nott-Bower* [1965] 1 Q.B. 57 (minute by deputy commissioner of police to commissioner regarding transfer of senior officers); *Reg. v. Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388 (letter by assistant chief constable to Gaming Board in response to a request for information concerning an application for a gaming licence) and *Hasselblad (G.B.) Ltd. v. Orbinson* [1985] Q.B. 475 (letter of complaint to Commission of European Community).

4. The immunity from suit of an officer of the Crown in respect of acts done abroad otherwise than under colour of legal right. This also is

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A referred to as immunity in respect of an “act of state.” It is unnecessary to cite the authorities since they are far from the present point.

5. The refusal of the court, save in exceptional cases, to inquire into the validity and policy of foreign municipal legislation so far as it relates to matters done purportedly in furtherance of such legislation within the territory of the foreign state. This also is often referred to as an example of “act of state.” Here again, citation is unnecessary.

B 6. The abstention by the court, in certain circumstances, from adjudication upon the act of a foreign sovereign state—at least when the act is done within the territory of the foreign state. This doctrine, also described as being concerned with “act of state,” was discussed in *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888.

C 7. The refusal by the court to entertain any claim against a foreign sovereign or state, or a diplomatically accredited officer thereof, except in respect of certain types of transaction, unless the immunity is waived by the sovereign or a person having the power to communicate a waiver on his behalf: the State Immunity Act 1978. This principle does not deny the existence of a cause of action against the sovereign or his officer, but rather makes it impossible for the cause of action to be enforced: see *Dickinson v. Del Solar* [1930] 1 K.B. 376, 381.

D 8. The recognition by the state and by the courts that the person of the foreign sovereign and his accredited officers should be protected from affront: article 29 of the Vienna Convention on Diplomatic Relations, as set out in Schedule 1 to the Diplomatic Privileges Act 1964.

E 9. As an aspect of the principle just stated, the recognition by the state and by the courts that the correspondence of the sovereign and the documents of his diplomatic mission touching on its functions should be kept inviolate, in the sense that they must be protected from harm, and from perusal and use without the sovereign’s consent: see for a partial re-enactment of this long established principle of international law, article 24 of the Vienna Convention.

F I have divided the cases and statutes into categories to illustrate why in my judgment the application of them by analogy to a new situation should be embarked on with caution. Thus, the doctrine that certain types of document are invulnerable has developed over the years from a notion that they should not be taken out of the hands of high officers of state, to a refusal to allow them to be given in evidence, and finally to a ruling that such documents (or more accurately the publication of them) are the subject of absolute privilege. These consequences are not the same, as was pointed out by Roche J. in *M. Isaacs and Sons Ltd. v. Cook* [1925] 2 K.B. 391, 398, and Starke J. in *Gibbons v. Duffell*, 47 C.L.R. 520, 529. Granted, it is usually of no moment to either party whether the plaintiff fails for want of proof, or because the publication is incapable of founding a cause of action: see the observations of Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888, 930, and Starke J. in *Gibbons v. Duffell*, 47 C.L.R. 520, 530. But the distinction may be important in a case such as the present, where the document, its contents and its publication are admitted in the pleadings, and where the document is disclosed on discovery and put in evidence at the trial without objection.

H Again, there is a risk that the terminology may prove misleading. The types of case identified as items 4, 5 and 6 above have all been discussed in terms of the label “act of state.” Yet they are really quite unrelated, as regards their effect, boundaries and underpinnings of policy. There is a temptation to believe, because the events with which the present action is

concerned were in one sense “foreign” and because they bear some resemblance to the type of English communication which has been characterised as an “act of state” in the passage from *Fraser on Libel and Slander (Law and Practice)*, 7th ed. (1936), p. 127, quoted in more than one of the cases, that we are here concerned with a “foreign act of state.” This might encourage the court to explore the limits of that doctrine, such as were discussed in *I. Congreso del Partido* [1983] 1 A.C. 244, and treat them as applicable here. In my judgment this would be a mistake.

Furthermore, although it is quite clear that the protection is derived in every one of these cases from considerations of public policy, it is equally clear that these considerations are not the same throughout. Thus the rationale of cases such as *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189, is that the direct interests of the community in the United Kingdom demand that an officer of a certain status should be able to communicate candidly on certain subjects without running the risk of being brought before the court as defendant or witness, and examined on the accuracy or honesty of what he has written. Plainly, there is no such direct interest where the document passes between two persons quite unconnected with the government and administration of the realm, on matters which are equally so unconnected. If there is to be the protection now claimed by the defendant it must either rest on the grounds of comity which in one shape or another underlie items 5 to 9 above, or on some other ground altogether.

For these reasons I would prefer not to venture any extension of the principle exemplified by *Chatterton v. Secretary of State for India in Council*, to documents created within and for the purposes of a foreign diplomatic mission. Rather, I would look to see whether there is any ground upon which immunity should be granted because the United Kingdom has an interest in conceding to other states those privileges which it would in kindred circumstances wish to be accorded by the foreign state.

Before addressing this question it is convenient to deal with four reported cases which might be said to shed light on the present problem.

The first is *Hart v. Gumpach* (1872) L.R. 4 P.C. 439. The defendant was the inspector general of customs of the Chinese government at a time when a unique condominium existed after the Treaties of Tientsin. The plaintiff had been professor of mathematics and astronomy at a college of western language and science which had been established by the Chinese government. The plaintiff raised an action before a court in China, which had jurisdiction over disputes between British subjects. Amongst his complaints was an allegation that the defendant had libelled him in a letter written to the head of a body called the Foreign Board at Peking. On appeal to the Privy Council against a verdict in favour of the plaintiff it was held that the communication was at least subject to qualified privilege. The Board did not, as I understand their opinion, reach a distinct conclusion on whether it was also entitled to absolute privilege, there being insufficient facts upon which to decide the question, and since a retrial was ordered it must, I think, be taken that a case for absolute privilege was not made out. But this cannot in my judgment be regarded as any authority against the defendant in the present case, for the circumstances of the two actions are quite different. The one concerned a claim by one British subject against another in respect of acts done abroad, in fulfilment of an office in a government which, so far as the court was concerned, was in one sense “local,” and in another not. Here by contrast the claim springs from dealings between foreigners in England in relation to the business of a

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A government which is not in any sense local, but which has an embassy here entitled to the protection of the English state and the English court.

Next, there was *M. Isaacs and Sons Ltd. v. Cook* [1925] 2 K.B. 391. The plaintiffs carried on business in London as auctioneers of fruit. The defendant was High Commissioner of the Commonwealth of Australia in the United Kingdom. In the course of his duties he wrote a report on the outcome of sales of Australian fruit, in terms which the plaintiffs alleged were defamatory of themselves. The defendant contended that the report was absolutely privileged. The plaintiffs argued for the contrary view, primarily on the ground that the matter was of a commercial nature and did not concern a state matter, such as was involved in *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189. On a preliminary issue, Roche J. held in favour of the defendant. In my judgment, there are two reasons why this decision does not point to any conclusion in the present case. First, because the question whether the principle stated in *Fraser on Libel and Slander (Law and Practice)* 1st ed. (1893), p.95, and adopted in *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 187, 191, and other cases had any application at all to a communication between persons who were not, in the most direct sense, officers of the Crown, does not appear to have been canvassed. Second, because the closeness of the relationship between the Commonwealth of Australia and the United Kingdom involved considerations of public policy much more immediate than those called forth by the need to maintain cordially reciprocal relations with foreign states. I think it unsafe to make any assumption as to what Roche J. would have held if the suit had concerned the transactions of persons, who owed no allegiance to the Crown, regarding the business of a foreign state.

At first sight, the next case in chronological sequence, namely *Szalatnay-Stacho v. Fink* [1947] K.B. 1, appears much closer to the present point. It is, however, necessary to examine rather carefully what the case actually decided. The plaintiff, a Czech national, was the Czechoslovak diplomatic representative in Egypt during the second world war. The defendant, also a Czech national, was the chief military prosecutor of the Czech army. The defendant had received a number of written statements concerning the activities of the plaintiff whilst on diplomatic service. He forwarded these statements to the Military Office of the President of the Czech Republic (in exile), with a covering letter which explained that since the plaintiff was a civilian the defendant had no jurisdiction to bring criminal proceedings against him, but that the charges made in the statements were so grave that he considered it his duty to bring them to the attention of the President. He then went on to enumerate sections of the Czech criminal law which were alleged to have been contravened. Ultimately this letter came to the notice of the plaintiff, who brought an action in libel in the English court, to which the defendant responded with a plea of absolute privilege.

At first instance, this plea was upheld. Henn-Collins J. took little time to dispose of arguments that the publication was privileged because the dossier was an act of state, or a step in the proceedings of a military tribunal, so as to bring it within the protection afforded by the reported cases. As to the former, the communication did not take place at a sufficiently high level to qualify as a state matter, of the kind contemplated in *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189. As to the latter, it had nothing to do with disciplinary proceedings, and did not touch any matter over which the military tribunal had any jurisdiction.

The judge did however give effect to another consideration. Expert evidence had established that an action such as the one before him would be inconceivable in Czechoslovakia, since the defendant was a state official and acting as such. Having reached this point, the judge continued (1945) 174 L.T. 191, 193:

“That raises the question whether, by the comity of nations, His Majesty’s courts should extend to communications such as this, passing between Czech nationals on Czech affairs, the same protection as their own domestic courts would afford. It is, of course, only by comity that protection could be afforded, even to the acts of state of a foreign government, for we, here, have no direct interest in the good government of any foreign power, however friendly—but equally, of course, we have an indirect interest; and it has been indicated in *Hart v. Gumpach*, L.R. 4 P.C. 439, that in some circumstances it may be against the public interests of this country to entertain a suit involving an inquiry into reports made by an officer in the service of a foreign state to the government of that state, and that one of those circumstances would be the fact that such a communication would be protected in the foreign state. That, as I have found, is the case with this communication. Is it proper in this case to apply the doctrine which the Privy Council thought it might be proper to apply in the very circumstances which have arisen here? If the comity of nations is ever to be applied, it should surely be applied where the document in question was published in this country only because the foreign government, being our allies, were our guests while their unhappy country was occupied by our common enemy. I therefore think I ought to apply it, and to hold that this dossier is absolutely privileged.”

On appeal, the case took a rather strange course. Counsel for the defendant expressly disclaimed the ground of comity on which Henn-Collins J. had decided in his favour, and also any argument based on act of state, the sole ground relied upon being that the defendant’s report was a step in judicial proceedings. The Court of Appeal rejected this argument for very much the same reasons as were given in the court below. It was, however, considered necessary also to discuss the argument which the defendant had disclaimed. Delivering the judgment of the court, Somervell L.J. said, at p. 11:

“Before considering this reasoning, it is necessary, in order to deal with Mr. Slade’s first argument under this issue, to consider the question on somewhat wider lines. The application of the principle of absolute privilege to foreign official documents is one on which there is little, if any, direct authority. The principle in our law is based on public interest, and, as it seems to us, would not necessarily apply to corresponding foreign documents. At the material time the Czechoslovak government was in this country as our ally in the war. This was an unprecedented state of affairs. Whatever may be the position in normal circumstances it may well be that in these circumstances the public interest would justify the application to Czechoslovak official documents of the principle applied to our own documents.”

Somervell L.J. then went on to discuss the question whether the document was the first step in criminal proceedings, and after dealing with this continued, at p. 12:

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A “Henn-Collins J. based his decision, as we have stated, on a different principle. Although the document was made and published in England, he felt that he must consider what would have been the rights of the parties if the action had come before a Czechoslovakian court. In *Hart v. Gumpach*, L.R. 4 P.C. 439, the observations were obiter and the position was, as it seems to us, essentially different. The action was brought before Her Majesty’s Supreme Court for China. It was between two British subjects, both in the service of the Chinese Government, and was based on false representations alleged to have been made by the defendant in his official capacity in China. In that case, therefore, everything had happened in China, the country whose law it was suggested might be applied to the documents. Here everything happened in England. Having due regard to the exceptional position of the Czechoslovak Government, we do not think that the principle of the comity of nations compels or entitles the courts of this country to apply Czechoslovak law to acts done here, in proceedings in tort between Czechoslovak citizens, that law giving a general protection in civil suits to acts done by officials, which is not afforded under our law. This would be to make an inroad on a very fundamental principle. If there is to be such an application of foreign law in the circumstances set out it would, in our opinion, have to be expressly provided for by legislation. We, therefore, decide that this document was not absolutely privileged.”

E Although these passages might perhaps be regarded as obiter dicta since they were dealing with a proposition which had not been advanced, I would have thought it right to give effect to them, if they had been directly in point. But I do not think that they are. The document in suit here is not just a “foreign official document” but an embassy document; the issue is not whether the court should allow to the defendant such immunities from liability or suit as he would have enjoyed if he had been sued in his own country under his own law, but whether the litigation is of a kind upon which the English court should engage itself at all. This being so, I believe that *Szalatnay-Stacho v. Fink* [1947] K.B. 1, does not preclude this court from tackling the present problem de novo.

F Finally, there was *Richards v. Naum* [1967] 1 Q.B. 620. The subject matter of the alleged libel was a report by a colonel in the office of special investigations in the United States Air Force, stationed in England, to a general in that force, concerning the continued employment of the plaintiff, a civilian investigative officer. If the court had decided whether absolute privilege attached to such a document, the case would have been of the greatest interest. But it did not, the sole conclusion expressed being that the law was insufficiently certain, and the facts and the law so likely to be intertwined, that the issue was not one which could appropriately be decided as a preliminary point. Unfortunately, therefore, *Richards v. Naum* does not advance the present discussion.

H In these circumstances, I am unable to find in any statute or decided case a rule of law which leads directly to a solution of the issue now before the court. Specifically, there is to my mind nothing material in the cases in the first three categories listed above, all of which are concerned with what may be termed “United Kingdom act of state,” for these are founded on considerations of public policy which have no bearing on the present case. I therefore do not pause to discuss the questions, much pressed in argument, whether if this line of authority had been relevant the positions

occupied by the defendant, Mr. Nabil Hijazi and the plaintiff, and the nature and circumstances of the document and publication sued upon, were such as to bring this action within its scope. If there is to be immunity from liability, it must rest on the other aspect of public policy, described briefly by the word "comity." Here it seems to me that there are matters which provide an important background to any consideration of the problem, even though not pointing unequivocally to a solution, namely that (i) the law of nations, as reflected in the Vienna Convention treats embassy documents as sacrosanct, and (ii) there are situations in which the English court will find it inexpedient to investigate the actions of a foreign state or legislature, even though they fall within its formal jurisdiction.

Against this background, one returns to the question: Should the English court engage upon an inquiry as to the merits of a letter written or caused to be written by one person exercising high supervisory functions in a foreign embassy to a senior official of that embassy concerning the latter's continued employment at the embassy, and raising questions as to the conduct of the plaintiff (a foreign national) in relation to privileges obtained for him by the embassy? We are here, as elsewhere in this field, faced with conflicting aspects of public policy: the need to confine to an absolute minimum any curtailment of the right of a litigant to bring an action for recompense in respect of wrong committed in England, and the need to confine to an absolute minimum any meddling by the English court in the affairs of a foreign sovereign. In general, it would seem to me that the latter consideration should prevail, unless there is some objection in general or in the circumstances of this particular case.

So far as concerned the general objections, the plaintiff relied on the following. First, that there was no need to grant absolute privilege to communications of this kind, since qualified privilege would furnish the defendant with all the protection which in justice he could reasonably require. In my view, whilst this objection might have force if we were considering immunity based on "act of state," it is beside the point here, since the issues of justification and malice which would often be opened up by a plea of qualified privilege would require precisely that inquiry into the workings of the foreign embassy which (if I am right in the general approach suggested above) an English court ought to abjure.

Next, it is urged that diplomatic immunity is sufficient to secure the interests of justice and to maintain the dignity of the foreign sovereign, and that there is no need to superimpose on this a doctrine which would enable a person to publish damaging material in England without any cause of action even coming into existence. I can see much more force in this argument, but I must disagree. The respect owed by one state to the sovereign of another and to his diplomatic representatives is allied to but not the same as a voluntary abstention by the courts of the receiving state from inquiring into the conduct of his embassy. A foreign sovereign might well take the view that his dignity would be impaired rather than maintained by insisting on a personal immunity for one of his officers in respect of a civil suit, and I believe that in practice such an attitude is nowadays by no means uncommon. But this is not inconsistent with an attitude on the part of the court that the matter is not apt for investigation, and that the author of an embassy document such as the present should be answerable (if at all) for what he says only in the courts of his own country.

Allied to the argument just discussed is the point that whereas the statutes confer on the diplomat, both inviolability of person and immunity

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A from suit, there is in the case of documents an express reference only to
inviolability. I do not find this argument convincing. The statutes and
conventions do not form a complete code for the operation of public policy
in the field of comity, as witness the various versions of the doctrine of
foreign act of state, all of which are creations of the common law. I can
B see no reason why the fact that a particular ground of policy does not have
statutory recognition should prevent the court from giving it whatever
weight may be thought fit.

C Finally, it is contended that if immunity is granted in circumstances
such as these, the net will be cast wider than if the subject had been a
communication between officers of the Crown. This is factually correct, in
the sense that persons of less rank than the high officers of state
contemplated by the *Chatterton* line of authority would be enabled to avoid
liability. I do not however regard this as a valid objection, since the
D considerations of policy are quite different, and may be expected to yield
different results in the individual case.

E Those were the grounds upon which the plaintiff contended that
communications of this general type were not the subject of immunity.
There were in addition certain aspects of this particular case where, so
it was argued, the court should not uphold the pleaded defence. First, it
D was submitted that since the document in suit has not been the subject of
any contested application for disclosure and adduction in evidence, but has
rather been disclosed voluntarily in the list of documents, admitted in the
pleadings and put in evidence without objection: so that no question of
violating embassy documents can arise. This is true enough, but the
conduct of the trial has lain in the hands of the defendant individual, not of
E the Government of the Emirates. No renunciation by the government of its
right to be free from the inspection of its affairs by the English court (if
indeed such a renunciation could be effective) is to be inferred merely from
the fact that it has taken no step to intervene: and in any event, I have not
founded my conclusion in favour of the defendant directly on article 24 of
the Vienna Convention, but have rather used it as a part of the general
background against which the considerations of public policy are to be
F assessed. Similarly, I do not regard it as conclusive that in this particular
instance no inquiry into the merits of the dispute will be required, since
there are no pleas of justification or qualified privilege; for it seems to me
that the decision by the court as to whether or not an action of this kind
should be entertained ought not to depend on a decision by the individual
parties as to the way in which they choose to contest it.

G Equally, I do not think it an answer that the defendant was not an
ambassador at the relevant time. This would indeed have been important if
the case were to be assimilated to the *Chatterton* line of authority, for as
Lopes L.J. observed in *Royal Aquarium and Summer and Winter Garden
Society Ltd. v. Parkinson* [1892] 1 Q.B. 431, 451, that kind of immunity
appears to attach to the person rather than the character of the document.
H However, for the reasons already stated I believe that the reverse is true
when questions of comity are involved, and if I am right in treating this as
the type of document which the English court ought not to admit as the
foundation of a suit, the formal position of the writer should not be
conclusive.

For these reasons therefore I would arrive at the same conclusion as
the judge, albeit by a rather different route. Since the matter in fact
proceeded to trial I would give effect to the conclusion by holding that the
document was subject to absolute privilege. Whether at an earlier stage the

court's unwillingness to enter on the matter could have been demonstrated by staying the proceedings need not now be discussed. (In this connection I should mention that neither party contended that the interlocutory proceedings before the master during 1983 had the result of creating an issue estoppel, or otherwise affecting the outcome of the trial itself).

In conclusion, I must draw attention to the waiver of diplomatic immunity contained in paragraph 7 of the defence which had been a source of concern in two respects, both arising from the defendant's dual capacity as head of the mission (which consequent authority to waive diplomatic immunity for all members of the mission, including himself) and as litigant (with consequent power to determine the shape of the issues before the court). First, because of the apparent inconsistency between the waiver of immunity and the assertion of absolute privilege. I say "apparent" because on reflection I do not consider that there is any real conflict between the two; since although both immunities derive ultimately from the same general concept of comity, the means by which this concept is put into effect are not indetical, and do leave room for a stance enabling the foreign sovereign at the same time to permit his representative to put himself formally in peril of a judgment, and yet to permit him also to raise a defence which will maintain the assertion that embassy transactions are not a proper subject for inquiry.

The second ground for hesitation was the form in which the waiver of sovereign immunity was expressed. I have no doubt that this was inappropriate. The defence was a document formulated on behalf of the defendant qua individual litigant, not ambassador, and was not the correct vehicle for a renunciation of the immunities belonging to the foreign sovereign. If my conclusion on the main issue had been that the appeal ought to be allowed, and judgment given for the plaintiff, it would have been for careful consideration whether the court of its own motion should make inquiries so as to satisfy itself that the defendant did indeed have authority to convey the waiver. In the event, however, the waiver has no potential effect on the outcome of the proceedings. Bearing in mind that the defendant was not an accredited diplomat at the time when the action was commenced, and that it proceeded to trial and judgment without any question being raised, I think it legitimate to allow the matter to rest.

For these reasons, therefore, I would dismiss the appeal.

CROOM-JOHNSON L.J. I have read the judgments of both Kerr and Mustill L.JJ. I agree with them and have nothing to add.

KERR L.J. The memorandum whose contents and publication form the basis of this action for libel was in every respect a "diplomatic" or "embassy" document in the sense that it appertained to the embassy in this country of a friendly sovereign state. It was the property of the embassy or of the foreign state. It was an inter-departmental memorandum on embassy paper addressed by one embassy official to another, both acting within the course of their official duties. Publication of its contents by or on behalf of the defendant took place only within the embassy and to its ministry of foreign affairs. And the contents of the document related to the plaintiff only in the context of matters which were of concern to the embassy, to the dignity of the state which it represented, and to their joint relations with H.M. Government. The fact that the contents may not have been of a high degree of importance to the foreign state in comparison with their seriousness for the plaintiff's reputation must be irrelevant to the status of

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A the document as such. Even without each and every of the attributes of the
document enumerated above—and I express no opinion about the point at
which the line falls to be drawn—there can be no doubt that the document
falls within article 24 of the Vienna Convention on Diplomatic Relations
which provides (Schedule 1 to the Diplomatic Privileges Act 1964): “The
B archives and documents of the mission shall be inviolable at any time and
wherever they may be.” As Mustill L.J. said at the beginning of his
judgment, this is a curious case. It is curious that a dispute arising out of a
document of this nature should have found its way into our courts. Since it
did, it is not surprising that this resulted from a curious combination of
circumstances. The document, or a copy of it, came into the possession of
the plaintiff. When he issued his writ, the defendant was not the
C ambassador. He had been the ambassador and knew that he would shortly
be re-appointed. In the interim he exercised the authority of head of
mission internally, to the knowledge of all concerned. He had neither
written nor dictated the memorandum. But he had discussed the problems
reflected in its contents in the course of his position as de facto head of
mission. He was therefore in a doubly ambivalent situation. First, he was
not the author of the memorandum. But when an action for defamation
was brought upon it, he felt that he must accept responsibility for it in the
D circumstances. Secondly, when he was then re-appointed to the post of
ambassador and his defence fell to be served, this expressly waived his
diplomatic immunity, for reasons and in circumstances which are unclear,
as mentioned below. At the same time, however, and more or less in the
same breath, he has maintained throughout, on various grounds and in
different ways, that an action founded upon this embassy document is not
E properly justiciable in our courts. This is no doubt a situation without
precedence in our jurisprudence. But in the upshot, because of this curious
combination of circumstances, it is necessary to decide as a matter of
principle whether or not this action is properly maintainable and should be
allowed to proceed, in which case our courts would have to adjudicate on
the issues raised by the contents and publication of this document.

F What would that involve in practice? In the normal course of
an action of this kind it must involve the truth or otherwise of
the allegations concerning the plaintiff; the circumstances in which these
allegations were made, for the purpose of seeking to establish a prima facie
defence of qualified privilege; and then no doubt the usual issue as to the
good faith or possible malice of the person responsible for them. Having
G regard to the contents of the document, the full ventilation and exposure
of these issues, and the decision of our courts upon them, would be bound
to intrude upon the internal policies and practices of this embassy, and
thereby reflect upon the United Arab Emirates in a manner which might
affect relations with this country.

However, the embarrassment for United Arab Emirates which could
result from the public discussion of the issues likely to be raised in this
particular case is not in itself any ground for deciding whether this dispute
H is properly justiciable in our courts. That question must be decided as a
matter of principle by reference to the nature and status of the document
on which the claim is based. But the likely consequences of justiciability
for the dignity of a foreign friendly state and its embassy in this country
illustrate the need for the application of a rule of public policy in order to
decide that question.

I share entirely the views of Mustill L.J. that the justiciability of the
dispute raised by this document cannot be determined by a process of

attempting to put the present case into one of the categories of related issues raised by earlier cases in different contexts in times when international relations may have been less sensitive. The present case is sufficiently unparalleled in our corpus juris to require an independent approach, undeterred by the traditional reluctance of our courts to create new applications of rules of public policy. In that connection, and in the same way as Mustill L.J., I have reached the clear conclusion that the broad concept of international comity, in combination with the settled rule within that concept expressed by the "inviolability" of diplomatic documents, require us to hold that this dispute is not justiciable in our courts. In the context of an action for defamation this consequence can be expressed by holding that the publication of this document in the circumstances of this case is protected by absolute privilege; and I so hold. But the appropriate terminology is secondary to the non-justiciability of this dispute as a matter of principle. In that connection I think that it is irrelevant at what point and by what procedural means the objection to its justiciability is raised; viz. whether by an application to strike out the action, or by objecting to the production or admissibility of the document on discovery or in evidence, or by a defence of absolute privilege. The principles of comity and "inviolability" must be the same in all cases, at any rate where the action is founded upon the contents and publication of an embassy document.

Despite the novelty of the issue raised by this case, it seems to me that this conclusion is consistent with the general tenor of the authorities to which we were referred and not inconsistent with any of them. I derived the greatest direct assistance from the learned discussion of this question in the judgment of Bissonnette J. in the Supreme Court of Quebec in *Rose v. The King* [1947] 3 D.L.R. 618, with which the other members of the court agreed. The facts were briefly as follows. The defendant was a Canadian subject who had been convicted on charges of conspiracy with a group of Russian and Canadian subjects to violate the provisions of the Official Secrets Act 1939 in various ways which were prejudicial to the safety of Canada. Part of the evidence against him was contained in documents which Gouzenko, a cypher clerk in the Russian embassy in Ottawa, had stolen from the embassy files of the Russian Military Attaché, Zabotin, the central figure in a spy ring, which Gouzenko had handed over to the Royal Canadian Mounted Police. The documents were produced by Gouzenko as a witness at the trial and formed an important part of the evidence for the prosecution. The defendant Rose thereupon claimed that the documents were inadmissible on the ground that they were privileged and immune from use in any legal proceedings. Bissonnette J. summed up this argument, at p. 639:

"He maintains, and I feel well seized of his argument, both in his statement and at the hearing, that immunity, being an absolute privilege resulting from *jus gentium*, every court of justice, as soon as the matter sub judice permits establishing that this privilege is put in peril, is, *erga omnes*, without jurisdiction or competence to hear or to receive the deposition of a diplomatic agent and to take cognizance of documents which he offers in evidence, without the consent of the state that he represents."

The judgment continues with a lengthy and detailed review of the principles of international law relevant to this argument, with copious citations from text books of high authority. The fact that most of these were French is

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A irrelevant, since the principles are those of *jus gentium*, and it was expressly pointed out that there was no relevant Canadian statute which affected the issue. The judge's conclusion that diplomatic documents were "inviolable" anticipated the use of the same term in the Vienna Convention of 1961, as do many passages from his judgment. The interesting point for present purposes, however, is the width of his conclusion about the concept of inviolability. He said, at p. 646:

B "International law creates a presumption of law that documents coming from an embassy have a diplomatic character and that every court of justice must refuse to acknowledge jurisdiction or competence in regard to them."

C This conclusion is supported by *Denza on Diplomatic Law* (1976), (published by Oceana Publications Inc. and the British Institute of International and Comparative Law) in the author's commentary on article 24 of the Vienna Convention, at p. 110, to which we were also referred.

D In *Rose v. The King* [1947] 3 D.L.R. 618 Bissonnette J. went on to hold that the immunity of diplomatic documents from use in legal proceedings was not absolute and that it did not avail the defendant in that case. He held that it could not be invoked by a Canadian citizen in litigation between his government and himself; nor when the documents revealed an abuse of diplomatic privilege by the foreign state which constituted a threat to the safety of the receiving state; nor—semble and quaere—in cases where no one connected with the foreign state or its embassy claimed any privilege for the documents. But none of these considerations applies here. Having read and re-read the judgment of Bissonnette J. I find that it fully supports my instinctive conclusion that the contents and publication of this embassy document must be treated as immune from the process of our courts for the purposes of an action such as the present. It falls within the concept of "inviolability" in the wide sense stated above, and no possible exception to that concept can be of any relevance in the present case.

F I equally agree with the remarks of Mustill L.J. expressing doubts about the circumstances concerning the defendant's waiver of diplomatic immunity. These involve two aspects which need to be emphasised. First, there is no inconsistency in principle between a waiver of the diplomatic immunity of a defendant and the assertion of a claim for immunity of a diplomatic or embassy document whose contents are sought to be introduced into the proceedings against him. Admittedly, the co-existence of the waiver and of the assertion is extraordinary in the present case, because every issue raised against the defendant, whose personal immunity has been waived, stems from the contents and publication of a document whose immunity has been asserted in the same breath. But I cannot see that this makes any difference in principle. It merely produces an extraordinary and apparently unprecedented situation. The waiver of the immunity from suit of the defendant does not destroy the claim for immunity of the document, since this is justified by the character of the document, irrespective of the defendant's submission to the court's jurisdiction against him personally.

H The second aspect is that the fact and circumstances of the waiver of the defendant's immunity are perplexing and unsatisfactory. It is elementary that only the sovereign can waive the immunity of its diplomatic representatives. They cannot do so themselves. For that reason alone the defendant's defence filed in the proceedings against him is not an

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appropriate vehicle for the manifestation of the sovereign's decision to waive the defendant's immunity. Moreover, a waiver which only purports to be manifested in this manner gives rise to doubts as to whether it really represents the act and will of the sovereign. In the present case I have remained throughout in the gravest doubt about the knowledge and understanding of the sovereign, the United Arab Emirates, concerning the issues and perhaps even the pendency of these proceedings. But, in the same way as Mustill L.J., I do not see that any purpose would be served at this stage by taking these aspects any further. I would only add that if I had felt any doubt about the correctness of the judge's decision in favour of the defence of absolute privilege, then I would—for myself—not have been willing to reverse his decision and allow this action to proceed without having made an attempt, through the Foreign and Commonwealth Office, to ascertain the attitude of the United Arab Emirates to this action.

I agree that this appeal should be dismissed.

Appeal dismissed.

Defendant's costs of appeal.

Costs below undistributed.

Leave to appeal refused.

Solicitors: McKenna & Co.; Fox & Gibbons.

8 April 1987. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Templeman and Lord Oliver of Aylmerton) dismissed a petition by the plaintiff for leave to appeal.

A. R.

[COURT OF APPEAL]

ADDISON v. BABCOCK F.A.T.A. LTD.

1987 Feb. 17;
March 5

Sir John Donaldson M.R.
Ralph Gibson and Bingham L.JJ.

Employment—Unfair dismissal—Compensation—Assessment—Salary paid in lieu of notice and sum paid under employers' redundancy scheme—Whether "just and equitable" to deduct payments from compensatory award—Employment Protection (Consolidation) Act 1978 (c. 44), s. 74(1)(2)(b)

The employee was dismissed for redundancy on 20 July 1984 and was given a sum of money which included a payment of wages in lieu of notice of £704, a statutory redundancy payment of £703.95 and a payment under the employers' own redundancy scheme of £845. On 7 January 1985, the employee found new employment. In August 1985 an industrial tribunal held that the employee had been unfairly dismissed and they assessed compensation in the knowledge that on 30 September the

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employers' factory would close and all the remaining workforce would be made redundant. They calculated the compensatory award according to the provisions of section 74(1) of the Employment Protection (Consolidation) Act 1978¹ and assessed his loss of earnings between 20 July 1984 and 30 September 1985, deducting from it the sum of £704, the payment in lieu of notice. The tribunal also deducted the payment of £845 from the total award.

On appeal by the employee against the amount of the compensation, the appeal tribunal held, *inter alia*, that the five weeks' wages in lieu of notice which the employee in fact received should not have been deducted in assessing the compensatory award under section 74(1) and that, moreover, he should be compensated for the difference between the wages in lieu of notice he actually received and the six weeks' wages in lieu of notice he would have received if instead of being unfairly dismissed on 20 July 1984 he had been made redundant on 30 September 1985, which difference amounted to £140.

On appeal by the employers:—

Held, allowing the appeal, that in considering in the light of good industrial practice what was just and equitable compensation to be awarded for unfair dismissal under section 74(1) of the Act of 1978, a tribunal should take into account and give the employer credit for any payments in lieu of wages and other benefits but not those wages earned by the employee from alternative employment during the period covered by the payment in lieu; that the industrial tribunal should have increased the compensation by the amount which the employee would have received in lieu of notice if he had been made redundant on 30 September 1985 less the amount of money the employee actually earned during those six weeks from the alternative employment which he had in fact found; and that the order of the appeal tribunal should be varied accordingly (post, pp. 134E—135B, G—136D, 143A—D).

Norton Tool Co. Ltd. v. Tewson [1973] 1 W.L.R. 45, N.I.R.C. and dictum of Sir Hugh Griffiths in *Hilti (Great Britain) Ltd. v. Windbridge* [1974] I.C.R. 352, 357, N.I.R.C. approved.

Finnie v. Top Hat Frozen Foods [1985] I.C.R. 433, E.A.T. disapproved.

T.B.A. Industrial Products Ltd. v. Locke [1984] I.C.R. 228, E.A.T. considered.

Decision of the Employment Appeal Tribunal [1987] I.C.R. 45 reversed in part.

The following cases are referred to in the judgment:

Blackwell v. G.E.C. Elliott Process Automation Ltd. [1976] I.R.L.R. 144, E.A.T.

Clydebank Co-operative Society Ltd. v. Mackie (unreported), 22 August 1983, E.A.T.

Everwear Candlewick Ltd. v. Isaac [1974] I.C.R. 525; [1974] 3 All E.R. 24, N.I.R.C.

Finnie v. Top Hat Frozen Foods [1985] I.C.R. 433, E.A.T.

Hilti (Great Britain) Ltd. v. Windridge [1974] I.C.R. 352, N.I.R.C.

Norton Tool Co. Ltd. v. Tewson [1973] 1 W.L.R. 45; [1972] I.C.R. 501; [1973] 1 All E.R. 183, N.I.R.C.

Stepek (J.) Ltd. v. Hough (1973) 8 I.T.R. 516, N.I.R.C.

T.B.A. Industrial Products Ltd. v. Locke [1984] I.C.R. 228, E.A.T.

Tradewinds Airways Ltd. v. Fletcher [1981] I.R.L.R. 272, E.A.T.

¹ Employment Protection (Consolidation) Act 1978, s. 74(1): see post, p. 125c.

The following additional case was cited in argument:

Adda International Ltd. v. Curcio [1976] I.C.R. 407; [1976] 3 All E.R. 620, E.A.T.

A

APPEAL from the Employment Appeal Tribunal.

The employee, Michael Addison, applied to an industrial tribunal for compensation for unfair dismissal by his employers, Babcock F.A.T.A. Ltd. The tribunal, in awarding compensation for unfair dismissal, required the employee to give credit for certain payments made by the employers. The employee appealed to the Employment Appeal Tribunal on the ground, *inter alia*, that the industrial tribunal had erred in law in requiring him to give credit for payment of salary in lieu of notice, when assessing his compensatory award in accordance with section 74(1) of the Employment Protection (Consolidation) Act 1978, and in deducting a payment of £845 payable under the employers' own redundancy scheme from the total award. The Employment Appeal Tribunal [1987] I.C.R. 45, on 7 July 1986, allowed the employee's appeal by varying the award of compensation.

B

The employers appealed on the grounds that the appeal tribunal had erred in law (1) in deciding that (a) in calculating the compensatory award under section 74 of the Employment Protection (Consolidation) Act 1978, an industrial tribunal should not deduct from the amount to be awarded to the employee sums already received by the employee from the employer as pay in lieu of notice, (b) therefore the sum of £704 paid by the employers to the employee in July 1984 as pay in lieu of notice should not have been deducted from the compensatory award under section 74, and (c) the employers should pay a further sum of £140 to the employee in relation to pay in lieu of notice which would have been received by the employee after September 1985 had he not been unfairly dismissed in July 1984; and (2) in failing to decide that (a) the sum of £704 had been correctly deducted from the compensatory award by the industrial tribunal in that the payment of that sum in July 1984 had reduced the loss suffered by employee in respect of the unfair dismissal and it was just and equitable in all the circumstances to deduct that sum, and (b) the industrial tribunal should have awarded the employee an additional £240 in the compensatory award.

C

D

E

F

The facts are stated in the judgment of Ralph Gibson L.J.

David Pannick for the employers.

Andrew Hogarth for the employee.

G

Cur. adv. vult.

5 March. The following judgments were handed down.

RALPH GIBSON L.J. This is an appeal by Babcock F.A.T.A. Ltd., the employers, from a decision of the Employment Appeal Tribunal given on 7 July 1986 whereby they increased a compensatory award made by the industrial tribunal upon a claim by the employee, Mr. Addison, based upon unfair dismissal. The amount in issue is not large but the points of principle which have been discussed are of importance. They concern the proper treatment in the calculation of a compensatory award of sums paid or payable by employers "in lieu of notice."

H

3 W.L.R.

Addison v. Babcock F.A.T.A. Ltd. (C.A.)

Ralph Gibson L.J.

A The employee was dismissed in July 1984 on the ground of redundancy. It was later determined that his dismissal was unfair. The industrial tribunal had to assess the proper compensatory award. The employee had been paid the sums calculated to be due by the employers who, in dealing with the grave misfortune of redundancy, were both generous and careful in following good industrial practice. The sums paid to the employee (rounding out the figures) were as follows.

B Redundancy payment—5 weeks at £140.79—£704; payment in lieu of notice—5 weeks at £140.79—£704; ex gratia payment—6 weeks at £140.79—£845. The £845 was described as company severance pay.

C Before the industrial tribunal and at both stages of appeal the facts have been to a large extent not in issue. It was common ground that if he had not been dismissed on 20 July 1984, the employee would have been dismissed on the ground of redundancy on 30 September 1985 when the employers made the entire workforce redundant. The task of the industrial tribunal was therefore to calculate, pursuant to section 74(1) of the Employment Protection (Consolidation) Act 1978:

D “such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal . . .”

and that loss would include the earnings and benefits which he would have been paid and which he might reasonably be expected to have received but for the dismissal in 1984.

E The award of the industrial tribunal was made up as follows: (i) Basic award: after deduction of the redundancy payment already made nothing was due. (ii) Total loss of earnings from 20 July 1984 to 19 August 1985, the date of the hearing. The employee obtained new employment on 7 January 1985. On the same date the wages which he would have been earning with the employers were increased. For the period from 20 July 1984 to 7 January 1985 the loss was 24 weeks at £125.23, a total of £3,005. From 7 January 1985 to 19 August 1985 the loss was 32 weeks at £132.74, a total of £4,247. From that total gross loss of £7,252 the industrial tribunal deducted the actual earnings of the employee after 7 January 1985 in the total sum of £2,969, leaving a net loss of £4,283. In addition the industrial tribunal deducted £704, the amount paid to the employee as five weeks' pay in lieu of notice calculated from 20 July 1984. After deducting that sum the award for loss of earnings was £3,579. (iii) For future loss for the six weeks from 19 August 1985 to 30 September 1985, when the employee would in any event have been made redundant, the industrial tribunal awarded £240, being six weeks at the net loss, or the difference between the earnings he would have been receiving from Babcock F.A.T.A. and his actual earnings in his new job. (iv) The industrial tribunal calculated sums for loss of B.U.P.A. health insurance cover, £233; loss of statutory industrial rights, £50; and loss of pension rights, £200: a sum of £483 in all. (v)

H The industrial tribunal then deducted from the total award the sum of £845 which had been paid to the employee as “company severance pay,” by way of ex gratia payment, as set out above. The reason for making that deduction given by the industrial tribunal was that there could be no claim to an ex gratia payment and the receipt of it by the employee in September 1985 was speculative.

Mr. Addison appealed to the Employment Appeal Tribunal. He contended that it was wrong in law to deduct the £704 which had been

paid to him in lieu of notice, and wrong to deduct the £845 which he had received as an ex gratia payment. He also complained that the industrial tribunal had failed to increase the awards for redundancy and for wages in lieu of notice by reference to the extra year of work which the employee would have achieved with the employers if he had been allowed to stay in their employment until 30 September 1985. The sums would have been increased by one week's earnings. It is to be noted that the employee did not claim that he should receive both the £704 which the industrial tribunal had deducted and the £844 which he contended he would have received as wages in lieu of notice on 30 September 1985 if he had still been in the employment of the employers.

Before the appeal tribunal the area of dispute concerned two parts of the award. It is convenient to deal first with the deduction of £845 which the industrial tribunal made from the sum calculated as the net loss of earnings between 20 July 1984 and 30 September 1985 in respect of the £845 paid to the employee as an ex gratia payment under the company's severance pay scheme. Mr. Pannick submitted that the deduction could be justified, but the appeal tribunal rejected that submission and held that the £845 should not have been deducted. The employers have not appealed against that part of the order of the appeal tribunal and, in my view, they were right not to pursue the point.

The employers had acknowledged that if the employee had remained in their employment he would have been paid the sum of £845 as an ex gratia payment under the company's severance pay scheme precisely as the remaining staff were going to receive the appropriate sum under that scheme on 30 September 1985. That sum was accordingly a "benefit which he might reasonably be expected to have had but for" the unfair dismissal in July 1984 and it mattered not, on the facts of this case, that there was no enforceable legal obligation to pay under the scheme. He was paid the sum of £845 in July 1984. He would have received at least that sum in September 1985 under the same scheme. Therefore there was no reason to deduct £845 from his net loss of earnings.

There was in issue a sum of £210 by which the employee claimed that his ex gratia payment would have been increased under the company's severance pay scheme if he had stayed to 30 September 1985. The appeal tribunal held that in principle he was entitled to the amount claimed subject (in default of agreement) to proof of the figure; and they directed that, if need be, the case be remitted to the industrial tribunal for the issue of amount to be resolved. There has been no attempt to disturb that part of the order of the appeal tribunal.

The other area of dispute before the appeal tribunal was the proper handling of the sums paid or payable to the employee "in lieu of notice." That has been the live issue in this court. Before coming to the judgment of the appeal tribunal, it should be noted that the phrase "wages in lieu of notice" is a convenient and well understood phrase but it is commonly applied to a variety of circumstances. In fact in this case notice was given and wages were paid over the period of notice: by letter of 19 July 1984 the employee was told that his "official date for calculation purposes" would be 24 August 1984, that is to say, after expiry of the five weeks' notice. He was also told that he would not be required to work after 20 July 1984. He was paid in advance for the period of notice. Throughout this case the parties have been content to treat the employment as terminating on 20 July 1984. Nothing turns on that point in the circumstances of this case.

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Addison v. Babcock F.A.T.A. Ltd. (C.A.)

Ralph Gibson L.J.

A It was contended for the employers that the deduction of £704 paid
for wages in lieu of notice was correct because the industrial tribunal
had calculated the loss of wages from 20 July and not from 24 August
when the five weeks' period of notice expired. The compensatory award
was required by section 74 to be based on the loss sustained and the
employee could not recover for the loss of wages which he had been
B paid in full. The right way to deal with the benefit of wages in lieu of
notice which, as the employers conceded, the employee could reasonably
be expected to have received on 30 September 1985 was to allow a sum
of six weeks instead of five weeks (by reason of the notional further
year's employment) and to deduct from that sum what he was in fact at
that time then earning so as to leave a claim of six times £40 or £240 in
all. The appeal tribunal [1987] I.C.R. 45 rejected that argument and
C ruled that there should be added to the award calculated by the
industrial tribunal the sum of £844, representing the £704 which had
been deducted and an additional £140 for the extra week.

D It seems to me that there is some risk of confusion in the process of
correcting deductions by adding back. In order that we may receive the
assistance of counsel in ensuring that the ultimate order of this court is
correct, I will set out what I understand the full award would be if based
upon the appeal tribunal's order:

(i) Loss of earnings from 20 July 1984 to 19 August 1985 ...	£7,252
Less actual earnings	£2,969
	<hr/>
	£4,283
(ii) Future loss: 6 weeks at £40 to 30 September 1985	£240
(iii) Loss of B.U.P.A. benefit, industrial rights, pension	£483
(iv) Additional sum for statutory redundancy	£140
(v) Additional sum for payment in lieu of notice	£140
	<hr/>
TOTAL	£5,286

F The £704 and £845 which the appeal tribunal ruled should not be
deducted do not separately appear in that calculation because I have
taken the figures for loss of earnings in the full amount without those
deductions which the industrial tribunal had made. It is further to be
noted that the amount for one week's wages added for the notional
payments in September 1985 is at the gross rate of pay earned in July
G 1984. It was not sought on this appeal to vary those amounts by
reference to any increase in earnings after January 1985.

H It seems to me that the appeal tribunal approached the matter of the
payment in lieu of notice as an issue to be decided by reference to a
special principle of law. They referred to section 74(1) of the Employment
Protection (Consolidation) Act 1978 and noted that the question of
deduction of payments in lieu of notice had been the subject of a
number of decisions. They referred first to *T.B.A. Industrial Products*
Ltd. v. Locke [1984] I.C.R. 228 and noted that in that case Browne-
Wilkinson J., giving the judgment of the appeal tribunal, had said, at
p. 231:

"There cannot be any circumstances in which the . . . employer is
not to be given credit for the payments he has made to the
employee on account of his claims for wages and other benefits."

They referred next to *Finnie v. Top Hat Frozen Foods* [1985] I.C.R. 433, a decision of the appeal tribunal sitting in Scotland, in which Lord McDonald followed *Clydebank Co-operative Society Ltd. v. Mackie* (unreported), 22 August 1983, a decision of the appeal tribunal sitting in Scotland, in holding that a payment in lieu of notice need not be deducted from the compensatory award. Faced thus with two apparently conflicting decisions of the Employment Appeal Tribunal, they decided that they should follow *Finnie v. Top Hat Frozen Foods* [1985] I.C.R. 433 rather than what was said in *T.B.A. Industrial Products Ltd. v. Locke* [1984] I.C.R. 228 and concluded [1987] I.C.R. 45, 50:

“However, for the reasons set out by Lord McDonald in *Finnie v. Top Hat Frozen Foods* [1985] I.C.R. 433, we believe that the approach to section 74 and the phrase ‘just and equitable’ have to be looked at, not in the light of common law principles but in the light of good industrial practice, even though the duty to mitigate is specifically dealt with by section 74(4). Accordingly, if the decision in *T.B.A. Industrial Products Ltd. v. Locke* [1984] I.C.R. 228 is in conflict with that in the *Finnie* case, we prefer the decision of the *Finnie* case and propose to follow it. We do this first because we believe it accords with good industrial practice; secondly because comity requires that similar principles should be adopted both in the English and the Scottish divisions of this appeal tribunal; and thirdly because in the sphere of industrial relations it is more important that the law should be clear than clever.”

The reasoning of the appeal tribunal in this case, and in the cases cited appears to me to have proceeded thus. The decision in *Clydebank Co-operative Society Ltd. v. Mackie* (unreported), 22 August 1983 was based upon or supported by the view of the lay members that “in good industrial practice the statutory entitlement to wages in lieu of notice is regarded as something to which an employee is automatically entitled, irrespective of any other payments which may be due.” In *Finnie’s* case the fact that the entitlement was not statutory but contractual was held to be no ground of distinction. If an employee is paid wages in lieu of notice and is lucky enough to get new employment during the period of notice he is not required to pay back or give credit for the wages earned from the new employer. If an employee is not so fortunate as to get new employment during the period of notice he should be entitled to have his statutory, or contractual, entitlement to wages in lieu of notice regarded as a matter apart and to have compensation for unfair dismissal calculated irrespective of it. The lay members of the appeal tribunal in the present case were in full agreement with the view expressed as to good industrial practice by the appeal tribunal in the two Scottish cases and that “management/union negotiations would be prejudiced if this well recognised principle were departed from.” Therefore there should be no deduction of the £704 and there should be added the additional sum of £140 by which the sum payable for wages in lieu of notice would have been increased if the employee had been dismissed for redundancy on 30 September 1985.

It seems to me that in this process of reasoning there have been run together, as if for these purposes indistinguishable, earnings from a new employer during a period of notice and wages paid or payable by the old employer in respect of the period of notice. In the result, in my

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A judgment, the conclusion of the appeal tribunal on this point was wrong in law for the following reasons.

In the absence of an agreement, express or implied, to the contrary effect it seems to me to be clear that the respondent employers are to be given credit for all payments they have made to the employee on account of claims for wages and other benefits. In *Hilti (Great Britain) Ltd. v. Windridge* [1974] I.C.R. 352 the dismissed employee was paid a sum of £239.52 which was expressed to be four weeks' wages in lieu of notice. The employee was, in fact, entitled to six weeks' notice. However, £239.52 represented £13.20 in excess of his net wages for the full six weeks. It was held by the National Industrial Relations Court that the excess was deductible from the balance of the compensation assessed. Sir Hugh Griffiths, presiding in the court, said, at p. 357:

C "Miss Alton has argued that there should be no deduction from the £239.52 [the four weeks' gross pay]—her first argument is that it was paid under a mistake of law and therefore it does not fall to be deducted in the calculations. This court has said more than once that it wishes to eschew any legalistic approach to the resolution of industrial problems. The industrial tribunal is charged with doing that which is just and equitable between the parties. If an employee seeks to recover a large sum of money, it is neither just nor equitable to disregard such sums as he has in fact received from the employer consequent upon his dismissal. Accordingly the whole sum paid by the employer consequent upon the dismissal should be brought into account in doing justice between the parties."

E Sir John Brightman, giving the judgment of the National Industrial Relations Court in *Everwear Candlewick Ltd. v. Isaac* [1974] I.C.R. 525, cited that passage and relied upon it. I do not think that that basis of approach has been doubted since it was first stated and I would hold it to be correct.

F By section 74(1) the industrial tribunal is directed to assess the amount of the compensatory award "In such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal;" and, in so doing, to apply the common law rule concerning the duty to mitigate. That rule requires a dismissed employee to take reasonable and proper steps to obtain other employment. It is not open to the industrial tribunal or the Employment Appeal Tribunal, in my judgment, to devise by decision a rule of law which conflicts with the statutory provisions whether or not based upon or supported by a principle of good industrial practice.

H The origin of the principle dealing with payment of wages in lieu of notice is the decision of the National Industrial Relations Court (Sir John Donaldson, President, Mr. R. Boyfield and Mr. R. E. Griffiths) in *Norton Tool Co. Ltd. v. Tewson* [1973] 1 W.L.R. 45. The judgment dealt with a number of important questions in the then new system of law applied by industrial tribunals. So far as concerns payment of wages in lieu of notice, the relevant facts were that the employee, who was employed at a net weekly wage of £25.60, was summarily dismissed after 11 years' employment. The industrial tribunal for compensation for unfair dismissal awarded £250 compensation, which included his four weeks' lost wages whilst he was unemployed amounting to $4 \times £25.60 = £102.40$. On an appeal and cross-appeal by the employers and employee

the court was requested by the parties, in the event that either appeal or cross-appeal should be allowed, to substitute its own award of compensation. The statutory provisions then in force in section 116(1) and (2) of the Industrial Relations Act 1971 were essentially the same as those now contained in section 74(1), (2) and (4) of the Act of 1978. Sir John Donaldson, after reference to the statutory provisions, continued, at pp. 49–50:

“The Contracts of Employment Act 1963, as amended by the Act of 1971, entitles a worker with more than ten years’ continuous employment to not less than six weeks’ notice to terminate his employment. Good industrial practice requires the employer either to give this notice or pay six weeks’ wages in lieu. The employee was given neither. In an action for damages for wrongful, as opposed to unfair, dismissal he could have claimed that six weeks’ wages, but would have had to give credit for anything which he earned or could have earned during the notice period. In the event he would have had to give credit for what he earned in the last two weeks, thus reducing his claim to about four weeks’ wages. But if he had been paid the wages in lieu of notice at the time of his dismissal, he would not have had to make any repayment upon obtaining further employment during the notice period. In the context of compensation for unfair dismissal we think that it is appropriate and in accordance with the intentions of Parliament that we should treat an employee as having suffered a loss in so far as he receives less than he would have received in accordance with good industrial practice. Accordingly, no deduction has been made for his earnings during the notice period. We have no information as to whether the £25·60 per week is a gross or a take-home figure. The relevant figure is the take-home pay since this and not the gross pay is what he should have received from his employer. However, neither party took this point and we have based our assessment of this head of loss on six weeks at £25·60 per week or £153·60. The employee drew £3 unemployment benefit for a short period, but we were not asked to make any deduction for this and have not done so. Finally, we have taken no account of the extent to which the employee’s income tax liability may be reduced by his period of unemployment, since we consider that the sums involved will be small and that such a calculation is inappropriate to the broad, common sense assessment of compensation which Parliament contemplated in the case of unfair dismissal of a man earning the employee’s level of wages.”

It is relevant to add that, earlier in the judgment, Sir John Donaldson, after reference to section 116 of the Act of 1971, pointed out that the object was to compensate, and compensate fully, but not to award a bonus. The principle there stated has been applied in many cases. In *Everwear Candlewick Ltd. v. Isaac* [1974] I.C.R. 525, after reference to *Norton Tool Co. Ltd. v. Tewson* [1973] 1 W.L.R. 45, to *J. Stepek Ltd. v. Hough* (1973) 8 I.T.R. 516 and to *Hilti (Great Britain) Ltd. v. Windridge* [1974] I.C.R. 352 mentioned above, Sir John Brightman said, at pp. 527–528:

“The principle behind these three cases is clear. If an employee is unfairly dismissed without due notice and without pay in lieu of notice, he is *prima facie* entitled to compensation equal to his net

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- A pay for the proper period of the notice. No deduction is to be made for anything which the employee may earn elsewhere, for example, from another employer, during the period for which he should have received notice. If an employee is dismissed without due notice but receives a sum which is equal to his pay for a shorter period than the requisite notice, that sum is to be taken into account in the
- B sense that the employee will not receive compensation for loss of wages during that (short) period, but will receive compensation for loss of wages during the balance of the proper period of notice, and no deduction is to be made for anything which the employee earns elsewhere during the requisite period of notice. If an employee is dismissed without due notice but is given by his employer a sum which actually exceeds his net pay for the due period of notice, he
- C obviously receives no compensation for loss of wages during the period of notice because he has lost none, but he is bound to bring into account any additional sum which has been paid to him by his former employer. We underline the words 'by his former employer.' The position would be different if during the period of due notice he had received money from another employer."
- D There was a departure from that principle in *Tradewinds Airways Ltd. v. Fletcher* [1981] 1 R.L.R. 272. In that case the employee was entitled to 12 weeks' notice: he received no payment in lieu of notice. He obtained alternative employment during the notice period. The industrial tribunal awarded his loss of wages for the full weeks of the notice period without requiring him to bring into account his earnings from his new employment. The appeal tribunal reversed the decision of
- E the industrial tribunal. After reference to the decision in *Norton Tool Co. Ltd. v. Tewson* [1973] 1 W.L.R. 45, which had been treated as laying down as a rule of law that loss of wages during the notice period was to be considered an irreducible minimum to which the employee is invariably entitled, the appeal tribunal said that, if the National Industrial Relations Court intended to lay that down as a rule of law, they were
- F wrong to do so because the whole law on the matter was contained in the provisions of the statute. In *T.B.A. Industrial Products Ltd. v. Locke* [1984] 1 C.R. 228, to which reference has already been made, Browne-Wilkinson J., giving the judgment of the appeal tribunal, declined to follow the decision in *Tradewinds Airways Ltd. v. Fletcher* [1981] 1 R.L.R. 272 and said [1984] 1 C.R. 228, 233-234:
- G "the decision . . . is quite inconsistent with the earlier cases. We have to decide which authority to follow. In the realm of industrial relations (where settlement by negotiation must be the prime objective) it is even more undesirable than usual that there should be conflicting decisions. If we were satisfied that the decision in the *Norton* line of cases was wrong in principle or, due to changes in industrial relations practice, had ceased to be appropriate, we would
- H say so but suggest that the parties should correct the matter in the Court of Appeal rather than produce conflicting authority in this tribunal. But in our judgment the line of authorities stemming from the *Norton* case is not unsound in principle and there has been no change in the law or practice which merits a departure from it. There is no doubt that in assessing compensation under section 74 of the Act of 1978 the industrial tribunal in deciding what compensation is just and equitable has to have regard to the loss

sustained by the employee in consequence of the dismissal. In order to ascertain that loss, one has to discover what the employee would have received if he had not been unfairly dismissed. This appeal tribunal in the *Tradewinds* case had regard to what, as a matter of contract and the common law remedy for breach of contract, the employee would have got. At common law there is no doubt that the employee is bound to mitigate his loss by seeking alternative employment during the notice period and, if successful, his damages for breach of contract are reduced by the amount of his earnings during the notice period from his new employment. The *Tradewinds* case therefore identifies this as his loss. In making exactly the same assessment (i.e. the loss suffered by the employee) the *Norton* line of cases starts from a different premise, i.e. that the employer would act not only in accordance with his contractual duties but also in accordance with good industrial practice which would require (in the absence of gross misconduct) that an employee who is summarily dismissed should at the time of his dismissal be paid a payment in lieu of notice covering the notice period. If such good industrial practice is adopted, there is no right for the employer to recover any part of it from the ex-employee if, during the notice period, he obtains alternative employment. Therefore, on this basis the loss suffered by the employee is the full amount of his wages during the notice period without any deduction for wages from the alternative employment."

For my part I would uphold the principle established by the National Industrial Relations Court in the *Norton* case and followed since in the Employment Appeal Tribunal but, in my judgment, it is necessary to clarify the extent to which it states a rule of law. Mr. Pannick invited the court to reject the *Norton* principle if and so far as it could be held to apply so as to entitle the employee to recover any sum for wages in lieu of notice in addition to loss of earnings caused by the dismissal. I will come later in this judgment to the application of the principle to the facts of this case.

I would uphold the principle, first, because it is not shown to have worked unfairly or in a manner contrary to the intention of Parliament in the limited form in which it was stated and applied in the cases cited. The first step in the reasoning of the court in the *Norton* case is that when a payment is made of wages in lieu of notice at the time of the dismissal the employee would not have to make any repayment upon obtaining further employment during the notice period. That is in accordance with the normal intention of both sides when such a payment is made without stipulation of any special terms. The next step in the reasoning is, in my respectful opinion, of a different nature: because good industrial practice requires that the employer either give the notice or pay six weeks' wages in lieu, the employee, who is given neither notice nor payment, should not be worse off and therefore he also should not have to give credit for wages earned from another employer during the period of notice notwithstanding the direction that the rule as to the duty to mitigate shall be applied. I do not doubt that the industrial practice referred to was a good practice and right to be applied in a case such as *Norton Tool Co. Ltd. v. Tewson* [1973] 1 W.L.R. 45 and such a case must be typical of a very large proportion of the cases coming before industrial tribunals. In such a case the employer,

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A if he was acting fairly, would pay the sum due in lieu of notice. It is usually convenient for the employer if the dismissed employee leaves the premises and if the wages for the whole period are paid in advance; and it is convenient for the employee to be released to look for other work; and the immediate receipt of wages for the period of notice, coupled with the chance of getting other employment during that period, may soften a little the blow of losing employment. In the *Norton* case the period of notice was six weeks. In *J. Stepek Ltd. v. Hough*, 8 I.T.R. 516, where payment in lieu of wages was not made in full, the period was eight weeks. Not surprisingly there was no attempt in these cases to show that the circumstances in which full payment was not made justified or explained departure from the normal good industrial practice. It seems to me, however, that circumstances may arise in which, having regard to the length of notice required, and the known likelihood of the employee getting new employment within a short period of time, or for other sufficient reason, an employer may show that a payment less than the wages due over the full period of notice did not offend good industrial practice. The employer might tender two months' pay in respect of a six-month period of notice and ask to be informed if the expected new job was for any reason not obtained. I am unable to accept that any rule of law exists which requires that in all circumstances, irrespective of the terms upon which a payment in lieu of notice was made, and of any justification for not making payment in full of wages in advance for the full period of notice, the employee is entitled in claiming a compensatory award under section 74 to disregard wages earned from another employer during the notice period. The number of cases in which an employer will be able, in the view of an industrial tribunal, to justify departure from the general practice will probably be small. But in my view no rule of law exists to prevent the industrial tribunal from considering such a case or from giving effect to it if it is established.

Next, and before dealing with the extension of the principle which has been effected by the appeal tribunal by the decisions in *Finnie v. Top Hat Frozen Foods* [1985] I.C.R. 433 and in this case, it is necessary to consider the limits of the principle. The employee is to be treated as having suffered a loss in so far as he recovers less than he would have received in accordance with good industrial practice. As Mr. Pannick submitted in this court, it seems to me that the principle, when applicable on the basis of good industrial practice, secures to the dismissed employee the opportunity to earn during the period of notice without giving credit for earnings from another employer against wages due during the period of notice. It does not secure to him anything in addition to the amount of wages due during the period of notice: he can only get the extra if he gets the new job and thereby earnings from another employer. If the employer has paid the wages due in lieu of notice at the time of dismissal, the employer has complied with good industrial practice. If the employee does not get employment during the period of notice, no principle of good industrial practice can secure to the employee any further payment by way of lost wages in respect of the period of notice: he has received the wages for that period and if he is to recover the same amount again it must be by reference to some rule of law outside the provisions of the Act of 1978 and in my view no such rule exists.

The next step in the reasoning of the appeal tribunal was that, if an employee is not so fortunate as to get new employment during the period of notice, he should be entitled to have his statutory or contractual entitlement to wages in lieu of notice regarded as a matter apart and that compensation for unfair dismissal should be calculated irrespective of that entitlement: the principle was stated in *Clydebank Co-operative Society Ltd. v. Mackie* (unreported), 22 August 1983:

“an employee dismissed with wages in lieu of notice, if fortunate enough to obtain immediate employment elsewhere, reaps a financial benefit. We do not see why, if he has been unfairly dismissed and is not so fortunate he should not be entitled to have his statutory entitlement to wages in lieu of notice regarded as a matter apart and compensation for unfair dismissal calculated irrespective of it.”

On the facts in *Finnie v. Top Hat Frozen Foods* [1985] I.C.R. 433 the employee was unfairly dismissed on 9 May with three months' pay in lieu of notice to which he was entitled under his contract. The industrial tribunal made the basic award and, in addition, a compensatory award over a period of three months after the lapse of which time the claimant should be able to get another job. The award included sums for loss of use of a company car and of certain other perquisites over the period of three months but the industrial tribunal awarded nothing for loss of wages because he had been paid wages for the three months in lieu of notice. The appeal tribunal held, at p. 437:

“Wages in lieu of notice . . . is an independent payment to which an employee has a separate right under statute [or] under contract [and] therefore that the industrial tribunal ought to have allowed three months wages . . . as part of the compensatory award.”

I am unable to accept that such a ruling was correct. By making the payment in lieu of notice the employer had complied with good industrial practice. The employee was under the duty to take proper and reasonable steps to find other employment so as to mitigate his loss resulting from the dismissal. The industrial tribunal found that after three months he should be able to get another job and there could be no loss of wages after that date. Such loss as resulted from the dismissal was covered by the award. The provisions of the Act of 1978 provide in my judgment no basis for an award of the amount of wages over the three months of the period of loss, as found by the industrial tribunal, in addition to the basic award and the wages due for that period already paid. Similarly, if the wages in lieu of notice had not been paid, but the employee had obtained new employment within the three month period, or it was held that new employment was available to him within that period, this compensatory award could not on account of lost wages include anything more than the wages due for that period. Whether the wages in lieu of notice are paid or not, the employee need not give credit for sums earned in new employment during that period (subject as discussed above to a finding, when payment was not paid in full, that the course taken by the employer was justified) but the employee can only recover once for wages lost in the period of loss determined by the industrial tribunal. I would add that, on the basis of the reasoning of the appeal tribunal in *Finnie's* case, I can see no reason why the right to wages in lieu of notice as an independent right should be limited to the unfortunate dismissed employee who does not find new employment

A during the period of notice. If it is an independent right, the fortunate dismissed employee is also entitled to it. The fortunate dismissed employee could therefore recover wages in lieu of notice, compensation for wages lost over the period of notice and give no credit for earnings from the new employer. Such a result seems to me to be plainly in conflict with the provisions of the Act of 1978.

B I therefore conclude that the appeal tribunal in this case went wrong in law in ruling that the sum of £704 paid in July 1984 for the five weeks starting on 20 July was not to be deducted from the award for lost wages which had been calculated from 20 July 1984 and therefore included the wages for that period of five weeks.

C But there remains the question whether the compensatory award thus corrected is just and equitable having regard to the loss sustained by the employee. Mr. Hogarth submitted that upon the basis for compensation accepted by the industrial tribunal, namely, that the employee should be compensated for what he had lost by being dismissed on 20 July 1984 compared with being made redundant on 30 September 1985, the compensatory award must include the payment in lieu of wages which the employee would have received on 30 September 1985, namely, £844, which was the sum in effect awarded by the appeal tribunal. In short, Mr. Hogarth contends that the right result was achieved even if the reasons given cannot be supported. Good industrial practice, he argues, would require that the £844 be paid in full and, if so paid, no credit would be required against it for earnings received in other employment. Mr. Pannick, on the other hand, contended that the principle of *Norton's* case could have no application. He acknowledged
D that the remaining employees who, at the date of the hearing on 19 August 1985 were to be made redundant on 30 September 1985, would be paid wages in lieu of the appropriate period of notice in accordance with good industrial practice; and that the appropriate period for the employee would have been six weeks; but the requirements of good industrial practice in the case of this employee had been satisfied in July 1984 and he had then had the opportunity to earn in other employment
E without giving credit. It was conceded that the cut-off date for loss of earnings for the purpose of calculating the compensatory award should be extended from 30 September for the period of six weeks, because the employee if not dismissed in July would have received earnings to that date; but it was said that there was no justification for ignoring the fact that the employee had mitigated his loss by getting other employment.
F His loss over that period of six weeks was £40 per week or £240 and not
G £844; and that period of six weeks was not a period of notice.

I have found this last question to be difficult. I have reached the conclusion that the principle in *Norton Tool Co. Ltd. v. Tewson* [1973] 1 W.L.R. 45 is not applicable to the loss of earnings over the six weeks from 30 September 1985 and that the compensatory award for that period cannot exceed the net loss, namely, £240. It seems to me that the
H principle is to be applied to the occasion of dismissal when good industrial practice requires that the payment in lieu of wages be paid, and that if it is not paid the employee should nevertheless have the opportunity of earning wages in new employment without giving credit. It cannot, as I think, operate as a separate rule of law so as to entitle a claimant to a sum larger than his demonstrated loss by reference to a period which was not a period of notice. The point can be tested thus. If the employee in January 1985 had got a new job in which he earned

more than in his job with the employers, instead of less, the continuing loss would have ended then and his compensatory award would have been so calculated. He could not, I think, have claimed in addition the sum of £844 on the basis that if he had not been dismissed in July 1984 he would have received wages in lieu of notice in September 1985. The fact that a continuing loss causes the compensation period to run to 30 September 1985 cannot entitle him to be treated as receiving a second notice to terminate his employment with an accompanying period in which no credit need be given in respect of wages earned in other employment.

Accordingly, I would allow this appeal to the extent contended for by Mr. Pannick. I have set out above what I understand the full award would be as based upon the order of the appeal tribunal. From that sum of £5,286 there should be deducted a sum of £704 paid as wages in lieu of notice and the sum of £140 added by the appeal tribunal as additional payment in lieu of notice. The award is thus reduced to £4,442. To that there must be added the sum of £240, the additional net loss for six weeks following 30 September which, subject to checking of my arithmetic, produces an award of £4,682. The disputed amount of £210 claimed as an additional payment under the company severance pay scheme remains to be disposed of by agreement or on remission to the industrial tribunal pursuant to the order of the Employment Appeal Tribunal.

BINGHAM L.J. I agree that this appeal should be allowed to the extent proposed and for the reasons given by Ralph Gibson L.J. and Sir John Donaldson M.R.

SIR JOHN DONALDSON M.R. The only criticism which is, or can be, directed at Babcock F.A.T.A. Ltd., the employers, is that they dismissed the wrong man when, in July 1984, they found that they had to make one of their platers redundant. The employee's dismissal therefore ranks as an "unfair dismissal" and, under section 74(1) of the Employment Protection (Consolidation) Act 1978 he became entitled to a compensatory award of

"such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

This appeal concerns the amount of that award.

Section 74 provides a comprehensive code designed to guide industrial tribunals in the assessment of a just and equitable award. However, apart from subsection (1), which I have quoted, only subsections (2), (3) and (4) are material to this appeal. They read as follows:

"(2) The said loss shall be taken to include—(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal. (3) The said loss, in respect of any loss of any entitlement or potential entitlement to, or expectation of, a payment on account of dismissal by reason of redundancy, whether in pursuance of Part VI or otherwise, shall include only the loss referable to the amount,

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A if any, by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 73(7) or (9)) in respect of the same dismissal. (4) In ascertaining the said loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or of Scotland, as the case may be.”

B In substance section 74 re-enacts section 116 of the Industrial Relations Act 1971, and I have no reason to resile from the view which, in an earlier guise or disguise, I expressed in *Norton Tool Co. Ltd. v. Tewson* [1973] 1 W.L.R. 45, 48, namely that the amount of the award is governed by the statute and nothing else, that it involves a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary, but that the discretion has to be exercised judicially and upon the basis of principle, the object being to compensate, and compensate fully, but not to award a bonus.

C The assessment of any compensation, whether in an industrial relations context or otherwise, must always involve a comparison between what was, is and will be and what would (or should) have been—between the actual past, present and future and the hypothetical past, present and future. The future must be conjectural on both sides of the equation, although the conjecture as to the actual future will sometimes, and perhaps usually, be more firmly based than that concerning the hypothetical future. In the context of section 74, both will have to take account of the chances of accident to the claimant, ill health, fair dismissal, redundancy, retirement (whether voluntary or compulsory), and of the claimant leaving his employment of his own volition. Weighing these imponderables, there often comes a point at which an industrial tribunal can reasonably, fairly and properly say to itself “Well after that point of time, we just cannot foresee either what is likely in fact to happen or what would have been likely to have happened. Accordingly the claimant has proved no loss beyond that time and we disregard any later period in making our award.” What is unusual in this case is that the tribunal knew with virtual certainty not only the actual, but also the hypothetical, facts and, ironically, it is this which has thrown up problems which otherwise might have been lost in the wash of speculation. Let me therefore set out both sides of the equation—the actual and the hypothetical.

G *What actually happened*

H The employee received oral notice of dismissal on 16 July 1984, which was confirmed in writing on 19 July, telling him that his employment would be terminated on 24 August, but that he would not be required to work after 20 July. On 26 July he received a further letter enclosing a statement of what was due to him and, I assume, a cheque for that amount. This statement showed that he was being paid (in round figures) £704 as a redundancy payment, a further £704 as five weeks' gross pay “in lieu” and ex gratia payments totalling £845, based upon six weeks' gross pay (two weeks provided by the employers and four weeks by Babcock International). The expression “in lieu” used by the employers was presumably a contraction of “in lieu of notice” which was not entirely accurate, since the employee had in fact been given

notice as contrasted with being dismissed summarily. However, in an industrial context, the meaning was clear. The sum was being paid at once instead of week by week, the employee was free to seek other employment during the running of the notice and the employers would not seek to take account of any earnings from such other employment in reduction of their liability to the employee. And, still less, would they expect him to repay any part of this sum if he did achieve such earnings. All this was in accordance with good industrial practice. These sums, together with a small tax refund, amounted to £2,271.

In the event the employee could not find alternative employment until 7 January 1985 and then it was at a rate of £93 per week, which was less than he had previously been earning. This employment was secure at least until the end of 1985, which, as will appear, is all that is material.

What would and should have happened

Some other plater should have been dismissed instead of the employee. Had that occurred, the employee would have worked and continued to receive his wages from the employers until 30 September 1985. Until 7 January 1985, which coincidentally was the date when he obtained alternative employment, he would have continued to be paid at the rate of £125.23 net of deductions and thereafter at the rate of £132.74 also net. The payments which he had received on dismissal were based upon his gross wage of £140 per week. However, on 30 September the employers would justifiably, and therefore "fairly," have given the employee and the other platers six weeks' notice of dismissal on the ground of redundancy. He would then, in accordance with the practice of the employers, which was not only "good industrial practice," but even generous, have been paid £844 as money "in lieu," a further £844 as a redundancy payment and a sum, the precise amount of which is still in dispute but would possibly have been of the order of £1,055, as an ex gratia payment. As was the case when the employee was in fact dismissed, he would have been free to seek other employment during the running of the notice and would not have been accountable for any earnings received as a result of that employment.

In setting out what actually happened and what would have happened, I have deliberately omitted reference to such matters as B.U.P.A. health insurance cover, pension rights and loss of statutory industrial rights. These were taken into account by the industrial tribunal, but are not relevant to this appeal.

The industrial tribunal's decision

The industrial tribunal first assessed the employee's loss of earnings from 20 July 1984 up to the date of the hearing on 19 August 1985. This was a perfectly straightforward calculation. On the debit side they put what he would have earned if he had continued in the employment of the employers and on the credit side they put £704 "money in lieu" and the sums which the employee had earned in his alternative employment beginning on 7 January 1985. They then assessed the employee's loss between 19 August 1985 and 30 September 1985, the actual date when the other platers received notice of dismissal on grounds of redundancy, and the date upon which, hypothetically, the employee would have received such a notice, if he had not been dismissed in July 1984. This again was a straightforward calculation. The loss was £240.

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- A The industrial tribunal ignored the effect of the redundancy payment received by the employee, save to note that it extinguished any right to a basic award. The industrial tribunal gave the employers credit for the ex gratia payment of £845 made to the employee in July 1984 against the total sum which would otherwise have been awarded to him in respect of his loss of wages. Consistently with this approach, they did not have to bring into account, and did not bring into account, the ex gratia payment which the employee would have received if he had continued in the employment of the employers until the other platers were dismissed. The final figure awarded was £3,457.00.
- B

The Employment Appeal Tribunal's decision

- C The appeal tribunal [1987] I.C.R. 45 varied the industrial tribunal's award in three respects, which are now accepted as being correct. They held that (a) the employers should not have been given credit against their legal liability for the £845 ex gratia payment paid to the employee in July 1984, since it was ex gratia and was intended to be in addition to any legal entitlement, although, of course, the employers at that time considered that there was no such entitlement; (b) the employee was entitled to a further £140 as representing the increased redundancy payment which he would have received if he had been made redundant in September 1985, when this would not have constituted an unfair dismissal, as compared with the amount which he in fact received in July 1984, when it was such a dismissal; (c) some further figure to be agreed or determined by an industrial tribunal, said by the employee to be £210, should be added to take account of the increased ex gratia payment which he would have received if he had been dismissed in September 1985 instead of July 1984. For simplicity I will assume that £210 is the correct figure.
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- E

The effect of the variations (a) to (c) is to increase the industrial tribunal's award by £1,195, making an award of £4,652.

- F The appeal tribunal, however, also held that (d) no credit should have been given to the employers for the £704 "money in lieu" paid in July 1984 and a further £140 should have been added to the award to take account of the increased "money in lieu," which would have been received by the employee if he had been dismissed in September 1985 instead of in July 1984. Another way of putting this might be that whilst credit should be given for the £704 paid in July 1984, the employee was entitled to the whole of the £844 which he would have received as "money in lieu" if he had been dismissed in September 1985. The effect of this further, and disputed, variation was to increase the award to £5,496.
- G

The appeal

- H The employers have appealed and Mr. Pannick, on their behalf, contends that (a) the industrial tribunal was correct in giving credit for the £704 "money in lieu" if, as they did, they calculated the employee's loss from 20 July 1984. Alternatively, they could have treated the £704 as eliminating all loss before 24 August 1984 and begun the calculation from that date. (b) The industrial tribunal was also correct in including £240 in their award in respect of the difference between what the employee in fact earned in the six weeks following 30 September 1985 and what he would have received in respect of that period in the form of

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"money in lieu," if he had been dismissed with the other platers. (c) The appeal tribunal was in error in refusing to give the employers any credit for the £704 "money in lieu" paid to the employee in July 1984 and also awarding a further £140 for the difference between what he in fact received under this head in July 1984 and what he would have received if dismissed in September 1985 thus, in effect, treating the £704 as covering the employee's loss of wages from 20 July until 24 August 1984 and awarding him the whole of the lost September "money in lieu," without giving any credit for the wages which he earned in the six weeks following 30 September 1985.

Mr. Hogarth, for the employee, agrees with Mr. Pannick that the £704 should have been set against the employee's loss of wages between 20 July and 24 August 1984. However, he submits that the award should have included an amount equal to the whole of the "money in lieu" which the employee would have received in September 1985 and that, consistently with the decision in *Norton Tool Co. Ltd. v. Tewson* [1973] 1 W.L.R. 45, 49, no account should be taken of the employee's earnings during the six weeks covered by that payment. In other words, he rejects the £240 proffered by Mr. Pannick ((b) above), not unnaturally preferring the £844 awarded by the appeal tribunal.

This then is the real, and the sole, issue in the appeal.

This problem arises, and its solution is bedevilled by, the decision of the National Industrial Relations Court in *Norton's* case, which has been followed in countless decisions including *Everwear Candlewick Ltd. v. Isaac* [1974] 1 C.R. 525 (Sir John Brightman) and *Blackwell v. G.E.C. Elliott Process Automation Ltd.* [1976] 1 R.L.R. 144 (Phillips J.) and "explained" in *Tradewinds Airways Ltd. v. Fletcher* [1981] 1 R.L.R. 272 (Bristow J.) and by conflicting decisions of the Employment Appeal Tribunal in *T.B.A. Industrial Products Ltd. v. Locke* [1984] 1 C.R. 228 (Browne Wilkinson J.); *Clydebank Co-operative Society Ltd. v. Mackie* (unreported), 22 August 1983 (Lord McDonald); *Finnie v. Top Hat Frozen Foods* [1985] 1 C.R. 433 (also Lord McDonald) and the instant case.

Happily none of these authorities is binding on this court. Whilst I confess to an affection for the decision in the *Norton* case, because in those far off days we fondly hoped and imagined that a few such decisions would finally settle the law and that the National Industrial Relations Court could then retire as an appellate court, I do not regard it as holy writ. This appeal, therefore, gives this court an opportunity of looking at the problem of "money in lieu" in the hope that hereafter decisions of industrial tribunals sitting in England and Scotland will be the same, although there will always be some room for, and risk of, divergence under a quaint system which channels appeals from both countries to a single court, namely the Employment Appeal Tribunal, but then permits a further appeal to different courts, the appeal lying in the case of proceedings of the appeal tribunal in Scotland to the Court of Session and of those in England to the Court of Appeal, only bringing the two appellate routes together again in the House of Lords. This is not, of course, a case of decisions by Scottish judges and lay members being considered by the Court of Session and those of English judges and lay members by this court, because, as was the case with the National Industrial Relations Court, all are members of the Employment Appeal Tribunal and can sit both in Scotland and in England.

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A In the *Norton* case the claimant was entitled under statute to six weeks' notice, but it would have made no difference if the entitlement had been contractual. Indeed, the wording of the Contracts of Employment Act 1963 was such that, arguably, it varied the contract of employment and it was the contract as so varied which gave rise to the entitlement. For present purposes, the crucial passage in the judgment is the following [1973] 1 W.L.R. 45, 49-50:

B "Good industrial practice requires the employer either to give this notice or pay six weeks' wages in lieu. The employee was given neither. In an action for damages for wrongful, as opposed to unfair, dismissal he could have claimed that six weeks' wages, but would have had to give credit for anything which he earned or could have earned during the notice period. In the event he would

C have had to give credit for what he earned in the last two weeks, thus reducing his claim to about four weeks' wages. But if he had been paid the wages in lieu of notice at the time of his dismissal, he would not have had to make any repayment upon obtaining further employment during the notice period. In the context of compensation for unfair dismissal we think that it is appropriate and in accordance with the intentions of Parliament that we should treat an employee

D as having suffered a loss in so far as he receives less than he would have received in accordance with good industrial practice. Accordingly, no deduction has been made for his earnings during the notice period."

E On the facts of the *Norton* case, the court was only concerned with loss during the notice period, because it was common ground that thereafter he had found alternative employment at the same wage as before. The argument for the employer was simply that since the common law duty to mitigate damage was incorporated into the statutory code for assessing compensation for unfair dismissal, on these facts the amount recoverable by an employee would be the same whether he claimed for wrongful dismissal or for unfair dismissal.

F If the *Norton* case was rightly decided, and I think that it was, or, if it was not, it should not be disturbed because it has been so widely accepted as correct for so long, it does indeed lay down a rule of law, but one which is more limited than is sometimes appreciated. That rule is that, in assessing compensation for unfair dismissal, it is just and equitable to regard a claimant as having suffered an additional loss if the

G employer in unfairly dismissing him did not otherwise act in accordance with good industrial practice. That there is nothing inconsistent in expecting an employer who dismisses unfairly so to act is well illustrated by the instant case, where the employer did just that. What the *Norton* case did not, and could not, decide as a rule of law, was that in all circumstances good industrial practice required that notice of dismissal should be accompanied by the payment of "money in lieu." Good

H industrial relations practice can change and, in any event, what is good industrial practice in relation to a weekly wage earner entitled to notice measured in weeks, may be quite different from that which is appropriate in the case of senior salaried staff entitled to notice measured in months or years.

The appeal tribunal in *Clydebank Co-operative Society Ltd. v. Mackie* (unreported), 22 August 1983, in *Finnie v. Top Hat Frozen Foods* [1985] I.C.R. 433 and in this appeal departed from its decision in *T.B.A.*

Industrial Products Ltd. v. Locke [1984] I.C.R. 228 and took the *Norton* case a good deal further. In *Clydebank Co-operative Society Ltd. v. Mackie* Lord McDonald said:

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"The lay members of this tribunal are agreed that in good industrial practice the statutory entitlement to wages in lieu of notice is regarded as something to which an employee is automatically entitled, irrespective of any other payments which may be due. Management union negotiations would be prejudiced if this well recognised principle were departed from. Occasionally this may result in inconsistency. Thus an employee dismissed with wages in lieu of notice, if fortunate enough to obtain immediate employment elsewhere, reaps a financial benefit. We do not see why if he had been unfairly dismissed and is not so fortunate he should not be entitled to have his statutory entitlement to wages in lieu of notice regarded as a matter apart and compensation for unfair dismissal calculated irrespective of it."

This was repeated by Lord McDonald in *Finnie's* case and, with approval, by Popplewell J. and the lay members in the instant case as the rationale for their refusing to give credit for the £704 paid as "money in lieu" or, in other words, holding that it was just and equitable that, because the employee was in fact unable to obtain alternative employment during the notice period, he should receive double pay from his employer. They do not say what would have happened if he *had* obtained alternative employment, as in the *Norton* case, for the last two weeks of the notice period, but I assume that, contrary to the position in that case, the employer would have been given credit as otherwise the spiral of compensation would have been endless—someone unfairly dismissed with the employee would have had a claim to further compensation over and above double wages to take account of the fact that he had *not* been able to obtain alternative employment.

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Of course the appeal tribunal would have been right if good industrial practice required that the employer should (a) pay wages in lieu and (b) guarantee to the employee that throughout the notice period he would be employed by some other employer at a wage no lower than that which he was earning at the time of his dismissal. That has never been suggested in this appeal and both parties accept that in this respect the appeal tribunal was in error.

F

This does not, however, dispose of the problem of what should be done about the "money in lieu" received by the other platers in September 1985. The submission for the employee is that he should have credit for this without deduction for his alternative earnings during that notice period, because if he had not been unfairly dismissed in July, this is what he would have been paid and, on the authority of the *Norton* case and in the light of good industrial practice, he would not have been accountable to his erstwhile employers for anything which he earned in other employment during the notice period.

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H

This submission has a certain logical simplicity which is most attractive. I fear, however, that it is fallacious for, looking at the matter as at September 1985, which we must for these purposes, it ignores the very real *advantage* which the employee derived from being dismissed in July 1984 rather than September 1985 and the fact that he was being compensated for all the disadvantages of his situation throughout that

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- A period. That advantage is that he was spared the necessity of seeking, and probably not finding, alternative employment. He was already in a job, albeit at a lower wage than he would have earned up to 30 September 1985 and the differential was already being made up by the award. True it is that the receipt of the "money in lieu" was a benefit which he might reasonably have expected to have had but for the unfair dismissal (section 74(2)), but in valuing that benefit account must be
- B taken of the fact that the employee was enabled by that unfair dismissal to be in employment in the six weeks following 30 September 1985. It might well have been different if there had been any evidence that the other platers who were dismissed in September 1985 at once walked into other employment or did so at any time during the six weeks' notice period. The employee could then say that, as compared with him, they
- C were better off. As it is, the value of the benefit which he lost is, in my judgment, to be assessed as the difference between the £844 "money in lieu" and the amount which he in fact earned during that period of six weeks. This amounts to £240.

For these reasons, which are substantially the same as those of Ralph Gibson L.J., I would allow the appeal and concur in the order which he has proposed.

*Appeal allowed with costs.
Order accordingly.*

Solicitors: T. R. Johnson; L. Bingham & Co.

P. M.

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[COURT OF APPEAL]

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C.B.S. SONGS LTD. AND OTHERS v. AMSTRAD CONSUMER ELECTRONICS PLC. AND ANOTHER

[1984 C. No. 5567]

1986 Oct. 15, 16, 17;

Fox and Nicholls L.JJ. and Sir Denys Buckley

B

1987 Jan. 12;

Feb. 25

Tort—Cause of action—Whether arising from breach of statutory prohibition—Offer for sale of recording machines for copying pre-recorded tapes—Representative action for incitement of breach of copyright—Whether cause of action against sellers—Whether representative action properly brought—Copyright Act 1956 (4 & 5 Eliz. 2 c. 74), s. 21(3)

C

The plaintiffs, suing on behalf of themselves and other copyright owners in the music trade, alleged that the defendants, by offering for sale tape-to-tape recording machines, each of which had two cassette decks for reproducing recordings from one tape directly on to another, had incited and authorised the public to infringe the copyrights, were liable for the infringement and in breach of a common law as well as an equitable duty of care owed to copyright owners. Granting the plaintiffs' application for an amendment to the claim to allege that the defendants had unlawfully incited the public to commit an offence under section 21(3) of the Copyright Act 1956,¹ the judge held that the plaintiffs had an arguable case for injunctive relief and damages for the incitement, struck out the original allegations in the statement of claim and refused the defendants' applications to strike out the action or bar the plaintiffs from acting in a representative capacity.

D

On appeals by the defendants and cross-appeal by the plaintiffs:—

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Held, allowing the appeals and dismissing the cross-appeal (Sir Denys Buckley dissenting), (1) that, apart from express statutory provision, a person, other than the Attorney-General acting *ex officio* or *ex relatione*, had no standing to seek to enforce the observance of the criminal law as such through the civil court rather than by a private prosecution; that a plaintiff had standing to enlist the civil court's aid in preventing infringement of a property right by criminal activity, but that in assisting him the court was not compelling the observance of the criminal law as such but giving effect to a cause of action possessed at law or in equity by the plaintiff as owner of the property right; that activity which was damaging to the property of the plaintiff but would not afford him a cause of action did not become remediable in a civil suit at the instigation of the plaintiff by reason only that the activity was criminal; and that, accordingly, the offence of inciting others to commit an offence under section 21(3) of the Copyright Act 1956 did not confer on copyright owners a right to sue in equity for an injunction and damages in lieu thereof or in addition thereto and, therefore, the judge's order giving leave to amend would be discharged (post, pp. 156F–H, 157A–B, D, 158B–C, 166c).

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Lourho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173, H.L.(E.) applied.

¹ Copyright Act 1956, s. 21(3): see post, pp. 148H–149A.

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A *Emperor of Austria v. Day and Kossuth* (1861) 3 De G.F. & J. 217, C.A.; *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, H.L.(E.) and dictum of Oliver L.J. in *R.C.A. Corporation v. Pollard* [1983] Ch. 135, 150, C.A. considered.

(2) That the question whether the plaintiffs had a good cause of action against the defendants otherwise than by reference to section 21(3) was not argued and, since there remained no live issues in the proceedings, the writ and statement of claim would be struck out (post, pp. 158c–d, 166c).

B *Per curiam*. If substantial manufacturers and distributors are inciting others, on a large scale, to infringe copyright in circumstances where the copyright owners have no practical remedy against the actual infringers, and there is nothing the copyright owners can do through the courts to stop them, then the present state of the law is gravely defective (post, p. 158d–e, F–G).

C *Per Sir Denys Buckley*. The claims of the plaintiffs and those whom they purport to represent have a common basis and the major relief claimed is common to the plaintiffs and those whom they purport to represent and, therefore, the action has been properly framed as a representative action (post, pp. 165h, 166a).

D Decision of Whitford J. reversed.

The following cases are referred to in the judgments:

Amstrad Consumer Electronics Plc. v. British Phonographic Industry Ltd. [1986] F.S.R. 159, Whitford J. and C.A.

E *Austria (Emperor of) v. Day and Kossuth* (1861) 3 De G.F. & J. 217, C.A. *Bedford (Duke of) v. Ellis* [1901] A.C. 1, H.L.(E.)

Boyce v. Paddington Borough Council [1903] 1 Ch. 109

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.)

British Airways Board v. Laker Airways Ltd. [1985] A.C. 58; [1984] 3 W.L.R. 413; [1984] 3 All E.R. 39, H.L.(E.)

F *Dixon v. Holden* (1869) L.R. 7 Eq. 488

E.M.I. Records Ltd. v. Riley [1981] 1 W.L.R. 923; [1981] 2 All E.R. 838

Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.)

Island Records Ltd., Ex parte [1978] Ch. 122; [1978] 3 W.L.R. 23; [1978] 3 All E.R. 795, C.A.

Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173; [1981] 3 W.L.R. 33; [1981] 2 All E.R. 456, H.L.(E.)

G *Macaulay v. Shackell* (1827) 1 Bli. N.S. 96, H.L.(E.)

Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 K.B. 1021, C.A.

Prudential Assurance Co. v. Knott (1875) L.R. 10 Ch.App. 142

R.C.A. Corporation v. Pollard [1983] Ch. 135; [1982] 3 W.L.R. 1007; [1982] 3 All E.R. 771, C.A.

Rickless v. United Artists Corporation [1987] 2 W.L.R. 945; [1987] 1 All E.R. 679, C.A.

H *Springhead Spinning Co. v. Riley* (1868) L.R. 6 Eq. 551

Temperton v. Russell [1893] 1 Q.B. 435, C.A.

The following additional cases were cited in argument:

A. & M. Records Inc. v. Audio Magnetics Inc. (U.K.) Ltd. [1979] F.S.R. 1, D.C.

Bollinger (J.) S.A. v. Goldwell Ltd. [1971] R.P.C. 412

Columbia Picture Industries v. Robinson [1986] F.S.R. 367

- Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd.* [1980] Q.B. 585; [1980] 3 W.L.R. 98; [1980] 1 All E.R. 1097 A
- E.M.I. Records Ltd. v. Kudhail* [1985] F.S.R. 36, C.A.
- Paterson Zochonis Ltd. v. Merfarken Packaging Ltd.* [1983] F.S.R. 273, C.A.
- Reade v. Conquest* (1861) 9 C.B.N.S. 755
- Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.) B
- Skeen v. British Railways Board* [1976] R.T.R. 281
- White v. Mellin* [1895] A.C. 154, H.L.(E.)

INTERLOCUTORY APPEALS from Whitford J.

By a writ dated 16 November 1984 and a statement of claim, as amended, the plaintiffs, C.B.S. Songs Ltd., E.M.I. Records Ltd. and Chrysalis Records Ltd., claimed, inter alia, an injunction restraining the first defendant, Amstrad Consumer Electronics Plc., and the second defendant, Dixons Ltd., from parting with cassette reproducing machines without taking such precautions as were necessary reasonably to ensure that copyrights in sound recordings or musical works owned by or exclusively licensed to the plaintiffs or a member of the British Phonographic Industry Ltd. or the Mechanical Rights Society Ltd. were not infringed by the use of the machines. The judge, sitting in chambers, struck out parts of the statement of claim but, also, granted leave to amend it, and refused the defendants' applications to strike out the action or make an order preventing the plaintiffs from acting in a representative capacity. C D

The defendants by two notices of appeal appealed on the grounds, inter alia, that the judge's decision to allow the amendment of the statement of claim was wrong and further or, alternatively, the judge's decision to allow the persons named as plaintiffs in the action to proceed in a representative capacity was wrong. E

The plaintiffs cross-appealed on the ground, inter alia, that the judge was wrong in law in holding that the words struck out from the statement of claim disclosed no cause of action. F

The facts are stated in the judgment of Nicholls L.J.

Geoffrey Hobbs for the first defendant.

Michael Fysh for the second defendant.

James Munby for the plaintiffs. G

Cur. adv. vult.

25 February. The following judgments were handed down.

NICHOLLS L.J. The Copyright Act 1956 creates rights of property and for their protection confers civil remedies and imposes criminal liabilities. The question arising on this appeal is whether copyright owners who, in respect of the acts complained of, cannot bring themselves within the scope of any of the civil remedies expressly conferred by the statute, nonetheless have a cause of action in equity for the grant of an injunction to restrain defendants from carrying out acts which constitute criminal offences and which damage their copyrights, this equitable jurisdiction being supplemented by the jurisdiction under H

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A the Chancery Amendment Act 1858 (Lord Cairns's Act) (21 & 22 Vict. c.27) to award damages in addition to or in lieu of an injunction.

Before the court are two appeals and a cross-appeal from an order of Whitford J. of 8 May 1986. They represent the latest stage in what the judge aptly described as the battle between Amstrad Consumer Electronics Plc., the well known manufacturer of electronics equipment, and those concerned to protect the interests of manufacturers and suppliers of tapes, with Dixons Ltd., the well known retailer of electronics equipment reluctantly tied, as its counsel put it, to Amstrad's coat tails.

B In 1984 Amstrad introduced on to the market three new models of tape-to-tape recording machines, designated T.S. 39, T.S. 87 and S.M. 104. A feature of these models is that they have two cassette decks from which it is possible to reproduce from one tape directly on to another, at twice the normal play-back speed. The machines, and this facility, were advertised on television and in the press in terms likely to encourage home copying of favourite tapes. Amstrad sells only to the trade, but in the advertisements Dixons was named as one of the well known retailers from whom the Amstrad tape decks could be purchased.

C British Phonographic Industry Ltd. ("B.P.I.") is a trade association, whose members comprise record companies making most of the lawful records sold in this country. B.P.I. wrote to Amstrad, and also to its principal trade outlets, asserting that by its advertisements Amstrad was encouraging the public to break the law, by inviting them to acquire machines with the double-headed facility for the purpose of copying from tapes containing copyright works.

E The upshot was two actions, in the course of which considerable procedural complications, not to say convolutions, have come about. Shorn of all matters not essential to the present appeals, the history is this. The first action *Amstrad Consumer Electronics Plc. v. British Phonographic Industry Ltd.* [1986] F.S.R. 159 ("the declaratory action") was brought by Amstrad against B.P.I. The writ was issued on 30 October 1984. The only substantive relief claimed was a declaration to the effect that by advertising and offering for sale, and selling six specified models of audio systems, including the three I have mentioned, Amstrad had not acted unlawfully "as alleged in [a letter from B.P.I.'s solicitors] dated 26 October 1984 or at all." On 16 November 1984 the writ in the present action ("the second action") was issued by C.B.S. Songs Ltd., E.M.I. Records Ltd. and Chrysalis Records Ltd. The first plaintiff was expressed to be suing on behalf of itself and of the other members of the Mechanical Rights Society Ltd. ("M.R.S."), and the second and third plaintiffs were expressed to be suing on their behalf and on behalf of all the other members of B.P.I. Amstrad is the first defendant and Dixons the second defendant.

H In the statement of claim in the second action, it is alleged that nearly all sound recordings available in this country are copyright and that nearly all the copyrights, or the exclusive licences under such copyrights, to reproduce sound recordings are owned by members of B.P.I.; also, that nearly all the mechanical rights in musical works in this country are owned by or exclusively licensed to the members of the M.R.S., who comprise nearly all the publishers of music in this country. Having referred to the three new Amstrad models and their introduction on to the market, the statement of claim continues with an allegation that the primary purpose for which that equipment was designed was

that the public would buy and use it to make copies of commercially available pre-recorded tapes and gramophone discs. It is also alleged that machines purchased will be so used, in infringement of the copyrights in the tapes and recordings, and to the damage of the plaintiffs and those whom they represent, and that in practice, for reasons which are self-evident, the plaintiffs and those whom they represent are unable to stop such use or obtain legal redress for such infringements by individual members of the public.

The various alleged causes of action put forward are that Amstrad and Dixons have incited others to infringe copyright; that they have authorised others to infringe copyright; that they are liable, as accessories before the event or as joint tortfeasors, for the infringement of the plaintiffs' copyright; and that the equipment is being supplied in breach of a common law duty of care owed to copyright owners, and also in breach of an equitable duty of care not to allow goods likely to be used for infringement to pass out of Amstrad's and Dixons' hands. The principal relief claimed is an injunction restraining the defendants from parting with possession of the three models complained of:

"without taking such precautions as are necessary reasonably to ensure that copyrights in sound recordings or musical works owned or exclusively licensed to the plaintiffs or a member of [B.P.I.] or [M.R.S.] are not infringed by the use of such machines."

The plaintiffs also claim an inquiry as to damages and an account of profits.

In a schedule to the defence served by B.P.I. in the declaratory action, the statement of claim in the second action was set out in extenso, and in its defence B.P.I. placed reliance on the matters set out in that statement of claim as justification for the accusations made by B.P.I. in the letters to Amstrad and the trade to the effect that Amstrad was acting wrongfully in its advertising and sale of the new equipment. In this way the causes of action set up in the second action became issues also in the declaratory action.

The declaratory action came to trial comparatively speedily. In March 1985, shortly before the trial of the declaratory action was due to take place, proceedings in the second action were stayed until further order. In consequence, summonses which by then had been issued by Amstrad and Dixons for the striking out of the second action or, alternatively, to prevent the plaintiffs from suing in a representative capacity, stood adjourned.

The trial of the declaratory action took place in June 1985. Whitford J. found in favour of B.P.I. and dismissed the action. On 29 October 1985 an appeal by Amstrad to this court was dismissed: [1986] F.S.R. 159. All three members of the Court of Appeal decided that none of the issues raised in the statement of claim in the second action and relied on by B.P.I. in its defence in the declaratory action gave rise to any civil liability on the part of Amstrad. However, during the hearing a further point had been raised, namely, that the putting out by Amstrad of the advertising material complained of might be capable of amounting to an incitement to commit the crime created by section 21(3) of the Copyright Act 1956. Section 21(3) provides:

"Any person who, at a time when copyright subsists in a work, makes or has in his possession a plate, knowing that it is to be used

A for making infringing copies of the work, shall be guilty of an offence under this subsection.”

B The suggestion was that a tape recording is capable of being a “plate” within the definition in section 18(3) and that once a person who is in possession of a tape recording consciously forms the intent to use it for the purpose of making an infringing copy, he is guilty of an offence under section 21(3). The court decided that it was neither necessary nor proper to adjudge whether Amstrad had committed the offence of inciting persons to commit the section 21(3) offence, but in its discretion refused to make the declaration sought by Amstrad.

C This outcome placed B.P.I. in the unsatisfactory position that, having obtained from the court the order it sought, viz. the dismissal of the appeal, it was unable to seek to take the matter further to the House of Lords, even though on all the substantive issues canvassed and decided in the action B.P.I. had failed. B.P.I. was left to derive such consolation as it could from the views expressed by the court that there was a possibility that Amstrad might have committed the criminal offence of inciting the offence prescribed by section 21(3).

D After the trial of the declaratory action, the stay of the second action was lifted. On 4 March 1986 the plaintiffs in the second action issued a summons for leave to amend the statement of claim in that action. On 8 May 1986 Whitford J. had before him that summons and also the two striking out summonses issued earlier by Amstrad and Dixons and which had meanwhile remained adjourned. The gist of the amendments which the plaintiffs wished to make to the statement of claim was to spell out and allege against Amstrad and Dixons the ingredients of the incitement offence.

E In short, at this hearing before the judge, Amstrad and Dixons asked that the second action should be struck out on the ground that all the issues raised therein had already been decided adversely to B.P.I. by the Court of Appeal in the declaratory action, and those issues would be bound to be decided in the same way at the trial of the second action. F They resisted the proposed amendments raising the incitement issue on the ground that they disclosed no cause of action. Whitford J. decided that on the incitement issue the plaintiffs had an arguable case for injunctive relief and for at least nominal damages in respect of Amstrad's and Dixons' alleged incitement. Accordingly he permitted the amendments to be made. Having considered the authorities, he expressed his conclusion:

G “Although Mr. Hobbs repeatedly suggested that what the plaintiffs are seeking in the [second] action is damages for infringement of copyright by a route not open to them, in truth it seems to me that basically what they are trying to do by their amended statement of claim is to stop damage occurring, which, if they are right, is only likely to occur as a result of this allegedly criminal offence and H which further is damage which they are unlikely ever to be able to prove and so recover. If incited so to do by the Amstrad advertisements purchasers of these equipments start recording from pre-recorded cassettes in which some one or more of the plaintiffs hold a copyright interest, how in any given particular case is any particular person whose interests may have been affected ever going to discover or prove that any infringement has taken place? Over the years in many fields there has been an increasing tendency,

particularly in the light of the total failure of penal proceedings to achieve any effective result, to accept that there are circumstances in which relief by way of injunction should be granted in civil proceedings. I am not persuaded that the [second] action, based on the statement of claim as amended, must necessarily fail; and, not being so persuaded, the amendments ought to be allowed to proceed.”

The judge also rejected the objection taken by Amstrad and Dixons that this was not a case for a representative action. He struck out those parts of the statement of claim which related only to the issues which this court had decided adversely to B.P.I. in the declaratory action. He gave leave to appeal on all points. Pursuant to that leave there are now before the court appeals by all parties against the judge's decision.

I should say at once that Mr. Munby accepted that, by reason of the decision of this court in the declaratory action, the appeal by the plaintiffs, in respect of the striking out of parts of the statement of claim, cannot succeed in this court. What he seeks is to use this appeal as the means for bringing before the House of Lords the issues decided adversely to B.P.I. by this court in the declaratory action, having been deprived of the opportunity to pursue those issues further in that action by the procedural quirk I have mentioned.

I turn to consider whether the plaintiffs should have been granted leave to amend. In summary form the material amendments sought to be made are these. A new paragraph, paragraph 6A, is sought to be added, alleging that all or nearly all the persons who use the equipment to make copies of commercially available pre-recorded cassette tapes or gramophone discs will thereby be guilty of an offence under section 21(3), and some particulars are given in that regard. Paragraph 7, as it stands at present, reads:

“The said equipment has been advertised by the first defendant and sold by the defendants in such a way as to incite members of the public to use it to make cassette recordings from pre-recorded tapes, gramophone discs and broadcast material, with a reckless disregard for the rights of the owners of the copyrights in the sound recordings and musical works contained therein.”

It is proposed to add these words to the end of that paragraph:

“and in circumstances where (by virtue of the facts and matters referred to in paragraphs 2 and 6A) all or nearly all of the persons making such cassette recordings will be guilty of an offence under the said subsection. The plaintiffs will say that the defendants have thereby unlawfully incited members of the public who buy the said equipment to commit offences under the said subsection.”

The relief sought is unchanged, save that the injunction would now inhibit Amstrad and Dixons from advertising and selling the machines in such a way as to incite members of the public to commit offences under section 21(3).

Before turning to the law, I mention one procedural matter. Whether leave to amend should be granted or refused turns, in this case, on whether the statement of claim as sought to be amended will disclose a reasonable cause of action. In the course of his submissions, however, Mr. Munby indicated that on this he was content that this court should

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A follow the same approach as in *R.C.A. Corporation v. Pollard* [1983] Ch. 135. There, with some encouragement from counsel, this court decided a difficult and important issue of law on an appeal from the judge's refusal to strike out a statement of claim. Likewise, here, Mr. Munby accepted that if, having heard the arguments, this court was satisfied that the plaintiffs' pleaded case as amended could not succeed as a matter of law, the court should so hold and not leave the question of law to be decided at a later stage in the course of what no doubt would be a protracted and expensive trial. In the event we had the benefit of full argument on the incitement point.

B Mr. Munby's case was that there are circumstances in which a private individual can properly sue for an injunction to restrain breaches of the criminal law. He submitted that the law today is that whether or not a potential plaintiff can sue in respect of a breach of a statutory prohibition depends upon the scope and language of the statute, and that in this regard there is a distinction between two different rights or remedies which statute may confer upon persons for whose protection or benefit a statutory obligation or prohibition, backed by an express criminal law sanction, has been passed: (1) as a matter of construction a statute may give rise to a duty owed not merely to the world at large but also to a class of "protected persons," the breach of which gives a member of the protected class a cause of action in tort for damages; and (2) a statute passed for the benefit of protected persons which does not create any duty, and thus cannot give rise to a claim in tort for damages, may nonetheless entitle a member of the class of protected persons to apply for an injunction: in such a case the plaintiff's claim is a claim in equity to enforce the observance of the criminal law. Mr. Munby accepted that the present case does not fall within his category (1), but he submitted that it falls within his category (2). In my view, there is no such category as that formulated by Mr. Munby as his category (2).

E I consider first, in chronological order, the authorities relied on by Mr. Munby. He relied on three 19th century cases, *Emperor of Austria v. Day and Kossuth* (1861) 3 De G.F. & J. 217; *Springhead Spinning Co. v. Riley* (1868) L.R. 6 Eq. 551 and *Dixon v. Holden* (1869) L.R. 7 Eq. 488, and on the recent decisions of the House of Lords in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 and of the Court of Appeal in *R.C.A. Corporation v. Pollard* [1983] Ch. 135.

F In my view Mr. Munby is not assisted by the much discussed *Emperor of Austria's* case. There the defendants appealed unsuccessfully from an order of Stuart V.-C. restraining them from making spurious Hungarian banknotes in this country and ordering the delivery up of notes already made. The three members of the court expressed their reasons in differing terms, but none of the reasoning supports the existence of Mr. Munby's category (2). Indeed, the case was not one where the acts complained of were criminal. The basis of Lord Campbell L.C.'s judgment, at p. 240, was that the court had jurisdiction to protect property from an act threatened which, if completed, would give a right of action. That by "right of action" he meant cause of action at law is apparent from his next words:

H "I by no means say that in every such case an injunction may be demanded as of right, but if the party applying is free from blame and promptly applies for relief, and shows that by the threatened

wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted.”

A

The reasoning of Knight Bruce L.J. was to the same effect. He said, at p. 247, that whether the acts complained of were criminal was not material; the preparation of the notes with the intention of issuing them in Hungary was by the law of England

“‘civilly unlawful,’ as regards rights of property, that is to say, the public revenues, the fiscal resources, the pecuniary means of the realm of Hungary, which rights the plaintiff is entitled to represent here.”

B

The plaintiff was entitled therefore to the protection of the court, “according to its ordinary course in analogous cases, from the infliction of such a wrong:” p. 248. Before us counsel had some difficulty in identifying with any confidence the cause of action at law possessed in that case by the plaintiff. Passing off and injurious falsehood were suggested. But I do not think that it is material for me to pursue this. Turner L.J. expressed himself in wider terms. He considered, at p. 253, that the introduction of the spurious notes constituted an injury to the private rights of the plaintiff’s subjects. He also said:

C

“I agree that the jurisdiction of this court in a case of this nature rests upon injury to property actual or prospective, and that this court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this court. I do not agree to the proposition, that there is no remedy in this court if there be no remedy at law, and still less do I agree to the proposition that this court is bound to send a matter of this description to be tried at law.”

D

E

Later he said, at p. 254:

“If the property of an individual is affected by an undue and unauthorised use of his name, the law would no doubt give a remedy. I am not satisfied that the law would not give the same remedy in the case of the undue and unauthorised use of the name of a nation or state; but whether it would do so or not . . . I think . . . that the case falls within the jurisdiction of this court.”

F

Thus Turner L.J. expressly did not base his decision on the existence of a cause of action at law.

G

If one stopped there, one might perhaps be forgiven for thinking that, on the basis of this reasoning, an argument could be mounted in the present case along the lines that, even though the incitement alleged did not found an action at law against Amstrad or Dixons for infringement of copyright, because the incitement constituted criminal acts which affected the plaintiffs’ copyrights, a court of equity would restrain those acts at the suit of the copyright owners. However, and this is an important feature of this case, Mr. Munby accepted that it was now established that to enable a plaintiff to sue for an injunction to restrain a criminal act it is not enough for him to show that the criminal act interferes with some property interest of his. Having regard to the decision in *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173, as interpreted by this court in *R.C.A. Corporation v. Pollard* [1983]

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A Ch. 135 and in *Rickless v. United Artists Corporation* [1987] 2 W.L.R. 945, that concession seems to me to have been inevitable. This being so, I am unable to see how the views expressed in the *Emperor of Austria* case assist the plaintiffs in the present case. I can find in that case no other proposition which might assist them.

B I am able to deal with the next two cases more shortly. *Springhead Spinning Co. v. Riley*, L.R. 6 Eq. 551 was a demurrer to a bill alleging that the printing and publishing of advertisements by the defendants for the purpose of intimidating workmen from entering the employment of the plaintiffs were unlawful acts, punishable by statute and as a common law crime. The relief sought was an injunction and damages. Malins V.-C. overruled the demurrer, relying mainly on the passage, set out above, in the judgment of Turner L.J. in the *Emperor of Austria* case, 3 De G.F. & J. 217, 253. Malins V.-C. said, at p. 558:

C "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or make it less valuable or comfortable for use or occupation."

D *Dixon v. Holden*, L.R. 7 Eq. 488 was another decision of Malins V.-C. In that case he applied the same principle when restraining the publication of a libel. Here again, it seems to me that the concession rightly made by Mr. Munby destroys any value that these cases might, at first sight, seem to have for him. Given the concession, I cannot see what is left in these decisions which advances the present plaintiffs' case.

E So I come to the recent authorities. In *Gouriet's* case [1978] A.C. 435, as is well known, Mr. Gouriet sought an injunction restraining the defendant union from endeavouring to procure any person to delay post in the course of transmission between this country and South Africa, contrary to statute. Mr. Gouriet did not claim that he had any special interest in the transmission of such post, or that he would suffer any special damage from non-transmission. The House of Lords struck out the proceedings on the ground that the court had no jurisdiction to grant Mr. Gouriet the relief sought by him. Viscount Dilhorne, at p. 492, made passing reference, without disapproval, to *Springhead Spinning Co. v. Riley*, L.R. 6 Eq. 551, but this was in the context of distinguishing from the instant case, where the plaintiff had not suffered any loss or damage, the "long line of cases dealing with the rights of individuals to secure injunctions and declarations when their private rights are threatened . . ." Lord Edmund-Davies made a statement, at p. 506, to the same effect. I do not think those passages assist the plaintiffs. Apart from anything else, even if, read out of their context, these passages might, at first sight, be thought to countenance a proposition that a plaintiff can sue for an injunction to restrain a criminal act which interferes with some property right of his, this would afford no support

H for the proposition embraced by Mr. Munby's category (2). The two propositions are quite distinct.

Before coming to the last authority on which Mr. Munby relied, *R.C.A. Corporation v. Pollard* [1983] Ch. 135, I must refer to *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173, which was the subject of consideration in the *R.C.A. Corporation* case. It will be recalled that one of the questions before their Lordships in the *Lonrho* case was whether, although no breach of contract was involved, delivery

to Southern Rhodesia by Shell and B.P. of petroleum products, contrary to the sanctions order, gave Lonrho a cause of action for damages, assuming Lonrho suffered loss in consequence of the activities of B.P. and Shell. In answering that question in the negative, in a speech concurred in by Lord Edmund-Davies, Lord Keith of Kinkel, Lord Scarman and Lord Bridge of Harwich, Lord Diplock referred to the principle that the question whether legislation, which makes the doing or omitting to do a particular act a criminal offence, renders the person guilty of such offence liable also in a civil action for damages at the suit of any person who thereby suffers loss or damage, is a question of construction of the legislation. Having set out the terms of the sanctions order, he pointed out that the order created a statutory prohibition upon the doing of certain classes of acts and provided the means of enforcement by prosecution for a criminal offence which was subject to heavy penalties. Lord Diplock continued, at p. 185:

"So one starts with the presumption laid down originally by Lord Tenterden C.J. in *Doe d. Murray v. Bridges* (1831) 1 B. & Ad. 847, 859, where he spoke of the 'general rule' that 'where an Act creates an obligation, and enforces the performance in a specified manner . . . that performance cannot be enforced in any other manner'—a statement that has frequently been cited with approval ever since, including on several occasions in speeches in this House. Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to this general rule."

The first of the two exceptions stated by Lord Diplock was:

"where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation."

In that type of case those intended to be benefited who were injured by contravention of the statute had a right at common law against the person who contravened the statute. I pause to observe that this is Mr. Munby's category (1), which, it is admitted, does not assist the plaintiffs in the present case.

The second exception stated by Lord Diplock was:

"where the statute creates a public right (i.e. a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J. in *Benjamin v. Storr* (1874) L.R. 9 C.P. 400, 407 described as 'particular, direct and substantial' damage 'other and different from that which was common to all the rest of the public.'"

He referred to *Boyce v. Paddington Borough Council* [1903] 1 Ch. 109 as a case of a public right conferred by statute, and said:

"It is in relation to that class of statute only that Buckley J.'s oft-cited statement at p. 114 as to the two cases in which a plaintiff, without joining the Attorney-General, could himself sue in private law for interference with that public right, must be understood. The two cases he said were: 'first, where the interference with the public

A right is such as that some private right of his is at the same time interfered with . . . and, secondly where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.' The first case would not appear to depend upon the existence of a public right in addition to the private one; while to come within the second case at all it has first to be shown that the statute, having regard to its scope and language, does fall within that class of statutes which creates a legal right to be enjoyed by all of Her Majesty's subjects who wish to avail themselves of it. A mere prohibition upon members of the public generally from doing what it would otherwise be lawful for them to do, is not enough."

C I pause again to observe that the present case does not fall within this second exception.

Having concluded that the case before the House of Lords fell within neither of the exceptions, Lord Diplock then considered, at pp. 186–187 the decision in *ex Parte Island Records Ltd.* [1978] Ch. 122, this having been relied on as showing:

D "that some broader principle has of recent years replaced those long-established principles that I have just stated for determining whether a contravention of a particular statutory prohibition by one private individual makes him liable in tort to another private individual who can prove that he has suffered damage as a result of the contravention."

E Suffice it to say, Lord Diplock rejected the existence of any wider general rule.

I make one observation on this case before turning to *R.C.A. Corporation v. Pollard* [1983] Ch. 135. Although the question before the House of Lords concerned the existence of a cause of action for damages, I read the passages cited above from the speech of Lord Diplock as intended to be a comprehensive statement of the circumstances in which, in general, some manner of enforcing performance of a statutory obligation or prohibition, other than prosecution for the criminal offence prescribed by the statute, is permissible. Their Lordships had before them, in the judgments in the *Island Records* case, references to the principle in equity said to be derived from cases such as *Springhead Spinning Co. v. Riley*, L.R. 6 Eq. 551, but Lord Diplock's speech contains no suggestion that, founded on these cases or otherwise, there might be a third exception to Lord Tenterden C.J.'s "general rule," whereby a court of equity would grant an injunction and damages to an individual plaintiff in a case not within either of the other two exceptions.

H I come at last to *R.C.A. Corporation v. Pollard*. The question in that case was the one left open by Lord Diplock in the *Lonrho* case [1982] A.C. 173, 187: whether recording companies have a cause of action against those making or distributing "bootlegged" records in contravention of the Dramatic and Musical Performers' Protection Act 1958. This court held that they do not. Thus the actual decision is not in point in the present case, but Mr. Munby relied strongly on one passage in the judgment of Oliver L.J. Oliver L.J. set out, at p. 150, three ways in which, until recently, a claim by the recording company to have a right

to restrain the sale of bootlegged recordings and for damages could have been framed. He later stated the second of these as:

“where there is a breach of a statutory provision for the protection of a class of whom the plaintiff is one and he can show that he is specially damaged by the breach, he may bring proceedings to enforce, not his own civil right of action, but the public duty which has been interfered with or not observed.”

Mr. Munby submitted that that is this case.

I do not think that this passage in Oliver L.J.’s judgment can sustain the burden which Mr. Munby requires it to bear. As I read Oliver L.J.’s judgment, the three ways set out by him are his paraphrase of (1) Lord Diplock’s first exception, (2) Lord Diplock’s second exception and (3) the wider principle of equity upheld by the majority of the Court of Appeal in the *Island Records* case [1978] Ch. 122 but rejected by the House of Lords in the *Lonrho* case [1982] A.C. 173. These were the three principles which had so recently been the subject of exegesis by the House of Lords. I do not think that in his summary Oliver L.J. could have been intending to depart from those principles, and to do so without any explicit indication that he was so doing and without stating his reasons for so doing.

In my view, therefore, the authorities relied on by Mr. Munby do not establish his proposition. Furthermore, the proposition is contrary to established principle. In considering whether a plaintiff has a right to obtain an injunction in this area of the law, it is necessary to identify what is the legal or equitable right of the plaintiff whose violation the plaintiff is seeking to prevent: *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909, 979, 980 and *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, 81. The proposition under consideration identifies that right as a claim in equity to enforce the observance of the criminal law. The proposition is framed in this way, as I understand it, to avoid the argument that the plaintiffs are seeking to set up and enforce a private right in respect of infringement of copyright which is not provided for in the Copyright Act 1956. But, apart from express statutory provision, persons other than the Attorney-General (acting either *ex officio* or *ex relatione*) have no standing to seek to enforce, through a civil court, the observance of the criminal law as such: their remedy is to bring a private prosecution: see *Gouriet’s* case [1978] A.C. 435, *per* Lord Wilberforce at p. 477. As Lord Eldon L.C. pointed out in *Maucaulay v. Shackell* (1827) 1 Bli. N.S. 96, 127, a court of equity has no criminal jurisdiction.

Of course, if the criminal activity will infringe a property right of the plaintiff, the plaintiff has standing to enlist the civil court’s aid in preventing that infringement. But in assisting such a plaintiff the court is not compelling the observance of the criminal law as such: it is giving effect to a cause of action, at law or in equity, possessed by the plaintiff as owner of the property right. If a person threatens to steal another’s car, the court would have jurisdiction to grant the owner of the car an injunction restraining that person from taking the car. But that injunction would not have the observance of the criminal law as its justification or purpose. The justification and purpose of such an injunction would be the restraint of the would-be thief from committing against the car owner the tort or torts which the theft of the car would involve. That

A the tort or torts would also give rise to criminal liability would be, essentially, irrelevant to the cause of action.

B Furthermore, as appears from the rejection in the *Lonrho* case [1982] A.C. 173, 187 of the views espoused by Lord Denning M.R. and Waller L.J. in the *Island Records* case [1978] Ch. 122, activity which is damaging to property of the plaintiff but which, if the activity were not
C become remediable in a civil suit at the instigation of the plaintiff by reason only that the activity is criminal. That the activity attracts criminal liability cannot by itself, in this field, convert into a cause of action acts which would otherwise not be sufficient for that purpose. (I confine my comments to the field of damaging a plaintiff's private rights of property, because different considerations apply elsewhere, for instance, where a party is seeking to enforce a contract, the making or performance of which is rendered illegal by statute.)

D Whether the plaintiffs have any cause of action in respect of Amstrad's and Dixons' alleged incitement of others to infringe the plaintiffs' copyrights was not a matter argued before us. That was one of the questions decided by this court, in favour of Amstrad, in the declaratory action. The only question argued before us on the incitement issue was the narrow one of whether the alleged incitement of others to commit the section 21(3) offence gave rise to claims in equity as set out above. For the reasons I have stated, in my view it does not.

E Mr. Munby sought to make his submission more attractive by confining the cases in which an individual has standing to obtain an injunction compelling the observance of the criminal law, where the activity complained of would damage a property right, to cases of a statutory prohibition enacted for the benefit or protection of a class of persons of whom the plaintiff is one. In my view, far from helping, this suggested limitation gives rise to further difficulties. In the first place, this limitation involves drawing a distinction between statutory crimes and common law crimes for which I can see no sound justification (and, in passing, I note that the crime alleged against Amstrad and Dixons is not a statutory one, but is the common law crime of incitement of others
F to commit an offence which is statutory in source).

G Secondly, this limitation involves construing a statute, but leads to a result which attributes to Parliament a very odd legislative intention. The exercise required by Mr. Munby's category (1) is the familiar, if sometimes difficult, one of construing a statute to see whether a breach of the statutory prohibition or obligation makes the person committing the breach liable in damages at the suit of a person damaged thereby. Mr. Munby's category (2) envisages that the court has undertaken that exercise and concluded (a) that the statutory prohibition or obligation was imposed for the protection or benefit of a particular class of persons but (b) that the contravention of the prohibition or obligation gave rise to no right for a member of that class to sue for damages at law, yet (c)
H the contravention did give rise to a right for a member of the class to sue in equity for an injunction, with (because this also is claimed by Mr. Munby) a claim for damages added, by a side wind, by Lord Cairns's Act.

I do not find this at all persuasive. I am unable to see what are the circumstances in which, or the purpose for which, Parliament would be concerned to draw the distinction between a claim for damages at law on the one hand, and a claim in equity for an injunction with damages

in addition to or in lieu of an injunction on the other hand, and then enact a prohibition having the effect of conferring on members of the "protected" class a right extending to the latter claim but not the former. Mr. Munby conceded, in my view rightly, that section 21(3) does not itself confer on copyright owners a right to sue at law for damages for breach of a statutory duty. I can see no basis for construing the subsection in such a way that, nonetheless, committing the offence of inciting others to commit the section 21(3) offence has the effect of conferring on copyright owners a right to sue in equity for an injunction and damages in lieu of or in addition thereto. A B

In the end, therefore, for the reasons I have sought to state, in my judgment the plaintiffs' incitement claim formulated in the amendment is not legally sustainable. Accordingly, I would allow the appeals by Amstrad and Dixons, and discharge the judge's order giving leave to amend. C

For the further reason I have already stated, the question whether the plaintiffs have a good cause of action against Amstrad or Dixons otherwise than by reference to section 21(3) has not been argued before us, Mr. Munby accepting that on this he is bound to fail in this court. Accordingly, I would dismiss the plaintiffs' appeal and, since this would leave no live issue in the proceedings, strike out the writ and statement of claim. I would do so, I must confess, with a feeling of profound dissatisfaction. The narrow issue argued before us was the criminal incitement point, which is, in my view, misconceived. But the overall result of these appeals is that if the facts alleged against Amstrad and Dixons are correct, substantial manufacturers and distributors are, on a large scale, inciting others to infringe copyright in circumstances where the copyright owners have no practical remedy against the actual infringers, and there is nothing the copyright owners can do through the courts to stop them. If, indeed, that is so, the present state of the law is, in my view, gravely defective. D E

SIR DENYS BUCKLEY. The facts of this case, and what I may perhaps call the strategic positions of the parties, have been set out in the judgment of Nicholls L.J. I will not recapitulate them. I remark, however, that the underlying cause of this action is the present apparent inefficacy of the law to protect those proprietary rights which statutes have conferred upon owners of copyrights against widespread infringement of their copyrights by the use of modern electronic copying devices. Either the means and methods of detection and control require improvement, or the very nature of copyright in works exposed to these risks of infringement calls for reconsideration. I understand that legislation in this field is already being considered. F G

The appeals presently before us are interlocutory appeals. The defendants, Amstrad and Dixons, both seek to have the action stayed in limine. The plaintiffs seek to restore to their statement of claim certain passages struck out by Whitford J. on 8 March 1986, on the ground that they no longer supported sustainable causes of action, having regard to the judgment given in this court on 29 October 1985 in the declaratory action, in which substantially the same issues were raised as in the present action. H

Mr. Munby, appearing for the plaintiffs, concedes that he cannot dispute in this court the correctness of the Court of Appeal's decision in the declaratory action, but he would seek to do so in any appeal to the

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A House of Lords. He has not contended that in the event the reasons given by this court which would have resulted in their making the declaration asked for, but for the circumstance which I shall next mention, were obiter dicta. He does, however, seek to support before us the view that the plaintiffs have a cause of action against the defendants which was not originally pleaded in the statement of claim in this action, but has been introduced by amendments permitted by Whitford J. on 8

B March 1986. This suggested cause of action was first propounded by counsel for the defendants in the Court of Appeal upon Amstrad's appeal in the declaratory action. It was on this account that the Court of Appeal, in the exercise of their discretion, refused Amstrad a declaration to the effect that they had acted lawfully in respect of the matters in issue in that action.

C In this state of affairs, the only live issue before us is whether (1) the plaintiffs have a reasonable chance of success upon what I may call the new cause of action or (2) the plaintiffs, having no reasonable chance of success in that respect and, being unable to contend in this court that they have any reasonable chance of succeeding on any other pleaded cause of action, the action should be stayed in limine. Whitford J. was not satisfied that the plaintiffs must necessarily fail on the new cause of

D action, and accordingly he allowed the amendments necessary to introduce it to the pleading and refused a stay. It will be convenient first to deal with the matter as between the plaintiffs and Amstrad.

The proposed new cause of action does not arise under the Copyright Act 1956, section 21(3), but is a consequence of the provisions of that subsection:

E "Any person who, at any time when copyright subsists in a work, makes or has in his possession a plate, knowing that it is to be used for making infringing copies of the work, shall be guilty of an offence under this subsection."

It is to be observed that the offence so created does not consist of infringing the copyright; it consists of making or possessing a plate, knowing that it "is to be used" for making infringing copies.

F Paragraph 6A of the amended statement of claim reads:

G "All or nearly all of the persons who use the said equipment to make copies of commercially available pre-recorded cassette tapes or gramophone discs will thereby be guilty of an offence under section 21(3) of the said Act. The plaintiffs will say that: (a) any person who uses the said equipment to make such copies will necessarily at the time of such copying have in his possession (within the meaning of the said subsection) the tape or disc being copied; (b) the tape or disc being copied as aforesaid will necessarily be a plate within the meaning of the said subsection; (c) by virtue of the facts and matters referred to in paragraph 2, copyrights will

H subsist in all or nearly all of such tapes or discs being copied as aforesaid; and (d) by virtue of the facts and matters referred to in paragraph 2, all or nearly all of the person making such copies will know the same to be infringing copies within the meaning of the said subsection."

The facts and matters referred to in paragraph 2 are:

"All or nearly all of the pre-recorded cassette tapes and gramophone discs (being tapes or discs in respect of which copyrights subsist)

commercially available in this country carry a warning notice to the effect that the unauthorised copying of the tape or disc is prohibited.”

A

Paragraph 7 of the amended statement of claim reads:

“The said equipment has been advertised by the first [defendant] and sold by the defendants in such a way as to incite members of the public to use it to make cassette recordings from pre-recorded tapes, gramophone discs and broadcast material, with a reckless disregard for the rights of the owners of the copyrights in the sound recordings and musical works contained therein and in circumstances where (by virtue of the facts and matters referred to in paragraphs 2 and 6A) all or nearly all of the persons making such cassette recordings will be guilty of an offence under the said subsection. The plaintiffs will say that the defendants have thereby unlawfully incited members of the public who buy the said equipment to commit offences under the said subsection.”

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The allegation is that the defendants have unlawfully incited members of the public who buy “the said equipment,” i.e. Amstrad’s high-speed copying double cassette units, S.M. 104, T.S. 87 and T.S. 39, to commit offences under section 21(3).

D

Paragraph 7 proceeds to set out in seven sub-paragraphs some material in the nature of particulars. I will not set these out in extenso. The sub-paragraphs are introduced by the words, “Pending discovery the plaintiffs point to the following facts and matters.” These “particulars” do not, in my view, have the effect of confining the plaintiffs to the matters so set out. Sub-paragraphs (a) to (c) refer to three published leaflets disseminated by Amstrad promoting the three equipments, drawing attention to the high-speed copying facilities, and saying, amongst other things, “you can even make a copy of your favourite cassette.” Sub-paragraphs (d) and (e) relate to a newspaper advertisement and a television commercial broadcast put out by Amstrad to much the same effect as the leaflets. Sub-paragraphs (f) and (g) relate to two occasions on which retail customers inquired about or bought Amstrad equipments of the relevant types from Dixons.

E

F

Mr. Hobbs, in his clearly presented argument in this court as in the court below, contended that by this plea the plaintiffs are seeking to obtain a remedy for infringement which is nowhere provided in the Copyright Act 1956, and is consequently not available to them. In my view, this argument is founded on a misconception. I can see no ground upon which it could be suggested that by selling its audio equipment, Amstrad has infringed any copyright in any work, a recording of which might thereafter be copied by the use of such an equipment. See, in this connection, that section of Lawton L.J.’s judgment in the declaratory action [1986] F.S.R. 159, 205, which is headed “Knowledge and intent.” Nor, for the purposes at any rate of the cause of action with which I am concerned, does the amended statement of claim contain any such allegation. The allegation is that, by selling its audio equipment and thus providing members of the public with the means to copy pre-recorded tapes, in the very great majority of which copyright will subsist, and by seeking to promote the sale of that equipment by such advertisements as it used, Amstrad has unlawfully incited members of the public to commit offences under section 23(1). It is not, I think, contended that Amstrad

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A has itself committed that offence; nor do I think that that could be suggested. The audio machines cannot come within the meaning of the word "plate," which is defined in section 18(3) of the Act as including "any stereotype, stone, block, mould, matrix, transfer, negative, or other appliance." Those last three words must, in my judgment, be construed ejusdem generis with the preceding words. An electronic copying machine of the kind with which we are concerned is not, in my judgment, of that genus, and does not fall within any natural meaning of the word "plate."

B So the question for us, in my view, is whether, if Amstrad is found in fact to have incited members of the public to commit offences under section 21(3), that conduct by Amstrad entitles the plaintiffs, or any of them, or any of the persons on whose behalf the plaintiffs respectively purport to sue, to a remedy in a civil court. If it is reasonably arguable that some civil remedy would or might be available, the defendants cannot be entitled to have the action dismissed or struck out, or stayed, at the present stage. For the purpose of considering the question, it should be assumed that Amstrad is guilty of incitement. Only if, on that assumption, the plaintiffs would nevertheless be bound to fail in securing any civil relief of a kind claimed can the defendants succeed. Mr. Munby is content that we should entertain and decide this question of law.

C Mr. Hobbs's sheet anchor on this part of the case is the House of Lords decision in *Lonrho Ltd. v. Shell Petroleum Co. Ltd.* (No. 2) [1982] A.C. 173. In that case the defendant company, Shell, was alleged to have breached an order having statutory force, which prohibited the supply of oil to Southern Rhodesia. The plaintiff company, Lonrho, asserted that this damaged a business of delivering oil by a certain pipeline which it carried on in Southern Rhodesia. Shell was held to have been guilty of no breach of contract with Lonrho. The question thereupon arose whether Shell was liable in tort.

E The only reasoned speech delivered in that case was Lord Diplock's, with which the other members of the House of Lords who participated in the decision all agreed. In the forefront of his reasons, Lord Diplock said that it was well settled that the question whether legislation which makes the doing or omitting to do a particular act a criminal offence renders a person guilty of such offence liable also in a civil action for damages at the suit of any person who thereby suffers loss or damage was a question of construction of the legislation. He pointed out that the statutory order in question in that case created a statutory prohibition upon the doing of certain classes of acts, and provided the means of enforcing the prohibition by prosecution for a criminal offence. He said, at p. 185:

F "So one starts with the presumption laid down originally by Lord Tenterden C.J. in *Doe d. Murray v. Bridges* (1831) 1 B. & Ad. 847, 859, where he spoke of the 'general rule' that 'where an act creates an obligation, and enforces the performance in a specified manner . . . that performance cannot be enforced in any other manner.'

H Lord Diplock then goes on to discuss two classes of exception to that general rule, all in the context of a statutory obligation or prohibition. The *Lonrho* case teaches this and, in my opinion, only this: where a statute, or a regulation having statutory force, creates a new statutory offence by imposing a new duty or a new prohibition on the public, or

some section of the public, specifying a particular method of enforcing compliance, a court of construction will, in the absence of special considerations, such as give rise to Lord Diplock's two exceptions, impute to the legislature an intention that an offender shall not be liable in any other way than that specified sanction or penalty, thus precluding the possibility of a claim in damages.

It will be observed that Lord Diplock, when he criticised, at p. 187D, what Lord Denning M.R. had said in *Ex parte Island Records Ltd.* [1978] Ch. 122, formulated the proposition of law from which he, Lord Diplock, was dissenting thus:

"whenever a lawful business carried on by one individual in fact suffers damage as the consequence of a contravention by another individual of any statutory prohibition the former has a civil right of action against the latter for such damage. . . ."

making clear that he was concerned with circumstances arising under a statute. That part of Lord Diplock's speech indicates what is, I think, an important distinction between the facts in the *Lonrho* case and those in the instant case.

There is no allegation in the present case that Amstrad has been guilty of any breach of a statutory prohibition, or of a failure to observe any statutory obligation, as there was in the *Lonrho* case and also *R.C.A. Corporation v. Pollard* [1983] Ch. 135. There is, in the present case, no legislative provision which falls to be construed in order to identify the remedies available for any breach of it. What is asserted by paragraph 7 of the amended statement of claim is that Amstrad has unlawfully incited members of the public to commit offences under section 21(3), that is to say, that Amstrad has been guilty of the common law criminal offence of inciting others to commit criminal acts, as to which, see *Halsbury's Laws of England*, 4th ed., vol. 11 (1976), p. 41, para. 53. Can that give rise to a liability in tort on the part of the inciter in favour of anyone injured by a criminal act incited by him? We have been shown no authority to the contrary.

If A, without justification, induces B to commit a breach of a contract existing between B and C, whereby C is damaged, A may be liable to a claim in damages for tort at the suit of C. It seems to me at least arguable by analogy that, if A unlawfully incites B to commit an offence under section 21(3) which will, or may, damage C, the owner of a copyright which is liable to be infringed as a consequence of that offence, A may be held to be actually or potentially liable for damages in tort at the suit of C, at any rate if that damage is a foreseeable consequence of the unlawful incitement, and a fortiori, if the consequence was intended or contemplated by A. If that is so, it cannot, in my judgment, be asserted that the amended statement of claim does not show a reasonable cause of action, that is, a cause of action which is not bound to fail in any event.

It is true, however, that in this court Mr. Munby has disclaimed any intention to rely on a common law liability in tort, and has contented himself with asserting an equitable right to injunctive relief with, as I understand, a claim for damages under Lord Cairns's Act appended to it, so I will not rest my decision of this appeal on the ground of tort. Mr. Munby's argument in support of that equitable claim has been founded on *Emperor of Austria v. Day and Kossuth*, 3 De G. F. & J. 217; *Springhead Spinning Co. v. Riley*, L.R. 6 Eq. 551, and *Dixon v.*

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A *Holden*, L.R. 7 Eq. 488. The first of these was a decision of the Court of Appeal; the other two were decisions of Malins V.-C., in which he sought to apply the principles enunciated in the *Emperor of Austria* case. It is true that Malins V.-C.'s two decisions have been the subject of criticism in later cases: see *Prudential Assurance Co. v. Knott* (1875) L.R. 10 Ch.App. 142 and *Temperton v. Russell* [1893] 1 Q.B. 435, 438. But the *Emperor of Austria* case has never, so far as I am aware, been disapproved. It appears to be binding upon us.

B Turner L.J. there, in a passage, at p. 253, already cited by Nicholls L.J., regarded the importation of spurious Hungarian bank notes to Hungary as an injury to unidentified individuals in Hungary on whose behalf the plaintiff Emperor could sue. The act complained of was not a criminal act by English law, but it was regarded by the court as an unjustified invasion of private property rights. Neither Lord C Campbell L.C. nor Knight Bruce L.J. seem to have considered that the absence of identification of the parties injured was a bar to relief. All three members of the court regarded themselves as exercising an equitable jurisdiction based upon a risk of injury to property. That decision appears to me to afford at least an arguable basis of support for D Mr. Munby's claim to injunctive relief in the present case, irrespective of whether the plaintiffs have a good common law cause of action for damages. I do not think that that decision is in any way affected by the *Lonrho* decision, or by anything said in *R.C.A. Corporation v. Pollard* [1983] Ch. 135 or in *Rickless v. United Artists Corporation* [1987] 2 W.L.R. 945 — both cases concerned with statutory prohibitions. I do not think the claim to damages under Lord Cairns's Act presents any E difficulty. The award of such damages would be discretionary. If no damages could be recovered at common law, a court of equity might well regard this as a proper circumstance to take into account in the exercise of its discretion.

I am not entirely clear what stage discovery has reached in the action. It is not, I believe, complete. It is not, I think, impossible that F the plaintiffs may want to make further amendments in their statement of claim as discovery proceeds.

G Taking all these considerations into account, this case is not one in which I, for my part, would feel disposed to assume the task of determining on these interlocutory appeals the point of law which I referred to earlier. It seems at least possible, and indeed probable, that any decision upon the trial of the action will be appealed as far as the House of Lords. I think that it is most desirable that, if and when that occurs, the relevant facts should all have been investigated and determined so that the House of Lords may be fully and precisely informed of the facts so as perhaps to be able to illuminate this area of the law.

H I now turn to Dixons' appeal. Whereas Amstrad does not sell its audio equipments direct to retail customers, Dixons does so. Amstrad has advertised its equipment in print and by television; there is no assertion in the amended statement of claim that Dixons has done so. Dixons clearly has greater opportunities to make oral representations to retail customers than has Amstrad. Amstrad very possibly has the greater incentive to build up a market for the equipment. The facts of the two cases are different, and the findings whether either of the defendants has been guilty of any such incitement as is alleged may well

be different. But the nature of the problems which arise in each case are very similar.

The allegation against Dixons in paragraph 7 of the amended statement of claim is that Dixons has sold the equipment in such a way as unlawfully to incite members of the public to commit offences under section 21(3). Whether such has been the case must be a question of fact, or of mixed fact and law. It is not a pure question of law, the determination of which adversely to the plaintiffs might justify striking out in limine against Dixons.

Mr. Fysh, appearing for Dixons, has submitted that the only specific events referred to in the amended statement of claim relating to alleged incitement by Dixons are the events mentioned in sub-paragraphs (f) and (g) of the so-called particulars, set out in paragraph 7. These two sub-paragraphs may be thought to afford slender material for concluding that Dixons has incited members of the public to commit offences under section 21(3), but, as I have already observed, I do not think that, as the pleadings stand, the plaintiffs are confined to that material in this respect.

In these circumstances, and for the reasons which I have discussed, I for my part would not stay or strike out this action against either defendant.

There remains the question whether the action can properly proceed as a representative action. The question can, I think, for present purposes, be formulated in this way. If a large number of potential plaintiffs all have distinct but similar causes of action against a potential defendant arising out of a particular act or course of conduct on the part of that defendant, which are alleged to give rise to relief of the same kind, though not necessarily of the same measure in the case of each potential plaintiff, can one, or a number of those potential plaintiffs sue as representing themselves and all or a number of the rest of the potential plaintiffs?

A leading authority in this field is *Duke of Bedford v. Ellis* [1901] A.C. 1, which related to Covent Garden Market. Six plaintiffs, who were growers of fruit, flowers, vegetables, roots and herbs, sued on behalf of themselves and all other such growers. They alleged that the defendant, the Duke of Bedford, who owned and managed the market, had contravened the Covent Garden Market Act 1828 (9 Geo. 4, c. cxiii), which governed the management of the market. The Act established preferential rights to use certain pitches at the market in favour of growers of the products in question at rates of rent and toll more favourable to growers than those prescribed for middlemen traders. The plaintiffs claimed a declaration as to the construction of the Act, injunctive relief restraining breaches of the Act, and an account of the amounts by which growers were alleged to have been severally overcharged. The defendant applied interlocutorily claiming that the action could not be pursued as a representative action. That interlocutory application was carried to the House of Lords, where it was held that the action was properly brought as a representative action. The leading speech was delivered by Lord Macnaghten, who said, at p. 8:

“Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.”

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C.B.S. Ltd. v. Amstrad Plc. (C.A.)

Sir Denys Buckley

A He drew attention to the fact that all the growers had the same rights for which they all relied on one and the same Act of Parliament.

B Similarly, in the instant case the plaintiffs, and all the persons whom they purport to represent, have statutory rights of the same character under the Copyright Act 1956, which the action is designed to protect from infringement resulting from the conduct of the defendants which is complained of. They share, in my judgment, a common interest and a common grievance, such as Lord Macnaghten had in mind. The relief which is primarily claimed is injunctive in a form which would benefit the plaintiffs and all whom they purport to represent in the same way, that is to say, by protecting them from the risk of infringements incited by the defendants.

C As Whitford J. has pointed out, there would be likely to be formidable difficulties in the way of discovering the precise measure of any damage already suffered by any individual copyright owner. It seems improbable that any claim to damages will be pursued, but it seems to me that the possibility of such a claim is no greater bar to a representative action than was the claim to an account in *Duke of Bedford v. Ellis*. See also *E.M.I. Records Ltd. v. Riley* [1981] 1 W.L.R. 923 where, in an infringement action, representative plaintiffs claimed an inquiry as to damages as well as an injunction.

D It has been argued that a representative action is not permissible where there is a claim to damages, because each claimant would have to establish his individual damage. We were referred to *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.* [1910] 2 K.B. 1021, where a claim in damages was brought against the owners of a ship lost at sea by plaintiffs suing on behalf of themselves and other owners of cargo on board the ship, which was also lost. The Court of Appeal held that the plaintiffs could not sue in a representative capacity. Vaughan Williams L.J. said, at p. 1029:

F “in the present case there is no common origin of the claims of those who shipped goods on board the *Knight Commander*—the contracts were constituted by the bills of lading, which manifestly might differ much in their form, and as to the exceptions, and probably would vary somewhat according to the nature of the goods shipped.”

G Fletcher Moulton L.J. said, at p. 1035: “where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable” but he subsequently made clear, at p. 1040, that what he had in mind was a case in which damages was the sole relief sought. Buckley L.J., who dissented on the ground that any difficulty about the action continuing as a representative action could be cured by an amendment of the pleadings, said, at p. 1045:

H “It may be, and I think it is the case, that in a representative action the plaintiff must be in a position to claim some relief which is common to all, but it is no objection that he claims also relief personal to himself.”

In the instant action, the claims of the plaintiffs and those of the persons whom they purport to represent, all have a common basis: damages are not the sole relief claimed and can, in my opinion, be regarded as a quite subsidiary form of relief, capable of being pursued by any individual claimant taking out a summons under any order for an

inquiry that the court might make to have his individual claim in damages assessed; and the major relief claimed is common to all the plaintiffs and those whom they purport to represent. In my judgment, this action has been properly framed as a representative action.

For these reasons I, for my part, would dismiss the defendants' two appeals in their entirety. In consequence of the decision of this court in the declaratory action, I would also dismiss the plaintiffs' appeal. If this interlocutory appeal is taken to the House of Lords, it will be open to the plaintiffs to seek to have those words which have been deleted from the statement of claim restored. If after trial any party wishes to appeal, it might be thought that the case would be a suitable one for the leap-frog procedure. This, to some extent, would mitigate the expense of these unfortunately duplicative proceedings.

Fox L.J. I have had the advantage of reading in draft the judgment of Nicholls L.J. I agree with it, and do not wish to add to it.

*Defendants' appeals allowed.
Plaintiffs' cross-appeal dismissed.*

Solicitors: Herbert Smith; Wilkinson Kimbers; Hamlin Slowe.

B. O. A.

[COURT OF APPEAL]

GULF OIL (GREAT BRITAIN) LTD. v. PAGE AND OTHERS

[1987 G. No. 1649]

1987 March 19;
April 2

Sir Nicolas Browne-Wilkinson V.-C.,
Parker and Ralph Gibson L.JJ.

Injunction—Interlocutory—Jurisdiction to grant—Conspiracy to injure—Defendants publishing allegation that plaintiff had acted in breach of contract—Accuracy of statement not in issue—Whether jurisdiction to grant interlocutory injunction restraining publication

The plaintiff, an oil company, entered into an exclusive supply agreement with the defendants who owned and operated several petrol filling stations. On 3 April 1985, following a dispute over outstanding amounts due from the defendants, the plaintiff refused to make any further deliveries to the defendants save on c.o.d. direct debit terms. The defendants obtained supplies from another source and failed to make any of the payments due to the plaintiff. On 15 April the plaintiff gave notice terminating the agreement. In July 1985 the defendants commenced an action against the plaintiff, claiming that the agreement was still in force and seeking damages for breach of

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contract. In December 1986 Scott J. held that between 3 and 15 April 1985 the plaintiff had been in breach of the agreement and that the defendants were entitled to damages for failure to make deliveries during that period. The defendants appealed and the plaintiff cross-appealed. While the appeals were pending the defendants circulated leaflets to several of the plaintiff's customers, giving an account of the litigation and judgment. In March 1987 the plaintiff was entertaining customers at a hospitality tent at the Cheltenham Gold Cup race meeting when the defendants flew a light aircraft over the racecourse, displaying a banner with the words "Gulf exposed in fundamental breach." The plaintiff sought an injunction restraining the defendants from displaying the airborne sign and subsequently issued a writ against the defendants seeking damages for conspiracy to injure. Warner J. refused to grant the injunction on the ground that the truth of the words was not in issue.

On the plaintiff's appeal:—

Held, allowing the appeal, that the general principle in defamation cases that there was no wrong done if the words published were true, did not apply if they were published pursuant to a combination, the sole or dominant purpose of which was to injure; that since the plaintiff did not assert any cause of action in libel and relied only on conspiracy to injure, the court needed only to be satisfied that there was a serious question on combination and intention to injure to be tried; that there was clear evidence of a combination between the defendants to display the airborne sign in circumstances where it would be seen by the maximum number of people in order to inflict the maximum possible damage to the plaintiff's business by way of revenge; and that, accordingly, there was a strong prima facie case of conspiracy to injure and the plaintiff was entitled to the injunction sought (post, pp. 171D–E, 172B–C, E–F, G–H, 173A–C).

Bonnard v. Perryman [1891] 2 Ch. 269, C.A. distinguished.

Per curiam. A plaintiff in an action for libel against the author and publisher of a newspaper article might well establish a combination, but it would only be in the rarest case that sufficient evidence of a dominant purpose to injure could be made out to warrant the grant of interlocutory relief. The court would scrutinise with the greatest care any case where a cause of action in conspiracy was joined to a cause of action in defamation and would require to be satisfied that such joinder was not merely an attempt to circumvent the rule in defamation (post, p. 172D–E).

The following cases are referred to in the judgments:

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.)

Bonnard v. Perryman [1891] 2 Ch. 269, C.A.

Coulson v. Coulson (1887) 3 T.L.R. 846, C.A.

Fraser v. Evans [1969] 1 Q.B. 349; [1968] 3 W.L.R. 1772; [1969] 1 All E.R. 8, C.A.

Harakas v. Baltic Mercantile and Shipping Exchange Ltd. [1982] 1 W.L.R. 958; [1982] 2 All E.R. 701, C.A.

Schering Chemicals Ltd. v. Falkman Ltd. [1982] Q.B. 1; [1982] 2 W.L.R. 848; [1981] 2 All E.R. 321, C.A.

No additional cases were cited in argument.

APPEAL from Warner J.

By notice of motion the plaintiff, Gulf Oil (Great Britain) Ltd., sought an interlocutory injunction against the defendants, Alfred William

James Page, Stephen Martin Page and Segap Garages Ltd., that each of them, in the case of the third defendant by its directors or officers and in the case of all defendants by themselves, their servants or agents or otherwise howsoever, be restrained from exhibiting or publishing on any airborne sign the legend "Gulf exposed in fundamental breach" or any words to the like or similar effect.

On 19 March 1987 Warner J. dismissed the plaintiff's motion. The plaintiff appealed and the appeal was heard later the same day. The Court of Appeal allowed the appeal and granted the injunction sought but reserved reasons for their decision.

The facts are stated in the judgment of Parker L.J.

John Cherryman Q.C. and *Edward Davidson* for the plaintiffs.
Leolin Price Q.C. and *Hubert Picarda* for the defendants.

Cur. adv. vult.

2 April. The following judgments were handed down.

PARKER L.J. The brothers Alfred and Stephen Page own, control and are directors of a company, Segap Garages Ltd. That company owns and operates a number of petrol filling stations. By an exclusive supply agreement dated 5 May 1982 Segap agreed to buy and Gulf Oil (Great Britain) Ltd. agreed to sell all the fuel required for certain of Segap's filling stations. The term of the agreement was five years from 13 April 1982.

At the beginning of 1985 Gulf were supplying the fuel to four filling stations. All were being supplied on credit terms. By 3 April 1985 Segap's product debt amounted to some £400,000, of which about £6,800 was due for payment on 10 April, about £7,000 on 11 April and the remainder on 20 April. Segap had also by that date placed orders for deliveries on 4, 6 and 9 April.

In this situation, Gulf, by telex dated 3 April, refused to make any further deliveries save on c.o.d. direct debit terms. Segap refused to accept deliveries on such terms and Gulf maintained its refusal to supply on existing credit terms. As a result Gulf did not make the deliveries due on 4, 6 and 9 April. On 10 April Segap obtained supplies from an alternative source but made it clear that it was holding Gulf to the agreement. It did not, however, make the payments due on 10 and 11 April.

On 15 April Gulf gave notice terminating the agreement, claiming to be entitled so to do pursuant to a clause in the agreement which gave it a right to terminate in the event of breach of the agreement by Segap. The breaches relied on by Gulf were the obtaining of supplies from another source and the failure to make the payments due on 10 and 11 April.

Gulf did not therefore make any further deliveries and Segap did not make the payment due on 20 April or any further payment, albeit that it continued to assert that Gulf remained bound by the supply agreement.

In July 1985 Gulf issued a writ against Segap and the two Pages claiming, *inter alia*, the outstanding money due under the agreement for which it was alleged the two Pages as well as Gulf were liable. Judgment in this action was given in favour of Gulf by Knox J. on 9 June 1986.

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A Also in July 1985 Segap issued proceedings against Gulf claiming damages for Gulf's failure to supply from 3 April onwards. In this action Segap continued to claim that the agreement was still in full force and effect. Judgment in those proceedings was given by Scott J. on 19 December 1986. By that time the defendants had paid £550,000 on account of the amount awarded by Knox J. plus interest and costs. Scott J. held that Gulf was in breach of the supply agreement in refusing peremptorily to supply save on c.o.d. direct debit terms but that it was entitled on 15 April to terminate the agreement for non-payment of the amounts due on 10 and 11 April. Accordingly, the agreement was terminated by the telex of 15 April and Segap were entitled to damages, but only in respect of the failure to fulfil the orders for deliveries on 4, 6 and 9 April. An inquiry as to the quantum of such damages was ordered. It is not disputed that such damages will probably be in the order of £1,500. Segap have appealed and Gulf have cross-appealed against the judgment of Scott J. and the appeal and cross-appeal are pending.

D After the judgment of Scott J. a document giving an account of the litigation and judgment was circulated to a number of Gulf customers, and on 18 March, during the Cheltenham race meeting, a light aircraft flew over Cheltenham where it could be seen both from Gulf's head offices and from the racecourse where Gulf was entertaining a number of customers. The aircraft was displaying a clearly visible legend "Gulf exposed in fundamental breach."

Thereupon Gulf's solicitors sent two telexes to the solicitors acting for Segap and the two Pages. The first telex was in the following terms:

E "Our client; Gulf Oil (Great Britain) Ltd.

"Your clients: Messrs. A. W. J. & S. M. Page and Segap Garages Ltd.

F "Our client has been aware for some time of a campaign, which is believed to be orchestrated by your clients and which has been conducted by circulating leaflets to our client's retail outlets about the recent litigation between our respective clients.

"Today an aeroplane flew over the Cheltenham area (where it is well known our client's head office is situated and large crowds were attending the races) towing a sign bearing the words 'Gulf Oil exposed in fundamental breach.' Our client has reason to believe that this too was arranged by your clients.

G "Our client takes a very serious view of this flagrantly offensive conduct, for which there can be no conceivable explanation but an intention to damage our client in a blaze of publicity, the potential damage of which is incalculable.

"Please note that application will be made on behalf of our client ex parte tomorrow morning in the Chancery Division for an immediate injunction to restrain any repetition of today's activity.

H "Please inform us immediately of the name and address of the operator of the aircraft concerned. We believe the operator to be Airspace Outdoor Advertising Ltd. of PO Box 2, Bishops Waltham, Hampshire.

"Our client will hold your clients liable for all damages suffered as a result of your clients' conduct."

The second telex stated:

"Your clients: Messrs. A. W. J. Page and S. M. Page and Segap Garages Ltd. A

"Our client: Gulf Oil (Great Britain) Ltd.

"One point further to our telex timed at 17:32 today arises: Please let us know if you have instructions to accept service of the writ we propose issuing tomorrow. This request goes to the writ only: If an order is made tomorrow, it will have to be served personally." B

The following morning Gulf's solicitors received the following reply:

"Your client: Gulf Oil (Great Britain) Ltd.

"Our client: A. W. J. Page and S. M. Page and Segap Garages Ltd.

"1. I thank you for your telexes of yesterday evening on which we have taken instructions. 2. Our clients arranged the aeroplane towing the sign. 3. You have correctly identified the operator of the aeroplane. 4. You have not identified any cause of action which your client says it has against ours. How does your client put its case? Is there in existence a draft statement of claim or draft evidence which we could see? If so, please fax together with draft minutes of order. 5. We are instructed to appear by counsel (Mr. Price Q.C.) on your client's ex parte application and if injunctive relief is obtained to your client to apply immediately inter partes for the discharge of such relief. Will your application be before the motions judge or have any other arrangements been made? Please let us know. 6. We have instructions to accept service of the writ. 7. Finally, we assume but please confirm that the truth of the words on the sign is not at issue? Regards." C D E

On receipt of this telex Gulf immediately applied in the Chancery Division for an interim injunction in these terms:

"that until trial or further order in the meantime the defendants and each of them, in the case of the third defendant by its directors and officers and in the case of all defendants by themselves their servants or agents or otherwise howsoever be restrained from exhibiting or publishing on any airborne sign or otherwise howsoever the legend 'Gulf exposed in fundamental breach' or any words to the like or similar effect." F

The application was heard by Warner J. It was opposed by counsel on behalf of Segap and the two Pages. It was refused by Warner J. At that time no writ had been issued but the writ which Gulf proposed to issue was intended to be, and subsequently was, endorsed with a claim for damages for conspiracy. The matter was of great urgency because the Cheltenham Gold Cup was due to be run at 3 p.m. the same day and this is an event which attracts particularly large numbers of race-goers. Gulf accordingly appealed forthwith to this court against the refusal to grant interim relief and the appeal was heard at 2 p.m. Interim relief was, after brief argument on both sides and for reasons to be given later, granted in the terms sought, save that the injunction was limited to exhibition by airborne sign and to the duration of the current Cheltenham race meeting. G H

Relief was refused by Warner J. on the simple ground that the truth of the words was not in issue and that, in a libel action, if a defendant

A intends to justify, interim relief is, as a matter of principle, never granted. Mr. Cherryman for Gulf did not seek to challenge the principle, but contended that where there was clear evidence of a conspiracy to injure the principle had no application. Mr. Price for the defendants advanced the contrary contention, asserting that if interim relief could be granted in such a case as this it would, in effect, reverse the long-standing principle because it would often be open to a plaintiff in a libel action to claim also in conspiracy against the reporter, editor, printers and publishers of the libel.

B The point is an important one and it is unfortunate that time considerations did not allow counsel on either side to prepare or develop full argument. This being so, and the matter being in any event interlocutory only, it is, in my view, undesirable that this court should make any further pronouncement on the law than is absolutely necessary for the purpose of disposing of the appeal.

C There was in the exchange of telexes clear evidence of a combination between the two Pages and Segap to display the airborne sign over the Cheltenham racecourse where it could be seen, and in order that it should be seen, by the maximum number of people, the vast majority of whom would have no interest whatever in the supply of fuel to retail filling stations. This was done, moreover, at a time when appeal and cross-appeal from the judgment of Scott J. was pending and when, according to his judgment, the supply agreement had been terminated. The defendants had therefore, at the time, no immediate interest of their own to protect against Gulf and no interest of their own to further as against Gulf. In these circumstances there is, in my view, a strong inference that the purpose of the display was simply to inflict upon Gulf the maximum possible damage in its business by way of revenge. There is thus not merely a serious question to be tried, but a strong prima facie case in conspiracy to injure. It may be that that case will not in the event succeed, but, unless the libel principle is a complete answer to the claim for interlocutory relief, this is a plain case for the grant of such relief on the principles enunciated in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396. Indeed, this was not seriously disputed.

E In my view, the principle mentioned is not a bar. It was established in this court in *Bonnard v. Perryman* [1891] 2 Ch. 269 in which case the court expressly approved the statement of the law by Lord Esher M.R. in *Coulson v. Coulson* (1887) 3 T.L.R. 846. It has been applied consistently ever since: see, for example, *Fraser v. Evans* [1969] 1 Q.B. 349; *Harakas v. Baltic Mercantile and Shipping Exchange Ltd.* [1982] 1 W.L.R. 958 and *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1. It is, in my view, unaffected by the general principles laid down in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396.

G However, in *Fraser v. Evans* [1969] 1 Q.B. 349 Lord Denning M.R., explaining the reason for the rule, said, at pp. 360-361:

H "The court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v. Perryman* [1891] 2 Ch. 269. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out. As

the court said in that case at p. 284: 'The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done.' There is no wrong done if it is true, or if it is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication."

It is true that there is no wrong done if what is published is true provided that it is not published in pursuance of a combination and, even if it is, there is still no wrong unless the sole or dominant purpose of the combination and publication is to injure the plaintiff. If, however, there is both combination and purpose or dominant purpose to injure there *is* a wrong done. When a plaintiff sues in conspiracy there is, therefore, a potential wrong even if it is admitted, as it is in the present case, that the publication is true and thus that there is no question of a cause of action in defamation. In such a case the court can, and in my view should, proceed on the same principles as it would in the case of any other tort.

The prospect that this would open the floodgates and reverse the principle applicable in libel actions is, in my view, unreal. A plaintiff in an action against the author and publisher of a newspaper article, for example, might well establish a combination, but it appears to me that it would only be in the rarest case that sufficient evidence of a dominant purpose to injure could be made out to warrant the grant of interlocutory relief, and I have no doubt that the court would scrutinise with the greatest care any case where a cause of action in conspiracy was joined to a cause of action in defamation and would require to be satisfied that such joinder was not merely an attempt to circumvent the rule in defamation.

Where, however, it is not asserted that there is any cause of action in libel and the plaintiff relies on conspiracy only, then the court needs only to be satisfied that there is a serious question on combination and intention to injure to be tried. Very often there may not be, but in the present circumstances, in my view, there clearly was. The occasion, scale and manner of publication of the true statement was such that a strong *prima facie* case of dominant purpose to injure was made out.

I find it unnecessary to consider the question of the apparent anomaly that an act done by one which is not actionable can become actionable if done in combination and with the sole or dominant intent to injure, for it is well established that this is so.

I also find it unnecessary to consider Mr. Price's submission that the alleged conspiracy was between two directors of a company and the company itself, for it is admitted in the telexes that the arrangements for the aerial display were made by all three defendants.

For the above reasons the plaintiffs were, in my view, entitled to the limited injunction granted.

RALPH GIBSON L.J. I agree that the judge was not right to refuse relief on the ground that, in this case, the principle established in *Bonnard v. Perryman* [1891] 2 Ch. 269 constituted a bar. Although that principle, which is applied in defamation cases, is not directly applicable in its terms to a case where the basis of claim is conspiracy to inflict deliberate damage without any just cause, nevertheless it seems to me

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A that that principle, namely the individual and the public interest in the right of free speech, is a matter of great importance in the consideration of the question whether in the exercise of the court's discretion an interlocutory injunction should be made and, if yes, what should be the extent of any restriction upon publication of any statement pending trial. The plaintiffs made out, as I think, an arguable case that the aerial display was carried out by the defendants as part of a concerted plan to inflict deliberate damage upon the plaintiffs thereby without any just cause. Due regard being given to the principle of free speech, the plaintiffs were, in my judgment, entitled to the limited injunction granted by this court.

B

C SIR NICOLAS BROWNE-WILKINSON V.-C. I agree with both judgments and have nothing to add.

*Appeal allowed.
Costs in cause.*

Solicitors: Metson Cross & Co.; Gamlens.

D

S. H.

[HOUSE OF LORDS]

E

LONDON MERCHANT SECURITIES PLC.

AND ANOTHER APPELLANTS

ISLINGTON LONDON BOROUGH COUNCIL RESPONDENTS

F

1987 March 16, 17; Lord Bridge of Harwich, Lord Brandon of Oakbrook,
May 20 Lord Mackay of Clashfern, Lord Ackner
and Lord Goff of Chieveley

G

Rating—Unoccupied hereditament—Completion notice—Substantial completion of office block—Time required for customary works necessary to complete building—Whether preparation period prior to starting customary works included—Date at which customary works deemed to start—General Rate Act 1967 (c. 9), s. 17, Sch. 1, paras. 8(1)(b), 9

H

For the purposes of determining the date that a building under construction shall be rated as an unoccupied hereditament, paragraph 8(1) of Schedule 1 to the General Rate Act 1967 provides:

“Where a rating authority are of opinion—(a) that the erection of a building within their area has been completed; or (b) that the work remaining to be done on a building within their area is such that the erection of the building can reasonably be expected to be completed within three months . . . the authority may serve on the owner of the building . . . a ‘completion notice’ . . . stating that the erection of the building is to be treated for the purposes of this Schedule as completed on the date of service of the notice or on such later date as may be specified by the notice.”

Paragraph 9 provides:

“In a case of a building to which work remains to be done of a kind which is customarily done to a building of the type in question after the erection of the building has been substantially completed, it shall be assumed for the purposes of paragraph 8 of this Schedule that the erection of the building has been or can reasonably be expected to be completed at the expiration of such period beginning with the date of its completion apart from the work as is reasonably required for carrying out the work.”

The owners of a site in Islington decided to develop it by building a large block for the purpose of providing office space for letting. On 1 March an official of the rating authority visited the site and considered that the building had been substantially completed and on 1 June 1983, the rating authority served a notice under paragraph 8(1)(b) of Schedule 1 to the General Rate Act 1967, specifying 1 September 1983 as the date when the erection of the hereditament could reasonably be expected to be completed but the architect did not issue his certificate of practical completion of the building, apart from the fitting out work, until 31 August 1983. The owners appealed, pursuant to paragraph 8(4), against the rating authority's notice to the county court on the ground that the hereditament could not reasonably be expected to be completed by the date specified. The judge dismissed the appeal, holding that by the beginning of March 1983 the building was substantially completed, that the defects in the main structure of the building could be remedied during the period that would be necessary to carry out the works customarily done after substantial completion and those customary works could reasonably be carried out within a period of six months. On the owners' appeal to the Court of Appeal the judge's findings of law were affirmed but the appeal was allowed on the ground that upon the evidence before him the judge could not properly have come to the conclusion he did on the time reasonably required for fitting out, and the matter was remitted for the judge to consider anew the appropriate completion date.

On the owners' appeal on the construction placed on paragraph 9 in the courts below:—

Held, allowing the appeal in part, (1) that for the purposes of paragraph 9 the question to be asked was when the building was complete apart from the customary work; that it was plain that the present building was not complete apart from the customary work of fitting out until 31 August 1983, and it was from that date that the period reasonably required for carrying out the fitting out work must be assumed to run to arrive at the appropriate completion date (post, pp. 180F–G, H, 181D, 187E–F, 188E–F).

But (2) that in calculating under paragraph 9 the period required for carrying out the work customarily done after substantial completion no account was to be taken of the time required for planning, tendering and designing the work (post, pp. 181D–E, 182A–C, 183A–B, C–D, 187E–F, 188E–F).

(3) That the matter would be remitted to the county court to determine in the light of the determination of the appeal and of any further evidence led by the parties what period was reasonably required after 31 August 1983 for carrying out the work remaining to be done to the building and, accordingly, on what date it was to be treated as completed for the purposes of Schedule 1 to the General Rate Act 1967 (post, pp. 187B–C, E–F, 188E–F).

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Per Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Ackner and Lord Goff of Chieveley. In a case where the fitting out work has already begun when the notice under paragraph 8(1)(b) is served and there is no need to resort to paragraph 9 the building owner will be entitled to rely on the plans, specifications, contract or other evidence showing what work is intended to be carried out in order to prove the extent of the work remaining to be done and the court will base its estimate of the time reasonably required on that evidence. If this is the correct approach under paragraph 8(1)(b) to "the work remaining to be done," a similar approach under paragraph 9 to the question what work "remains to be done" must, as far as practicable, also be adopted. The adverb "customarily" in paragraph 9 serves only to distinguish between work of a kind done after substantial completion and that done before; it has nothing to do with the extent of the work (post, pp. 183D-E, 185G—186E, 187E, 188E-F).

Ravenseft Properties Ltd. v. Newham London Borough Council [1976] Q.B. 464, C.A. and *Watford Borough Council v. Parcourt Property Investment Co. Ltd.* (1971) 17 R.R.C. 19 considered.

Decision of the Court of Appeal [1986] R.A. 81 reversed in part.

The following cases are referred to in their Lordships' opinions:

J.L.G. Investments Ltd. v. Sandwell District Council (1977) 20 R.R.C. 61, C.A.

Ravenseft Properties Ltd. v. Newham London Borough Council [1976] Q.B. 464; [1976] 2 W.L.R. 131; [1976] 1 All E.R. 580, C.A.

Watford Borough Council v. Parcourt Property Investment Co. Ltd. (1971) 17 R.R.C. 19

The following additional cases were cited in argument:

Graylaw Investments Ltd. v. Ipswich Borough Council (1978) 21 R.R.C. 229, C.A.

Hastings Borough Council v. Tarmac Properties Ltd. [1985] R.A. 124, C.A.

Post Office v. Nottingham City Council [1976] 1 W.L.R. 624; [1976] 2 All E.R. 831, C.A.

Provident Mutual Life Assurance Association v. Derby City Council [1981] 1 W.L.R. 173, H.L.(E.)

APPEAL from the Court of Appeal.

This was an appeal by leave of the House of Lords (Lord Bridge of Harwich, Lord Brightman and Lord Mackay of Clashfern) dated 11 June 1986 by the appellants, London Merchant Securities Plc. and Trendworthy Two Ltd., the owners of a large office development known as the Angel Centre, Pentonville Road, Islington, from the judgment dated 24 March 1986 of the Court of Appeal (Dillon L.J. and Booth J.) allowing in part only an appeal by the appellants from the judgment dated 21 December 1984 of Judge Marder Q.C., sitting at Clerkenwell County Court, who had dismissed their appeal brought pursuant to paragraph 8(4) of Schedule 1 to the General Rate Act 1967, in respect of a completion notice dated 1 June 1983 served by the respondents, the London Borough of Islington, as the rating authority, on the appellants in respect of the Angel Centre.

The facts are set out in the opinion of Lord Bridge of Harwich.

William Glover Q.C. and *Guy Roots* for the appellants.

Matthew Horton and Nicholas Burton for the respondents.

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Their Lordships took time for consideration.

20 May. LORD BRIDGE OF HARWICH. My Lords, the Angel Centre is a large, modern office development in Islington. It comprises two buildings. The net office floor space in one building is 162,000 sq. ft., in the other 12,000 sq. ft. The appellants are the owners. They carried out the development for the purpose of providing office space to be let. In this sense the development may be described as speculative. The word is not used in any pejorative sense, but merely to distinguish such a development from one which is carried out by or to the order of the intending occupier. The distinction is of importance for this reason. In the case of an occupier's development, as I will call it, the building can be planned and executed as a single operation because the detailed requirements of the occupier as to how the building shall be fitted out are known in advance. In the case of a speculative development, however, of shops, offices and perhaps some other categories of building, the building operation will commonly be carried out in two phases. The developer will provide the main structure of the building complete with necessary services in the first phase. But the addition of many features which, when they are provided, will certainly form part of the building, as distinct from mere furnishings, will be postponed to a second phase in order that they may be designed to meet the requirements of the eventual occupier or occupiers. The most obvious example of this two phase process is a speculative development which comprises at ground floor level a row of small shops. On completion of the first phase these will be empty shells with boarded fronts. All the shop fronts and fittings will be provided in the second phase to suit the various requirements of the individual shopkeeper tenants. The same two phase process appears now to be commonly adopted in the speculative development of modern office buildings.

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Parliament, by the Local Government Act 1966, gave power to rating authorities to adopt a code which enabled them for the first time to levy rates on unoccupied hereditaments. The power to adopt the code is now found in section 17 of the General Rate Act 1967 ("the Act") and the code in Schedule 1 to the Act. Some amendments to Schedule 1 made by the Local Government, Planning and Land Act 1980 can, for present purposes, be ignored as having no relevance to any point raised in this appeal. In a rating area where Schedule 1 applies, as it does in Islington, the owner of a "relevant hereditament" becomes liable to pay rates if the hereditament remains unoccupied for a continuous period exceeding three months. "Relevant hereditament" is defined by paragraph 15 as meaning:

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"any hereditament consisting of, or of part of, a house, shop, office, factory, mill or other building whatsoever, together with any garden, yard, court or other land ordinarily used or intended for use for the purposes of the building or part; . . ."

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In enacting the code, the legislature foresaw the necessity in the case of a newly erected building standing empty to determine with precision a date which should be taken as the commencement of the initial period of three months which must elapse before any liability to pay rates can attach. It will be convenient to refer to this as "the completion date."

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A They clearly had in contemplation the two phase process in certain forms of speculative development which I have described and the relevant provisions, as we shall see, are designed to ensure in relation to buildings erected in the course of such development that buildings in which the first phase of development has been completed may in due course attract liability to rates as unoccupied hereditaments notwithstanding that the second phase may be postponed.

B The first step necessary to determine the completion date for a new building is the service of a completion notice by the rating authority under paragraph 8(1) of Schedule 1 which provides:

C “Where a rating authority are of opinion—(a) that the erection of a building within their area has been completed; or (b) that the work remaining to be done on a building within their area is such that the erection of the building can reasonably be expected to be completed within three months, and that the building is, or when completed will be, comprised in a relevant hereditament, the authority may serve on the owner of the building a notice (hereafter in this paragraph referred to as ‘a completion notice’) stating that the erection of the building is to be treated for the purposes of this Schedule as completed on the date of service of the notice or on such later date as may be specified by the notice.”

D The effect of paragraph 8(2) to (5) may be summarised as follows. If the completion notice is not varied by agreement, withdrawn or successfully appealed against, the date specified in the notice as the date of actual or anticipated completion becomes the completion date. But the owner has a right of appeal to the county court under paragraph 8(4) on the ground:

E “that the erection of the building to which the notice relates has not been or, as the case may be, cannot reasonably be expected to be completed by the date specified by the notice.”

F If the appeal is successful, the completion date will be “such date as the court shall determine” for the purposes of Schedule 1: see paragraph 5.

G If the legislation stopped at that point the rating authority might never be able to serve an effective completion notice on the owner of a building erected in the course of speculative development and standing empty on completion of the first phase but in which the second phase had not yet been commenced. In the case of, say, a small shop where it would be apparent that the work of installing the shop front and fittings could be comfortably completed within three months, a notice served under paragraph 8(1)(b) specifying a date three months after service as the anticipated completion date could be appealed against on the ground that the work of installing the shop front and shop fittings necessary to complete the shop as a “completed building comprised in a relevant hereditament” could not reasonably be expected to be carried out until the shop was let and the requirements of the tenant shopkeeper were known. But to meet this situation paragraph 9 of Schedule 1 provides:

H “In the case of a building to which work remains to be done of a kind which is customarily done to a building of the type in question after the erection of the building has been substantially completed, it shall be assumed for the purposes of paragraph 8 of this Schedule that the erection of the building has been or can reasonably be expected to be completed at the expiration of such period beginning

with the date of its completion apart from the work as is reasonably required for carrying out the work."

The development of the Angel Centre began in 1980. The first phase of the development was finished in 1983. This phase of the development was carried out under a single contract at a cost in excess of £16 million. The architect issued his certificate of practical completion on 31 August 1983. On 1 June 1983 the respondent council as the rating authority served on the appellants under paragraph 8(1)(b) of Schedule 1 to the Act a notice specifying 1 September 1983 as the date when the erection of the building could reasonably be expected to be completed. The appellants appealed to the county court. After a hearing extending over 11 days between 5 and 26 November 1984, Judge Mander O.C., sitting in the Clerkenwell County Court, delivered judgment dismissing the appeal on 21 December 1984. The appellants appealed to the Court of Appeal on three grounds. The appeal failed on two grounds, but succeeded on the third to the extent that the Court of Appeal (Dillon L.J. and Booth J.) remitted the matter to the judge to consider afresh, in the light of their judgments, the appropriate completion date. The appellants now appeal by leave of your Lordships' House on the two grounds on which they failed in the Court of Appeal, which raise points of pure construction of paragraph 9 of Schedule 1 to the Act. Although there is no cross appeal, the issue on which the Court of Appeal determined that the matter called for remission has also been extensively canvassed in argument, primarily at the instance of counsel for the rating authority, and, since the case, if not resolved by agreement, will now have to go back to the county court in any event, it seems to me inevitable that your Lordships should also examine and give whatever guidance may be appropriate in relation to that issue.

The case for the rating authority in the county court was that an inspection of the Angel Centre buildings in March 1983 by council officials had shown that they must have been substantially completed by the beginning of that month and that the time reasonably required for carrying out the work which remained to be done of a kind customarily done to office buildings after substantial completion, which has throughout been compendiously and appropriately described as "fitting out work," was not more than six months. It was on this basis that they claimed to justify 1 September 1983 as the completion date. The appellants proved, and the judge accepted, that, inter alia, two items affecting the main building had caused the architect to delay issuing his certificate of practical completion until 31 August 1983. The building was equipped with a full air conditioning plant. This had been condemned by the respondent council, wearing a different hat than as rating authority, as being excessively noisy. This defect had not been remedied until July 1983. Moreover, because the building was air conditioned, it was essential that window frames and seals be correctly fitted. Many of these had been condemned by the architect when first fitted and the work had to be done again. This work was not complete before the end of August 1983.

Against this background of undisputed fact the judge had to decide on the true construction of paragraph 9, from what starting date the time reasonably required for the fitting out work began to run in order to arrive at the appropriate completion date, 1 March 1983 as the rating

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A authority contended or 31 August 1983 as the appellants contended and still contend.

The judge quoted the senior council official who made the March inspection, a Mr. Edwards, as saying:

B "My concept of 'substantial completion' is that you have to have walls, floors, ceilings, windows, a water supply, electricity supply and lighting, lifts, toilets, plastered walls and so on. All are required for substantial completion in a building of this size and they were there in that building."

When the judge addressed the issue of the construction of paragraph 9 he said:

C "Substantial completion, in my view, is a matter of objective fact, and the test adopted by Mr. Edwards is perhaps as near as one can get to a satisfactory definition. I accept that much work still remained to be done before the erection of the Angel Centre could be said to be complete, but that was *almost* entirely work of fitting out or adaptation of the kind which it is agreed is customarily done after substantial completion. Such *other* relatively minor work as did not meet that description—for example adjusting the window seals, or fitting a replacement air conditioning unit—that work could readily be accommodated (the word 'subsumed' was fashionable in the course of the hearing)—could readily be subsumed in the fitting out period . . ."

The added emphasis in this passage is mine and the reason for adding it will shortly become apparent.

E In the Court of Appeal [1986] R.A. 81 the judge's approach to this issue was approved. Dillon L.J. said, at p. 89:

F "On what I regard as the sensible construction of paragraph 9, the question whether a building has been substantially completed is a broad question of fact; I would reject the narrower construction that under paragraph 9 there is only substantial completion when there is nothing whatsoever but the fitting out work to be done."

Booth J., having recited the appellants' submission, continued, at p. 96:

G "I am unable to accept that submission. It amounts in effect to saying that the time reasonably required for the fitting out work shall not be deemed to run until the erection of the building is completed save and except for that work. Had Parliament intended paragraph 9 to have that meaning then the words used by the draftsman would have made it clear. In my judgment the words 'substantially completed' mean no more than that the building has reached the stage in its construction when it would be practical for the fitting out work to commence."

H My Lords, I have to say, with all respect to the judges in both courts below, that they failed to analyse sufficiently closely the language of paragraph 9. Had they done so, they would have discovered that it bears the precise meaning for which the appellants have throughout contended and indeed it seems to me to be capable of no other meaning.

In order to analyse paragraph 9 it will be helpful to set it out in numbered clauses and for clarity to vary the order in which these clauses

appear, which may be done without altering the sense of the paragraph. It will then read as follows:

“In the case of a building—(1) to which work remains to be done of a kind which is customarily done to a building of the type in question after the erection of the building has been substantially completed, (2) it shall be assumed for the purposes of paragraph 8 of this Schedule that the building has been or can reasonably be expected to be completed at the expiration of such period . . . as is reasonably required for carrying out the work (3) beginning with the date of its completion apart from the work.”

The words “substantially completed” appear in clause (1) only and the concept of substantial completion is relevant solely for the purpose of identifying a certain kind of work which, in this analysis, I shall designate as “the customary work.” The first question which a judge who has to apply this paragraph must ask himself is: “What kind of work is customarily done to a building of the type with which I am concerned after substantial completion?” Given the common practice of speculative development in two phases of shop and office buildings which I have earlier described, I apprehend that the answer to this question will not normally be in dispute, or, if in dispute, difficult to determine. In the case of a shop, the customary work will be the installation of the shop front and shop fittings. In the case of this office building there seems to have been no dispute that the customary work embraced no more and no less than what was described as the fitting out work. Proceeding to clauses (2) and (3), it is obvious that “the work” referred to in each clause means the customary work. The second question, therefore, which the judge must ask is: “What period is reasonably required for carrying out the customary work which remains to be done to the subject building?” I will call that “the customary work period.” To arrive at the date to be assumed as the completion date for the purposes of paragraph 8, clause (3) then poses the simple question: “When will the customary work period expire if it is assumed to begin on the date of completion of the subject building apart from the customary work?”

This analysis demonstrates that it never becomes necessary to ask under paragraph 9 the question when the subject building was substantially completed; the question to be asked about the subject building is when it was complete apart from the customary work. These two questions will produce different answers if the words “substantially completed” mean, as Booth J. put it, “no more than that the building has reached the stage in its construction when it would be practical for the fitting out work to commence.” But the language of clause (3), in choosing as the date when the period reasonably required for the customary work is assumed to begin the date of the completion of the building apart from that work, leaves no room for the assumption, on which all three judgments in the courts below are based, that ordinary work to complete the building (non-customary work) and fitting out work (customary work) may be carried out concurrently. It is clear that the Angel Centre was not complete apart from the customary work of fitting out until 31 August 1983 and it is from that date, not 1 March, that the period reasonably required for carrying out the fitting out work must be assumed to run to arrive at the appropriate completion date.

A Counsel for the rating authority was, I think, inclined to agree that
this construction of paragraph 9 accords with the ordinary grammatical
meaning of the language used. But he submitted that the construction
adopted by the courts below should nevertheless be preferred in order
to stem the tide of abuse which he suggested would follow if speculative
B developers could leave buildings at a stage just short of completion apart
from the customary work, in which state they could stand empty
indefinitely without attracting the unoccupied rate. My Lords, I would
suppose that most speculative developers of shop and office properties
are primarily interested in carrying out their development as economically,
swiftly and efficiently as possible and in letting the property to secure an
early return on their investment. I doubt if they will devote much of
their ingenuity or energy to devising schemes to ensure that, if they
C cannot let the property, they will escape liability for the unoccupied
rate. There was certainly not the slightest suggestion of any such
artificial device being involved in the instant case. But if my view of the
ways of property developers is unduly naive and the threat materialises
of widespread avoidance of the unoccupied rate on the lines adumbrated
by counsel for the rating authority, it can only be countered by amending
legislation. The language of the statute as it stands is clear and
D unambiguous and leaves no room for a construction designed to counter
rate avoidance in anticipation.

It follows that, in my opinion, the appellants are entitled to succeed
on the first issue raised in the appeal.

E The second question directly raised in the appeal is whether, in
calculating the period reasonably required for carrying out the customary
work which remains to be done to the building the period required for
certain preparatory operations should or should not be included in the
calculation. The nature of the preparatory operations in question is
sufficiently indicated in the following summary of the evidence of the
appellants' principal witness on the subject, which I take from the
judgment of Dillon L.J. [1986] R.A. 81, 90:

F "Mr. Henderson, who was called by the appellants as an expert on
fitting out of office buildings, gave in a written report a short
summary of the works which would be involved which he costed at
approximately £3m. He then said that, even without any survey
period to ascertain occupier's requirements, the time taken to
complete the outline design schemes for a building of the size of the
G Angel Centre incorporating the facilities he had described would be
at least eight weeks. He said that after the outline design schemes
had been accepted by the client bills of quantities and contract
documentation would be prepared and competitive tenders would
be sought; and the time required, including time for receiving and
analysing the tenders and appointing a contractor, would be about
two months. He produced a bar chart which showed a period of
four months, before the contractor went on site, for outline design,
H detailed design, local authority approvals and (spanned by the
foregoing) preparation of contract documentation and tender
period."

The factual accuracy of Mr. Henderson's estimate of four months for
this preparatory work is accepted by the rating authority, but they
submit that, on the true construction of paragraph 9, these necessary
preparations to enable the work to be carried out are distinct from

carrying out the work itself and accordingly that no time is to be allowed on this account in calculating the period reasonably required for carrying out the work. This submission was upheld by the judge and the Court of Appeal. It is submitted for the appellants that the preparatory work is incidental to the carrying out of the work. Counsel emphasises that paragraph 9 is a deeming provision and submits that, as against the ratepayer, it should not be construed so as to require any greater assumption contrary to the actual facts of the case than its language necessarily requires. In the case of the Angel Centre the actual fact was that on completion of the building apart from the fitting out work, no preparatory work of the kind described by Mr. Henderson had yet been undertaken. It follows, so it was submitted, that the period of four months necessary for preparation must elapse before the fitting out work could be undertaken and therefore must be included in the overall period reasonably required for carrying out that work.

It is to be observed that Mr. Henderson's estimate excludes "any survey period to ascertain the occupier's requirements." This exclusion was no doubt deliberately made in the light of the decision of the Court of Appeal in *J.L.G. Investments Ltd. v. Sandwell District Council* (1977) 20 R.R.C. 61. It was there held under paragraph 9 that the court could not take into account in calculating the period reasonably required for carrying out the work the time taken in finding a tenant. Delivering the leading judgment, Cairns L.J. said, at pp. 65-66:

"Counsel for the ratepayer contends that paragraph 9 is directed only to excluding unreasonable delay, and that there has been no unreasonable delay in any respect on the part of his clients here. He asks us to say that the words 'required for carrying out the work' are not the same as 'required in carrying out the work,' and points to matters incidental to the carrying out of the work in addition to the physical activities of performing it. He says that some incidental matters must surely be taken into account, such as, for instance, the time taken for the delivery of goods, and perhaps time taken for the preparing of plans for the work and time taken in obtaining consent under building regulations for it. I express no opinion upon any matters of that kind. They might be regarded as something which was indeed incidental to the carrying out of the work, in the sense that they were an essential part in addition to the actual job of the workmen in putting in partitions and that sort of thing. But it seems to me that it is a very different matter to say that time required for carrying out the work can include also the finding of a tenant, however convenient it may be to do so, before the work is started."

The ratepayer accordingly failed and the correctness of that decision is beyond dispute. But here Mr. Henderson's estimate of the time required for preparatory work assumes that at the moment when the Angel Centre was completed apart from fitting out work, the intending occupier had been identified and his requirements ascertained in general terms. On this assumption what remained to be done comprised the several steps described by Mr. Henderson as necessary to translate those general requirements into detailed plans, specifications and a concluded contract enabling the contractor to go upon the site armed with all the necessary statutory and byelaw permissions ready to commence the fitting out work.

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A Your Lordships must now decide the point left open by Cairns L.J. Like the Court of Appeal I do not find it easy. There is much force in the submission made for the appellants. I do not doubt that the phrase "carrying out the work" is wide enough to include some incidental operations going beyond the physical activities of craftsmen and labourers employed to work on the building of which account must be taken in estimating the period required for carrying out the work. But it seems to me that a distinction must be drawn between what is truly incidental and may prolong the period required once the work has been commenced and what is merely preparatory and necessary to be undertaken before the work can be commenced at all. We are here only concerned with activities in the latter category. Nothing turns on the use of the preposition "for" instead of "in." It is dictated by the preceding verb "required." It would be quite ungrammatical to speak of the period required "in" carrying out the work. If one asked after the event what period was actually occupied in carrying out the work, the answer would surely be arrived at by measuring the period between the contractor's starting and finishing dates. I can find no sufficient reason to apply a different test when required by the statute to ask before the event what period is reasonably required for carrying out the work. Accordingly, I conclude that the appellants must fail on this second issue.

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E The remaining issue calling for examination is that which prompted the Court of Appeal to remit the case to the judge for reconsideration. Before he could assess what period was reasonably required for carrying out the fitting out work which remained to be done to the Angel Centre on the date of its completion apart from that work, the judge had to decide the nature and scope of the work on which to base his assessment. The appellants' witnesses based their estimates of the time required on a schedule of work which included the provision of such facilities as kitchens, restaurants, dining rooms, an executive suite, a computer suite and conference rooms, as well as office areas. A submission was made by counsel for the rating authority that most, if not all, this work should be disregarded. He based this submission on some observations of my own in a case decided at first instance, *Watford Borough Council v. Parcourt Property Investment Co. Ltd.* (1971) 17 R.R.C. 19. The judge accepted this submission as the following paragraph from his judgment indicates:

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G "In my view if the statutory formula is to be satisfied a distinction must be drawn between on the one hand work required to complete the erection of the building, that is to say to render it capable of or available for occupation as an office building; and on the other hand work required by the proposed occupier, to make his occupation more convenient or more comfortable. The test, derived in particular from the case of *Watford Borough Council v. Parcourt Property Investment Co. Ltd.* was correctly stated by Mr. Horton in the course of his submissions. It is not what an actual tenant may reasonably require but what further work is essential for the purpose of occupation of that building qua office building, and account is to be taken of that work, only in so far as it is, or would be, part of the resulting hereditament. I do not think that (perhaps subtle) distinction was always apparent in the evidence of Mr. Nash or Mr. Henderson and some of the work they postulated seemed to me to involve overlapping or confusion of the two categories. That may be

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hard to avoid and even harder to quantify, but I do seek to discount that overlapping effect in considering the period of time reasonably required for carrying out the work.”

The *Watford* case was one in which the rating authority claimed rates on a newly erected and unoccupied building in respect of a period before any completion notice had been served. The first point for my decision was whether it was “a completed building comprised in a relevant hereditament” on a date when, to use for convenience the terminology I have adopted in this opinion, the first phase of development by the speculative developer was complete but none of the fitting out work had been done. It was accepted as common ground that the test to be applied was whether the building was ready for occupation for office purposes. I held that it was not on the ground that, at least, the large open floor areas would require to be divided before it was capable of being occupied as offices and the partitioning could only be provided so as to form part of the rateable hereditament. The later decision of the Court of Appeal in *Ravenseft Properties Ltd. v. Newham London Borough Council* [1976] Q.B. 464, to which I was also a party, affirmed the test of readiness for occupation as the appropriate test of completion in relation to a building which was the subject of a completion notice served under paragraph 8(1)(a) of Schedule 1 to the Act.

In the *Watford* case, 17 R.R.C. 19, by the time the case came on for trial the building was occupied and the fitting out work required by and provided for the occupier included a goods lift, a special air conditioning plant for a computer, a kitchen and a canteen. I said in my judgment, at p. 27:

“It was argued by counsel, on behalf of the defendant company albeit with no great enthusiasm, that the absence of the facilities subsequently provided by Heinz in the shape of air-conditioning for the computer, a goods lift and a kitchen and canteen, facilities which undoubtedly could only be provided in a form which would become part of the hereditament, were themselves facilities necessary to the occupation of the building. I am unable to take that view. It may be very usual in these days for the occupier of an office building of this calibre to provide a kitchen and canteen on the premises for his staff, but it is impossible to say that it is essential and a fortiori it is impossible to say that it is an essential feature of any office building to render it ready for occupation that it should be furnished with a goods lift or with an air-conditioning plant appropriate to the needs of a computer.”

In the instant case Dillon L.J. [1986] R.A. 81, 94–95 after citing the above passage from my judgment in the *Watford*, case said:

“I cannot think that Bridge J., in thus dealing in 1971 with what was essentially a question of fact in relation to a building which had been substantially completed in 1967, was intending to lay down rules of law for all time. . . . The Angel Centre contains over twice as much office space as the 1967 building with which Bridge J. was concerned. The main building in the Angel Centre would, on the evidence, have from 1,500 to 2,000 people working in it after it was occupied. In my judgment it is customary for the fitting out works for such a building to include the provision of restaurant and canteen facilities and a directors’ suite as proposed by Mr.

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A Henderson. The judgment of Bridge J. did not constrain the judge
to hold otherwise. Again computers are found so indispensable in
business nowadays that any new office development like the Angel
Centre will be fitted out with a computer room. If therefore the
allowance for overlapping which the judge made was made
comprehensively, without regard to minor details, to exclude the
B kitchen facilities, restaurants and dining rooms and the directors'
suite and the expenditure in respect of the computer suite, the
judge, in my judgment, misdirected himself. In this court we do not
know how far the judge, in deciding that the period for carrying out
the fitting work should be six months rather than the 12 months
proposed by the appellants, discounted for the fact that the work
specified by Mr. Henderson could reasonably be done in several
C months less than 12 months, and how far he discounted for supposed
overlapping."

Before your Lordships counsel for the rating authority, whilst
accepting that the remission to the judge could not be challenged, in
that the judge had failed to specify the items included in the appellants'
schedule of fitting out work which he discounted for what Dillon L.J.
D described as "supposed overlapping," still strenuously contended that on
reconsidering the matter the judge would be entitled to make a discount
in calculating the period reasonably required for carrying out the fitting
out work in respect of any facilities which were not proved to be
indispensable in an office building such as the Angel Centre.

My Lords, Dillon L.J. was, if I may respectfully say so, entirely
E right, in the passage quoted, to point out that my decision in the
Watford case, 17 R.R.C. 19, was a decision on the facts then before me
and to draw attention to the factual differences between that case and
the instant case derived both from the difference in scale of the two
office buildings in question and from advances in office technology. But
there is a more fundamental reason why what I said in the *Watford* case,
F correctly understood, is quite irrelevant to the question which the judge
here had to decide. The issue in the *Watford* case, as in the *Ravenscroft*
case [1976] Q.B. 464, was whether the building in question was, in the
condition as it stood when it fell to be considered, a "completed building
G comprised in a relevant hereditament." Applying the test of readiness
for occupation for office purposes the court in both cases answered that
question negatively. All I was saying in the paragraph quoted from the
Watford case referring to the facilities later provided for an occupier (air
conditioning for the computer, goods lift, kitchen and canteen) was that
their absence at the material time did not, per se, necessarily lead to the
conclusion that the building was not ready for occupation at that time.

Whenever a notice is served under paragraph 8(1)(a) of Schedule 1
to the Act specifying a date when the rating authority assert that a
building has been completed and is comprised in a relevant hereditament,
H the court must determine whether the building is ready for occupation
on that date. But when a notice is served under paragraph 8(1)(b)
specifying a future date as that on which the building can reasonably be
expected to be completed, the court's approach must necessarily be
different. Under paragraph 8(1)(b) the court must first determine the
nature and extent of "the work remaining to be done on the building" in
order to assess the time when that work can reasonably be expected to
be completed. In construing this phrase I can see nothing in the context.

still less in anything I said in the *Watford* case, 17 R.R.C. 19, directed to a different issue, which would justify the court in disregarding any of the work which was in fact intended to be done in the completion of a building which on completion would be comprised in a relevant hereditament on the ground that the facilities proposed to be provided in the fitting out work were more elaborate, lavish or extensive than was strictly necessary to make the building fit for occupation. Thus in a case where the fitting out work has already begun when the notice is served and there is no need to resort to paragraph 9 the building owner will be entitled to rely on the plans, specifications, contract or other evidence showing what work is intended to be carried out in order to prove the extent of the work remaining to be done and the court will base its estimate of the time reasonably required for completion on that evidence.

If this is the correct approach under paragraph 8(1)(b) to "the work remaining to be done," a similar approach under paragraph 9 to the question what work "remains to be done" must, so far as practicable, also be adopted. I would emphasise that the adverb "customarily" in this paragraph serves only to distinguish between work of a kind done after substantial completion and that done before: it has nothing to do with the extent of the work. If it is not known at the date of the hearing of an appeal against a completion notice what fitting out work is intended, as was the case here before the judge, the proper test must, I think, be to ask simply what work will probably be carried out. There is no warrant under either paragraph 8(1)(b) or paragraph 9 for drawing a distinction such as the judge drew between essential and inessential work. It goes without saying, of course, that a distinction is to be drawn, on the ordinary principles of rating law, between work which will enhance the value of the hereditament on which its eventual assessment in the valuation list will be based and mere furnishings which will not affect that assessment.

This brings me to consideration of the proper disposal of these proceedings if the parties cannot reach agreement. We have been told that the Angel Centre is now completed and fully occupied. It seems to me that it would be quite unreasonable now to remit the matter to Judge Marder on the basis that he should apply the principles I have endeavoured to expound to the necessarily speculative evidence he heard in November 1984 as to what the fitting out work was expected to involve. It is a principle of perfectly general application that the court should not speculate when it knows. The court will now be in a position to know what fitting out work was done to complete the Angel Centre before its occupation. If the work was done under a single contract in a continuous operation, evidence of what that work comprised will, it seems to me, be the best, if not conclusive, evidence of the extent of the work "remaining to be done" on 31 August 1983 and the time actually taken in carrying out the work will be cogent, though not, of course, conclusive, evidence as to the period reasonably required for carrying it out. If the work was done under a number of different contracts, different considerations may apply, but the evidence of what was done in fact will still be very relevant to the determination of the outstanding issue. If justice is to be done between the parties and if either party wishes to rely on evidence of the kind to which I have referred, I do not see how they can properly be denied that opportunity, even though this would effectively mean a retrial of the issue.

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A I should add that in all the circumstances it seems to me that a specific remission to Judge Marder may no longer be necessary. In saying that I imply no personal criticism of Judge Marder whatsoever. I have no doubt he is fully competent to retry the case. But if there has to be a retrial a simple remission to the Clerkenwell County Court may be more convenient to all concerned. It will, of course, be open to the parties to apply to the court to have the matter assigned for rehearing to Judge Marder, if they think that to be the most convenient course.

B Accordingly I would allow the appeal to the extent that I would substitute for paragraph 2 of the order of the Court of Appeal an order in the following terms:

C “that this matter be remitted to the Clerkenwell County Court to determine in the light of the speeches delivered in the House of Lords and in the light of any further evidence led by the parties what period was reasonably required after 31 August 1983 for carrying out the work then remaining to be done to the Angel Centre and accordingly on what date the Angel Centre was to be treated as completed for the purposes of Schedule 1 to the General Rate Act 1967.”

D Paragraphs (3) and (4) of the order of the Court of Appeal relate to costs and I apprehend your Lordships would wish to hear counsel's submissions in the light of the speeches delivered before reaching any decision as to that part of the order or as to the costs of the appeal to this House.

E LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and for the reasons which he gives I would allow the appeal to the extent proposed by him.

F LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Bridge of Harwich. I agree with the conclusion that he has reached and with the reasons that he has given for it, subject to a minor reservation.

G My noble and learned friend has stated that there is a fundamental reason why what he said in *Watford Borough Council v. Parcourt Property Investment Co. Ltd.*, 17 R.R.C. 19, correctly understood, is quite irrelevant to the question which the judge here had to decide. That fundamental reason was that the issue in the *Watford* case, as in *Ravenseft Properties Ltd. v. Newham London Borough Council* [1976] Q.B. 464, was whether the building in question was, in the condition as it stood when it fell to be considered, a completed building comprised in a relevant hereditament. It seems to me that considerations which point to whether or not a building has been completed on a particular date in the past may also be relevant to considering whether a building can reasonably be expected to be completed at a particular date in the future. One must look forward to what one can reasonably expect to be the state of the building at the future date which is in question and to ask oneself then whether or not, at that date in the light of the reasonable expectations which are entertained, the building will, at that date, be completed. Supposing one were looking at the building considered in the *Watford* case before the partitioning was put in place

and it was known that the partitioning would be completed within a month, the argument could still have been advanced that since at the end of the month it would have no goods lift or air conditioning plant appropriate to the needs of a computer it could not be said to be completed at the end of the month. It respectfully appears to me that this consideration would be as aptly disposed of by the remarks my noble and learned friend made in the *Watford* case as was the argument that the building had not been completed on the date in the past that was being considered by reason of the absence of the goods lift and the air conditioning plant on that past date. The mere fact that the date of completion being considered is in the future rather than in the past does not appear to me to alter the meaning of completion nor the circumstances that would qualify the building to be considered as completed. Although I do not agree that there is such a fundamental difference between the test to be applied in respect of past completion under paragraph 8(1)(a) and future completion under paragraph 8(1)(b) and paragraph 9, I entirely agree that it is not correct to seek to distinguish between work required to complete the erection of the building and work required to make the occupation more convenient or more comfortable since work may fall into both categories. In my opinion, what one has to do is to look, in the case of a building to be completed, at the work that is likely to be done to reach that completion to the standard that is likely to be attained. If the accommodation to be provided is of a higher standard than normal this may well require the finishing work to take longer than it would if a lesser standard of accommodation were being aimed at.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and for the reasons which he gives I would allow the appeal to the extent proposed by him.

LORD GOFF OF CHIEVELLY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge of Harwich. I agree with it and I too would allow the appeal for the reasons which he has given.

Appeal allowed.

Respondents to pay two-thirds of appellants' costs in House of Lords and in courts below.

Costs of retrial at discretion of county court.

Solicitors: Michael Conn & Co.; Legal Department, Islington London Borough Council.

J. A. G.

3 W.L.R.

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[QUEEN'S BENCH DIVISION]

QUIETLYNN LTD. v. PLYMOUTH CITY COUNCIL

PORTSMOUTH CITY COUNCIL v. QUIETLYNN LTD.

B

QUIETLYNN LTD. v. OLDHAM BOROUGH COUNCIL

1986 Dec. 8, 9, 10;

Watkins L.J., Webster

1987 March 5

and Mann JJ.

C

Licensing—Sex establishment—Objections—Licences for sex shops refused after objections made during and after 28-day period—Prosecutions for using premises as sex shops without licences—Whether justices and Crown Court having jurisdiction to consider validity of licensing authority's decision—Whether licensing authority entitled to hear objections after 28-day period—Local Government (Miscellaneous Provisions) Act 1982 (c. 30), s. 2, Sch. 3, para. 10(15)(19)

D

Three local authorities determined that sex establishments should be licensed and they passed the necessary resolution that Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 should apply in their area. The company, which had a number of sex shops, made applications to those local authorities for licences for its shops in their areas. The local authorities heard the applications and in accordance with paragraph 10(15) and (19) of Schedule 3¹ considered objections made within 28 days of the company's application. They also considered objections made after the 28-day period and one local authority permitted a councillor, who was not a member of the authority's licensing panel, to address the panel on reasons for refusing a licence. All three local authorities refused to grant licences to the company but the company continued to trade from its shops. On each local authority laying informations against the company, the justices convicted the company of using premises as a sex establishment contrary to paragraph 20(1) of Schedule 3 to the Act of 1982. The company appealed against each conviction to the Crown Court. In two cases, the Crown Court allowed the appeal on the ground that the refusal of the licence by the relevant local authority was invalid as the authority had failed to comply with the procedural requirements of paragraph 10(15) and (19) of Schedule 3 and the rules of natural justice by considering objections to the grant of the licence made more than 28 days after the company's applications. In the third case, the Crown Court dismissed the company's appeal.

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On appeal by two local authorities and by the company:—

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Held, allowing the local authorities' appeals and dismissing the company's appeal, that under the statutory code for licensing sex establishments, it was for the local authority to determine whether to grant a licence and any question of the validity of the local authority's decision was to be determined by the High Court in proceedings for judicial review; that until such proceedings the local authority's decision was to be presumed to be validly made (unless it was invalid on its face) and that, accordingly, on a prosecution for an offence under section 2 of, and Schedule 3 to, the Act of 1982, neither the justices nor the Crown Court had jurisdiction to consider the validity of the

¹ Local Government (Miscellaneous Provisions) Act 1982, Sch. 3, para. 10(15)(19); see post, p. 202D–E.

Quietlynn Ltd. v. Plymouth Council (D.C.)**[1987]**

refusal of a licence and therefore, the two decisions of the Crown Court that the refusal of licences were invalid had been made without jurisdiction (post, pp. 201H—202B).

Director of Public Prosecutions v. Head [1959] A.C. 83, H.L.(E.); *London & Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. 182, H.L.(Sc.) and *Reg. v. Jenner* [1983] 1 W.L.R. 873, C.A. considered.

Held, further, that under paragraph 10(15) of Schedule 3 a licensing authority was under a duty to consider objections made not later than 28 days after the date of the application for a licence but it also had a discretion to hear objections made after the period; that provided the authority gave the applicant an opportunity to be heard and deal with all objections, whether made during or after the 28 day period, the provisions of paragraph 10(19) of Schedule 3 had been complied with and there had been no breach of natural justice; and that, in the circumstances, the local authorities had given the company a sufficient opportunity to deal with all objections and, therefore, the Crown Court had wrongly held that two authorities' decisions to refuse a licence were invalid (post p. 203E–G).

Dictum of Stephen Brown L.J. in *Reg. v. Preston Borough Council, Ex parte Quietlynn Ltd.* (1984) 83 L.G.R. 308, 313, C.A. applied.

Dictum of Forbes J. in *Reg. v. Birmingham City Council, Ex parte Quietlynn Ltd.* (1985) 83 L.G.R. 461, 486 disapproved.

The following cases are referred to in the judgment:

Cannock Chase District Council v. Kelly [1978] 1 W.L.R. 1; [1978] 1 All E.R. 152, C.A.

Davy v. Spelthorne Borough Council [1984] A.C. 262; [1983] 3 W.L.R. 742; [1983] 3 All E.R. 278, H.L.(E.)

Director of Public Prosecutions v. Head [1959] A.C. 83; [1958] 2 W.L.R. 617; [1958] 1 All E.R. 679, H.L.(E.)

Hoffmann-La Roche (F.) & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295; [1974] 3 W.L.R. 104; [1974] 2 All E.R. 1128, H.L.(E.)

London & Clydeside Estates Ltd. v. Aberdeen District Council [1980] 1 W.L.R. 182; [1979] 3 All E.R. 876, H.L.(Sc.)

Reg. v. Birmingham City Council, Ex parte Quietlynn Ltd. (1985) 83 L.G.R. 461

Reg. v. Chester City Council, Ex parte Quietlynn Ltd., *The Times*, 19 October 1983

Reg. v. Davey [1899] 2 Q.B. 301

Reg. v. Jenner [1983] 1 W.L.R. 873; [1983] 2 All E.R. 46, C.A.

Rex v. Judge Pugh, Ex parte Graham [1951] 2 K.B. 623; [1951] 2 All E.R. 307, D.C.

Reg. v. Preston Borough Council, Ex parte Quietlynn Ltd. (1984) 83 L.G.R. 308, C.A.

Wandsworth London Borough Council v. Winder [1985] A.C. 461; [1984] 3 W.L.R. 1254; [1984] 3 All E.R. 976; 83 L.G.R. 143, H.L.(E.)

The following additional cases were cited in argument:

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208, H.L.(E.)

Dunlop v. Woollahra Municipal Council [1982] A.C. 158; [1981] 2 W.L.R. 693; [1981] 1 All E.R. 1202, P.C.

Durayappah v. Fernando [1967] 2 A.C. 337; [1967] 3 W.L.R. 289; [1967] 2 All E.R. 152, P.C.

Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112; [1985] 3 W.L.R. 830; [1985] 3 All E.R. 402, H.L.(E.)

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Quietlynn Ltd. v. Plymouth Council (D.C.)

A

Hinton Demolition Pty. v. Lowe [1971] 1 S.A.S.R. 512*Kruse v. Johnson* [1898] 2 Q.B. 91, D.C.*McIlkenny v. Chief Constable of the West Midlands* sub nom. *Hunter v.**Chief Constable of the West Midlands Police* [1980] Q.B. 283; [1980] 2

W.L.R. 689; [1980] 2 All E.R. 227, C.A.; [1982] A.C. 529; [1981] 3

W.L.R. 906; [1981] 3 All E.R. 727, H.L.(E.)

Musson v. Emile [1964] 1 W.L.R. 337; [1964] 1 All E.R. 315

B

Reg. v. Peterborough City Council, Ex parte Quietlynn (unreported), 22

February 1985, Forbes J.

Reg. v. Smith (Thomas George) (1984) 48 P. & C.R. 392, C.A.*O'Reilly v. Mackman* [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All

E.R. 1124, H.L.(E.)

QUIETLYNN LTD V. PLYMOUTH CITY COUNCIL

C

CASE STATED by the Crown Court at Plymouth.

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On 2 November 1984 an information was preferred by the Plymouth City Council against the appellant, Quietlynn Ltd., that the company on 2 August 1984, at premises known as the Private Shop, 23, Market Avenue, Plymouth, which was situated in an area in which Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 was in force, used the premises as a sex establishment without a licence granted under Schedule 3, contrary to paragraph 20 of Schedule 3 thereto and section 2 of the Local Government (Miscellaneous Provisions) Act 1982.

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On 11 January 1985 the Devonshire justices sitting at Plymouth heard the information and convicted the company, imposing a fine of £1,000 and ordering the company to pay £440 costs. An appeal against the decision of the justices was made by the company to the Crown Court at Plymouth, which appeal was heard on 3 June 1985.

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The Crown Court found that the premises were trading as a sex establishment as defined in the Act. No licence had been granted to the company and Schedule 3 was in force within the district where the premises were situated. The Plymouth City Council held a public hearing on 21 June 1984 to consider the application by the company for a licence. At the hearing the council considered a number of objections which had been received outside the 28-day period permitted by the Schedule. Some as recently received as the morning of the hearing and some sent to individual councillors. The council at the hearing considered representations by the chief officer of police. The company was not given a copy of the representations before the hearing. The company's representative Mr. Sullivan was cross-examined about those representations. The council refused to grant a licence.

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The company contended that the purported hearing and determination of its application was invalid because the council considered objections which had been lodged outside the permitted 28-day period. The company had not been advised in advance as to the representations by the chief officer of police. The council contended that the procedural irregularities were not fatal to the application.

The Crown Court was of the opinion that the decision in *Wandsworth London Borough Council v. Winder* [1985] A.C. 461 permitted the company to challenge the validity of the hearing and its refusal to grant a licence as its defence before the Crown Court. Following the decision of Forbes J. in *Reg. v. Birmingham City Council, Ex parte Quietlynn Ltd.* (1985) 83 L.G.R. 461 the irregularities were fatal to the

determination of the council and their refusal to grant a licence was invalid, and therefore the company's application for a licence remained to be heard. The court therefore allowed the appeal and quashed the conviction with costs to the company of the hearing and of the court below.

The council appealed.

The questions for the opinion of the High Court were whether it was within the power of the Crown Court to declare that the decision of the council to refuse to grant a licence was invalid in so far as the challenge to the decision was raised as a defence to a prosecution under paragraphs 6 and 20 of Schedule 3 and whether it was within the power of the Crown Court to assert that the company's application for a licence had still to be determined.

PORTSMOUTH CITY COUNCIL V. QUIETLYNN LTD.

CASE STATED by the Crown Court at Portsmouth.

On 15 May 1985 the Portsmouth justices convicted Quietlynn Ltd. and Brian James Richards, of the following offences (i) that the company on 28 July 1983 did knowingly use the premises known as The Private Shop, 62, Castle Road, Southsea, as a sex establishment without there being in existence a licence granted by the Portsmouth City Council permitting such use, contrary to paragraph 20(1)(a) of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982; (ii) that offence (i) was attributable to neglect on the part of Mr. Richards and he was thereby guilty of that offence by virtue of paragraph 26(1) of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982; (iii) that the company on 28 July 1983 did knowingly use the premises known as Sven Books, 60, Kingston Road, Portsmouth, as a sex establishment without there being in existence a licence granted by the Portsmouth City Council permitting such use contrary to paragraph 20(1)(a) of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982; (iv) that offence (iii) was attributable to neglect on the part of Mr. Richards and he was thereby guilty of that offence by virtue of paragraph 26(1) of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982.

Appeals against the convictions were made by the company and Mr. Richards to the Crown Court at Portsmouth, which appeals the Crown Court heard together on 7 and 8 August 1985. They made the following admissions of fact in respect of each of the four offences. The licensing panel for the City of Portsmouth met on 11 July 1983, to consider an application by the company for sex establishment licences, in respect of premises at 60, Kingston Road, Portsmouth, and 62, Castle Road, Portsmouth. The panel, having heard all the evidence and considered the applications, decided to refuse both applications, in respect of both premises. Those premises were used on 28 July 1983 as sex establishments within the meaning of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982. No licence had been granted by the Portsmouth City Council. The company had knowledge that the aforesaid premises were used as sex establishments on 28 July 1983 without a licence. The acts and omission of the company in using the aforesaid premises on 28 July 1983 as sex establishments, without a licence, were due to neglect on the part of Brian James Richards. The company applied for judicial review on 31 August 1983 and its application for leave was heard on 12

3 W.L.R.

Quietlynn Ltd. v. Plymouth Council (D.C.)

A April 1984. The company and the Portsmouth City Council were represented by counsel at the hearing of the application for leave. There were five grounds relied upon in the application for judicial review including a complaint as to the reception by the licensing panel of certain oral representations made by a Councillor Hancock. Leave was refused on that ground but granted on one other ground. The order of the court granting leave was made on the following terms:

B “After the respondent’s (Portsmouth City Council) evidence had been filed, the applicant’s (Quietlynn Ltd.) legal adviser should consider that evidence and, having taken advice of counsel, should decide whether it was appropriate to proceed with the application.”

C On 16 May 1984 the council filed their evidence and on 24 July 1984 the solicitors for the company informed the council that they had been advised by counsel that the matter should proceed. The application for judicial review was brought to trial on 23 January 1985 and the company withdrew its application. The company and Mr. Richards received a copy of a letter from the council dated 14 July 1983 setting out the grounds for the refusal of the licence.

D In addition to the above agreed facts the Crown Court heard evidence from Colin Sullivan on behalf of the company and Mr. Richards as set out in the following statement. Mr. Sullivan, a management consultant, represented the company at its application for a sex establishment licence, on 11 July 1983. That was the second or third such application that he had made on behalf of the company. At the meeting Mr. Sullivan addressed the committee, then council officers spoke and then a Councillor Hancock, who was not a member of the committee, addressed the committee. That was after Mr. Sullivan had made his address and in spite of his objections. Mr. Sullivan had been told informally before the hearing that Councillor Hancock proposed to make his observations and he had objected to that. Councillor Hancock was told by the chairman of the committee to limit his remarks to the sex shop that was within his ward, namely, the shop in Fratton. The councilor spoke generally about churches, schools, the Portsmouth rapist who had sex books in his possession when arrested and other criminals. The councilor had also disputed certain statistics which Mr. Sullivan had put forward to the committee. Councillor Hancock had not presented any written evidence to the committee but objected to the shop on the basis of the views of the local people to whom he had spoken. The observations by Councillor Hancock were one of the grounds of the application for judicial review but leave was refused in respect of that ground. Mr. Sullivan agreed, under cross-examination, that Councillor Hancock had said that he would limit his remarks to the particular shop in his ward. He also agreed that he could have asked but did not ask for a few minutes with the councilor to discuss the latter’s observations. Mr. Sullivan agreed that the proceedings appeared to be in accordance with the council’s standing orders and that he had also spoken about religious bodies, schoolchildren and crime, but unlike the councilor, he had not referred to specific crimes. Mr. Sullivan was recalled and confirmed that he had in fact addressed the committee after the councilor’s remarks. In addition there had been a delay between the councilor speaking and Mr. Sullivan’s summing up. A site visit had taken place and other business had been attended to. Mr. Sullivan had not asked for an adjournment as he had made similar applications

before and each time he had been refused. He had not wanted to antagonise the committee.

It was contended by the company and Mr. Richards that the situation was analogous to that which obtained in *Wandsworth London Borough Council v. Winder* [1985] A.C. 461, in that they had the right to set up as a defence to proceedings brought against them, the allegation that the decision of the licensing panel was ultra vires and void, and that they were not obliged to proceed under R.S.C., Ord. 53. Reference was made to *London & Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. 182. Whether the decision of the licensing panel was void ab initio or voidable was irrelevant: see the judgment of Forbes J. in *Reg. v. Sefton Metropolitan Borough Council, Ex parte Quietlynn Ltd.* (unreported), 22 February 1985. *Cocks v. Thanet District Council* [1983] A.C. 286 had to be distinguished from *Wandsworth London Borough Council v. Winder* [1985] A.C. 461 because in the present matter the company and Mr. Richards were seeking to defend themselves rather than seeking a declaration; and were seeking to retain pre-existing private law rights rather than establish new private law rights. The provision of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 and especially paragraph 28 demonstrated that the right to trade as a sex shop was an existing private law right. The licence was refused on the locality grounds as prescribed by paragraph 12 of Schedule 3 to the Act and Councillor Hancock had addressed the licensing panel on matters that were not relevant to this ground. Although it was conceded that the standing orders of the council allowed Councillor Hancock to address the licensing panel, as he was seeking to speak as an objector then he had to comply with paragraph 10 of Schedule 3 to the Act and give the appropriate notice within 28 days of the company's applications. The standing orders could not override the legislation. Councillor Hancock's address to the licensing panel was wide ranging, starting with churches and schools and then moving to matters of morality, referring to local crime statistics and cases including the Portsmouth rapist. His remarks were not restricted to his own ward which included the shop at Kingston Road. Res judicata or estoppel by issue could not apply to a criminal case: see *Archbold Criminal Pleading Evidence & Practice*, 42nd ed. (1985). Although the case had been before a court of competent jurisdiction that was not a bar to it being raised again in a criminal case. That situation was clearly envisaged in *Wandsworth London Borough Council v. Winder*. Further the law relating to paragraph 10 of Schedule 3 and the rights of objectors had been clearly defined in *Reg. v. Sefton Metropolitan Borough Council, Ex parte Quietlynn Ltd.* (unreported), 22 February 1985 after the alleged res judicata. The question for the Crown Court to determine on a balance of probabilities was whether the licensing panel had afforded the company a fair hearing and/or had conducted themselves according to Schedule 3 and to law.

It was contended by the council that it was for the company and Mr. Richards to prove on a balance of probabilities that the decision of the licensing panel was void: *Reg. v. Edwards* [1975] Q.B. 27. As the subject matter of the present complaint had been put before a single judge of the Divisional Court, with evidence by affidavit and with both parties represented and thereafter the complaint had been dismissed on its merits, the matter was res judicata; alternatively estoppel by record applied. Illustrative cases were *McIlkenny v. Chief Constable of the West*

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Quietlynn Ltd. v. Plymouth Council (D.C.)

- A *Midlands* [1980] Q.B. 283 where the ruling after a trial within a trial in criminal proceedings acted as a bar to a subsequent civil action, and *Green v. Hampshire County Council* [1979] I.C.R. 861 where the adjudication of an industrial tribunal acted as a bar to a subsequent civil action. As Councillor Hancock was told to limit his remarks to the shop in his ward, namely, 60, Kingston Road, and there being no evidence
- B that the licensing panel considered his remarks in a wider context the respondents' present complaints were limited to the two charges relating to the premises at 60, Kingston Road. The question resulting from *Wandsworth London Borough Council v. Winder* [1985] A.C. 461 was whether or not the instant matter was a further exception to the general rule as set out in *O'Reilly v. Mackman* [1983] 2 A.C. 237 to the effect that the proper procedure for challenging the decision of a public
- C authority was by way of judicial review under R.S.C., Ord. 53. The question could only be determined by analysing the interplay of public law rights, which were open to challenge under R.S.C., Ord. 53 and pre-existing private law rights, which might be raised as a defence in enforcement proceedings. When the council decided to pass a resolution bringing Schedule 3 to the Act into effect for its area, it was exercising a
- D public law function. Upon the requisite notice being published no premises in the area could be used as a sex shop. Any pre-existing private law right to trade as a sex shop had been removed by Act of Parliament and a public law function of the council. Pending the hearing of an application for a licence the company and Mr. Richards were protected from prosecution by paragraph 28 of Schedule 3 to the Act, but it was for them to establish a new, private law right, namely the
- E right to trade as a licensed sex shop. It follows that the principle in *Wandsworth London Borough Council v. Winder* did not apply to the instant matter, which was similar to the situation in *Cocks v. Thanet District Council* [1983] 2 A.C. 286 where the plaintiff was prevented from establishing his new private law right to permanent accommodation by way of proceedings for a declaration and injunction. There was no
- F breach of paragraph 10 of Schedule 3 to the Act. Councillor Hancock was not a "person objecting" within the meaning of paragraph 10(15) as that paragraph concerned notice to and objections from the public and not a member of the "appropriate authority" as defined by Schedule 3. In accordance with the judgment of Forbes J. in *Reg. v. Sefton Metropolitan Borough Council, Ex parte Quietlynn Ltd.* (unreported) it
- G was necessary to examine the circumstances of the present complaint in order to see if the rights of the respondents had been "seriously affected or eroded" by any non-compliance with paragraph 10 of Schedule 3 to the Act. There was no such effect on or erosion of their rights because they were represented at the application by Mr. Sullivan who was informed before the hearing of the intention of Councillor Hancock to
- H speak. Although Mr. Sullivan knew that he had the right to apply for an adjournment on this ground he did not do so, although he did apply for an adjournment on other grounds. In addition, Mr. Sullivan was given the opportunity to sum up to the licensing panel after Councillor Hancock had spoken. The reasons for refusal of a licence made available to the respondents were all permitted by Schedule 3 to the Act and did not disclose that the licensing panel had considered any improper matters. The presumption of validity must therefore apply.

The Crown Court was of the opinion that on the basis of the judgment of Forbes J. in *Reg. v. Sefton Metropolitan Borough Council, Ex parte Quietlynn Ltd.* the company and Mr. Richards were entitled to raise their complaint as a defence. They were not debarred by *res judicata*. Councillor Hancock should have been treated as an ordinary objector and the objection notified within 28 days. Although Councillor Hancock said that he was limiting his remarks to the Kingston Road shop, he went beyond that and there was no evidence that the licensing panel ignored them. The appeals were accordingly allowed with costs to be taxed if not agreed.

The council appealed. The question for the opinion of the High Court was whether on the evidence put before the Crown Court and having regard to the cases cited, the Crown Court was wrong in law in allowing the appeals of the company and Mr. Richards.

QUIETLYNN LTD. v. OLDHAM BOROUGH COUNCIL

CASE STATED by the Crown Court at Manchester.

On 15 April 1985 an information was preferred by the Oldham Borough Council against the company, Quietlynn Ltd., that it on 14 February 1985 at premises known as 95, Huddersfield Road, Oldham, which was situated in an area in which Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 was in force, did use the premises knowingly as a sex establishment without a licence granted under Schedule 3 contrary to paragraph 20 (i)(a) thereto.

On 28 May 1985 justices sitting at Oldham Magistrates' Court heard the information and convicted the company. The Crown Court heard the appeal against the justices' decision on 9, 10 and 13 January 1986 giving judgment on 6 February 1986.

It was admitted by the company that Schedule 3 was in force within the area; that no licence had been granted to the company; that the premises were a sex establishment as defined in the Act and that they operated the premises on 14 February 1985.

The company sought by way of defence to challenge the validity of the council's decision to refuse them a licence on 9 February 1984. It sought to argue that the decision was wrong in law and/or that the council did not afford the company a fair hearing under paragraph 10(19) of Schedule 3 and/or that the council acted in breach of natural justice if the court were to find that the council's decision was invalid then the company could rely upon paragraph 28 (1) of Schedule 3 and the prosecution would be unlawful. The council argued that such a defence could not in law be raised and therefore the Crown Court considered the matter as a preliminary point.

It was submitted by the company that it was entitled in law to defend a prosecution brought against it where a condition precedent for the proceedings was the council's decision to refuse the company a licence. The matter was similar to the situation in *Wandsworth London Borough Council v. Winder* [1985] A.C. 461, where the validity of a decision of a local authority was challenged by way of defence. The company was not precluded by the fact that it could have challenged the validity of the council's decision by judicial review. It was seeking to retain or protect pre-existing private law rights rather than establish new public law rights. The provisions of Schedule 3, in particular paragraph 28(1)

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A demonstrated that the right to trade as a sex shop was an existing private law right.

B It was contended by the council that judicial review was the appropriate remedy available and open to the company to challenge the validity of the refusal to grant a licence. *Wandsworth London Borough Council v. Winder* was authority for the proposition that in proceedings, other than by way of judicial review, a person might challenge the decision of a local authority in public law if he did so by way of a defence seeking to protect or retain a pre-existing private law right. The decision was not authority for any wider right for the company to challenge the validity of the council's decision by way of a defence simpliciter. The company had no pre-existing private law right. It had only a public law right to a fair hearing before the licensing committee and an immunity from prosecution in the interim, pursuant to paragraph C 28(1) of Schedule 3. If the court allowed the company to argue its defence and it was successful, the council would be in an impossible position with regard to their public law decision to refuse the company a licence on 9 February 1984, for though it was and remained a valid decision in public law it would not be in the criminal courts so far as enforcing Schedule 3 against the company.

D The Crown Court was of the opinion that the company did not have an existing private law right which would bring them within the framework of *Wandsworth London Borough Council v. Winder*. Further, the court did not find that the company had any wider right to challenge by way of a defence to the prosecution, the validity of the council's public law decision. The company having called no evidence upon their appeal and making the aforesaid admissions, the court, accordingly, E dismissed the appeal.

The company appealed. The question for the opinion of the High Court was whether the court was right in refusing to allow the company to challenge the validity of the council's refusal to grant it a licence, by way of a defence to a prosecution where the council sought to rely upon their decision to refuse the company a licence as a condition precedent F to their said prosecution.

Andrew Collins Q.C. and *Nigel Peters* for the company.

John Hugill Q.C. and *Charles Cross* for Plymouth City Council.

Roger Toulson Q.C. and *Iain Hughes* for Portsmouth City Council.

John Hugill Q.C. and *Stephen Stewart* for Oldham Borough Council.

Cur. adv. vult.

5 March 1987. WEBSTER J. read the following judgment of the court. Section 2 and Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 constitute a statutory code to make provision for the control of sex establishments by means of a system of licensing. The licensing authority is the local authority as defined in section 2(5); and section 2(1) empowers a local authority to resolve that Schedule 3 to the Act shall apply to its area. Paragraph 6 of the Schedule prohibits the use of premises as a sex establishment in any area in which the Schedule is in force, subject to the provisions of the Schedule, except under a licence; and paragraphs 20 to 22 contain penal provisions to enforce the prohibition contained in paragraph 6. Paragraphs 8 to 10 contain detailed

provisions for the grant, renewal and transfer of licences; paragraph 12 contains mandatory and discretionary grounds of refusal of licences and paragraphs 17 and 18 provide for the revocation and variation of licences. Paragraph 27 provides a right of appeal to the magistrates' court against, inter alia, a refusal of a grant of a licence on certain grounds and, where there is a right of appeal to the magistrates' court, there is a further right of appeal from their decision to the Crown Court.

Paragraph 28(1) provides that it shall be lawful for any person who was using premises as a sex establishment before the Schedule came into effect in the relevant area and who had applied for a licence before the appointed day "to continue to use the premises . . . as a sex establishment until the determination of his application."

The Plymouth City Council, the Portsmouth City Council and the Oldham Borough Council each resolved that the Schedule should apply to their area. In each area Quietlynn Ltd. had been using premises as sex establishments before the Schedule came into effect for the relevant area and it had applied for licences for those establishments before the appointed day. The local authority in each case refused every one of the company's applications; but the company continued, after those refusals, to use the premises as sex establishments. Each of the local authorities, therefore, took proceedings against the company alleging use of the premises as a sex establishment without a licence contrary to paragraph 20(1) of the Schedule. The Plymouth justices convicted the company who appealed against conviction to the Crown Court at Plymouth which allowed its appeal. The Portsmouth justices also convicted the company, and the Crown Court at Portsmouth also allowed the company's appeal. The Oldham justices also convicted the company; but the company's appeal against that conviction was dismissed by the Crown Court at Manchester.

In all of those proceedings the company had relied, as a matter of defence, upon the contention that each refusal by the relevant local authority of a licence had been ultra vires or invalid either because there had been an alleged failure to comply with one or more of the provisions of paragraph 10 of the Schedule which contains certain provisions applicable to applications for the grant of licences, or because the refusal was invalidated by an alleged breach of the rules of natural justice.

Each of the three Crown Courts has stated a case for the opinion of this court and there is one question common to all three cases which, in substance, is whether, on a prosecution alleging use of premises as a sex establishment without a licence contrary to paragraph 20(1), the court may investigate and determine the validity of the licensing authority's decision, namely, in each of these cases the decision to refuse to grant a licence, which was a necessary ingredient of the alleged offence.

Mr. Collins, appearing on behalf of the company, accepts that there is no decision directly in point; but he submits that the principle to be derived from the authorities on which he relies, to some of which we shall refer later in this judgment, support the contention that it is open to a defendant to challenge, and to the court before whom he is prosecuted to consider, the validity of the local authority's relevant decision. But unless constrained by authority, or by a principle unequivocally established by the cases, we reject that contention for two reasons.

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A In the first place, some of the results which the code achieves, with clarity and certainty, would be frustrated if that contention were correct. Any power of the justices to consider and decide upon the validity of a decision could not, obviously, oust the jurisdiction of the High Court, on judicial review, to consider the matter. But, if Mr. Collins's contention is correct, the court of trial could decide that a decision was invalid notwithstanding that the High Court, on judicial review, had upheld its validity. Once justices, or a Crown Court, had acquitted a defendant of an offence under paragraph 20(1), when the only defence was that the relevant decision was invalid, no further proceedings could be taken against the defendant, even though the High Court had determined that the decision was valid. As a result of the High Court's decision there could be no reconsideration by the local authority of the application for a licence. The provisions of Schedule 3 to the Act of 1982 (paragraph 28(1) referred to above, or paragraph 11(1) which provides that, on an application to renew a licence before its expiry, the licence is deemed to remain in force until the application is determined) would enable the defendant to continue trading without ever having to apply again for the grant or renewal of a licence, as the case may be. Not only would there be the risk of inconsistent decisions on the same point as between a magistrates' court and a Crown Court on the one hand and the High Court on the other, but there would also be a serious risk of inconsistent decisions by different justices or Crown Courts in relation to applications by more than one applicant determined at one hearing by a licensing authority. Of course it would be open to a prosecutor to appeal by case stated, but it would not necessarily follow that the facts found by the justices would be identical or consistent with the evidence before the High Court on an application for judicial review of the licensing authority's decision. Where different magistrates' courts or Crown Courts had adjudicated on the same hearing by a licensing authority there could also be inconsistent decisions of the High Court. In any event one asks the rhetorical question: why should the prosecution be put in the position of having to resolve, or attempt to resolve, the inconsistency?

F Results of this kind would, in our view, frustrate the clear policy of the statutory code. And in our view it is open to us to treat the question before this court as one which can be determined by a proper construction of that code. In *Reg. v. Davey* [1899] 2 Q.B. 301 the court held that the validity of an order for the removal to a hospital of a person suffering from a dangerous infectious disorder, made ex parte by a single justice under section 124 of the Public Health Act 1875 (38 & 39 Vict. c. 55), could not be inquired into, upon the hearing of a summons under that section before a court of summary jurisdiction for obstructing the execution of the order. Darling J. and Channell J. both reached that conclusion by reference to the object of the legislation in question.

G Our second reason is that the existence of a power in justices or the Crown Court to treat a decision as invalid would only avoid the uncertainties and consequences to which we have already referred if the court which first considered the matter had the power to "strike down" the decision in question. Lord Hailsham of St. Marylebone L.C. in *London & Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. 182, 187 said, of a certificate of alternative development given under section 25 of the Land Compensation (Scotland) Act 1963, that the certificate "was effective until it was struck down by a competent

authority . . . ;” and although justices sometimes, for the purpose of the case immediately before them, have to rule upon the validity of a byelaw or the decision of a local authority, that ruling is binding in no other case and it could not be suggested that justices or the Crown Court are a competent authority to strike down any such decision in the sense of declaring it invalid for all purposes.

For these reasons, therefore, we reject Mr. Collins’s contention unless we are constrained by a principle which is clearly to be derived from the authorities upon which he relies, to which we turn beginning with two decisions in the criminal jurisdiction. In *Director of Public Prosecutions v. Head* [1959] A.C. 83 the defendant was convicted of carnal knowledge of a mental defective contrary to section 56(1)(a) of the Mental Deficiency Act 1913 (3 & 4 Geo. 5, c. 28). At the time of the alleged offence the woman concerned was on licence from an institution for defectives, to which she had been sent pursuant to an order made by the Secretary of State in purported exercise of powers under the Act. The order was produced in evidence by the prosecution, as were two medical certificates which were before the Secretary of State when he made the order and on which he was required to be satisfied that she was a defective. Neither certificate contained any evidence on which it could be said that she was a moral defective within section 1(1)(d) of the Act. The prosecution conceded that the order was invalid and that on an application for a writ of habeas corpus it could be successfully challenged; and the House of Lords dismissed an appeal from the Court of Criminal Appeal which had quashed the conviction. But that decision, in our view, is no authority for the proposition that the justices in that case had power to investigate the making of the order. The crucial fact in that case was that the order was invalid on its face. Lord Tucker said, at p. 103:

“if it is shown and admitted . . . that on the face of the documents produced and received in evidence without objection the detention was illegal, the whole basis of the subsection and the presumption of defectiveness goes and the prosecution must fail.”

Lord Somervell of Harrow said, at p. 104:

“. . . I think the certificates may well be for this purpose part of the order to be looked at in order to see whether it is good on its face. . . . It is conceded that the court had material before it which would have led to the order being quashed on certiorari or other appropriate proceedings. The next question, as it appears to me, can be stated in this way. Is a man to be sent to prison on the basis that an order is a good order when the court knows it would be set aside if proper proceedings were taken? I doubt it.”

In *Reg. v. Jenner* [1983] 1 W.L.R. 873 the defendant was charged with using land in contravention of a stop notice contrary to section 90(7) of the Town and Country Planning Act 1971. He was committed for trial at the Crown Court where counsel on his behalf sought to challenge the validity of the stop notice. The court ruled that he could not do so, since it was not invalid on its face, and the defendant appealed against that ruling. The Court of Appeal allowed the appeal; but, as we read the judgment of the court given by Watkins L.J. the

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A appeal was allowed not because the court held that that ruling was wrong but because the defendant was not prohibited by the stop notice from carrying on the activities in question. That conclusion is accurately expressed, in our view, in the headnote to the Weekly Law Report; but not in the penultimate sentence of the headnote of the All England Report which should be deleted if the headnote is to summarise the decision correctly.

B In our view, therefore, neither *Director of Public Prosecutions v. Head* [1959] A.C. 83 nor *Reg. v. Jenner* [1983] 1 W.L.R. 873 assists Mr. Collins.

C He also, however, relies upon a number of cases in which the courts have held that challenges to the decisions of local authorities, relevant to claims in civil proceedings, were permissible in those proceedings. In addition to *London & Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. 182, Mr. Collins relies upon *Wandsworth London Borough Council v. Winder* [1985] A.C. 461; *Davy v. Spelthorne Borough Council* [1984] A.C. 262; *Cannock Chase District Council v. Kelly* [1978] 1 W.L.R. 1 and *Rex v. Judge Pugh, Ex parte Graham* [1951] 2 K.B. 623. But we have been referred to no dictum in any of those cases which suggests that challenges to the decisions of local authorities are permissible in criminal proceedings; nor is it possible, in our view, to derive from those decisions a principle that such a challenge is permissible in proceedings of every kind. In a number of those cases material distinctions were drawn, or sought to be drawn, between private and public rights; but for our part we get no assistance in the present case from attempting to draw, or apply, any such distinction, and we note that Lord Wilberforce in *Davy v. Spelthorne Borough Council* [1984] A.C. 262, 276, said that the expressions "private law" and "public law" must be used in this country with caution since, typically, English law fastens not upon principles but upon remedies. Nor do we gain, for present purposes, any assistance from the distinction between a decision being "void" or "voidable"; as Lord Diplock has said in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, 366:

G "it leads to confusion to use such terms . . . as descriptive of the legal status of subordinate legislation alleged to be ultra vires for patent or latent defects, before its validity has been pronounced on by a court of competent jurisdiction. These are concepts developed in the private law of contract which are ill-adapted to the field of public law."

H It has, of course, long been the practice for justices to decide for the purposes of a case immediately before them upon the validity of byelaws and, before the Town and Country Planning Act 1971, of enforcement notices. But those practices were established long before applications for judicial review were given statutory recognition in section 31 of the Supreme Court Act 1981. The law relating to judicial review has become increasingly more sophisticated in the past few decades, and in our view justices are not to be expected to have to assume the functions of the Divisional Court and consider the validity of decisions made by a local authority under this Act in the light of what is now a complex body of law. If a bona fide challenge to the validity of the decision in question is

raised before them, then the proceedings should be adjourned to enable an application for judicial review to be made and determined. In our view, therefore, except in the case of a decision which is invalid on its face, every decision of the licensing authority under the Act is to be presumed to have been validly made and to continue in force unless and until it has been struck down by the High Court; and neither the justices nor a Crown Court have power to investigate or decide upon its validity. This conclusion constitutes our answer to the question common to these three appeals and is sufficient to determine each of them.

The Crown Courts at Plymouth and Portsmouth, however, embarked upon a consideration of the validity of the refusal by the local authorities of the company's applications for licences and concluded, in each case, that the refusals were invalid. In these circumstances we should add a few words about those conclusions.

Paragraph 10 of the Schedule sets out, in 20 numbered subparagraphs, various things that have to be done in connection with applications for the grant, renewal or transfer of a licence. Sub-paragraphs (15) and (18) provide:

"(15) Any person objecting to an application for the grant, renewal or transfer of a licence under this Schedule shall give notice in writing of his objection to the appropriate authority, stating in general terms the grounds of the objection, not later than 28 days after the date of the application. . . . (18) In considering any application for the grant, renewal or transfer of a licence the appropriate authority shall have regard to any observations submitted to them by the chief officer of police and any objections of which notice has been sent to them under sub-paragraph 15 above."

The Crown Court at Plymouth found that, at the hearing of the company's application for a licence, the local authority had considered a number of objections which had been received outside the 28-day period specified in sub-paragraph (15), some of them having been received as recently as the morning of the hearing and some having been sent to individual councillors. The court also found that the local authority considered at the hearing representations by the chief officer of police but that the company had not been given a copy of those representations before the hearing. The court held that those irregularities were fatal to the determination by the local authority to refuse the company's application, relying upon a decision of Forbes J. in *Reg. v. Birmingham City Council* (1985) 83 L.G.R. 461. Forbes J. said, at p. 486, that sub-paragraph (15) "does restrict the giving of late notice of objection," words which the Crown Court at Plymouth construed as if they meant that the local authority could not take into account a notice of objection given late. Forbes J. clearly intended those words to be given that meaning because, at p. 487, he said that it seemed to him that Stephen Brown I.J. accepted the view that a local authority should not take into account late objections. The reference to the view of Stephen Brown I.J. was a reference to a sentence of his judgment in *Reg. v. Preston Borough Council, Ex parte Queltynn Ltd.* (1984) 83 L.G.R. 308, 313, where he said:

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A "The position, in my judgment, is as Woolf J. found. *Sub-paragraph (15) does not restrict the giving of notice of objection before the application, but it does restrict the giving of late notice of objection.*" (Our emphasis).

B That dictum arose in this way. In that case at first instance, decided on 14 October 1983 (The Times, 19 October 1983), Woolf J. in his judgment of which the court has a transcript entitled *Reg. v. Chester City Council, Ex parte Quietlynn Ltd.*, said:

C "The provisions of paragraph 10, which deal with objections, are clear. The objection must be in writing, it must set out its general terms and it must be made not later than 28 days after the date of the application. Furthermore, the authority is required to have regard to such objection which can be categorised as a statutory objection, but there is no such obligation in respect of information which does not fall within paragraph 10(15). However, in coming to a determination, the authority must be entitled to take account of information which comes into its possession and which is relevant even though it is not from a statutory objector. It may, for example, be necessary for inquiries to be made of the fire authorities and if an oral objection was made by the fire authorities out of time it could not properly be ignored in reaching a decision. It will be necessary, however, in respect of such non-statutory information to act fairly and, if necessary, give the applicant notice of the material upon which it is proposed to rely."

E We respectfully agree with those observations and would conclude for our part that the essential difference between an objection which complies with paragraph 10(15) and one which does not is that the authority is obliged to consider objections made not later than 28 days, but that it has a discretion whether or not to take into account objections made later. Of course it would follow that if it takes into account later objections, of which notice in writing will not have been given to the applicant pursuant to the requirement of sub-paragraph (16), then such notice has to be given to the applicant as is sufficient to ensure that the hearing of his application is fair. And, as to the fact that the company was not, in this case, given a copy of the representations made by the chief officer of police before the hearing, there seems to us to be no requirement that that should be done, nor anything said by Forbes J. to the effect that it should be done, provided that the applicants are given a fair opportunity to deal with those representations.

G We therefore conclude that the Crown Court was wrong in deciding that the so-called irregularities complained of by the company were fatal to the refusal of its licence; and we do not, with respect, read the sentence from the judgment of Stephen Brown L.J. which we have emphasised as containing anything other than a summary of the judgment of Woolf J. on this point, with which Stephen Brown L.J. appears to have agreed. It seems to us that by the word "restrict" in relation to late notices of objection Stephen Brown L.J. meant only to refer to the fact that an objector who gave late notice had no statutory right to have his objection taken into account; and we respectfully conclude that Forbes J. misinterpreted those words of Stephen Brown L.J., and therefore that the decision of the Crown Court at Plymouth on this issue was wrong.

The facts found by the Crown Court at Portsmouth, relevant to the validity of the licensing authority's decision, was that a councillor, a Mr. Hancock, who was not a member of the licensing committee, addressed the committee largely about the moral implications of granting the licence without having given notice in writing of an objection or having presented any written evidence to the committee.

This case illustrates, from reality, the sort of problems which could be created if the justices were to have power to consider the validity of a licence; because after the informations were laid the company applied for judicial review on a number of grounds including the "Councillor Hancock objection." The criminal proceedings were accordingly adjourned, leave to move for judicial review was given on one ground (not the Councillor Hancock objection) on terms that counsel acting for the company should reconsider the application after receipt of the respondents' evidence and, although we are told that counsel advised that the application should proceed after that evidence was received, it was in fact withdrawn.

Notwithstanding the fact that leave to move for judicial review was not given on the ground of the "Councillor Hancock objection," the Crown Court at Portsmouth was of the opinion that Councillor Hancock should have been treated as an ordinary objector, that his objections should have been notified within 28 days, and that although he had said that he was limiting his remarks to one of the two shops for which the company had been applying for licences, his observations were not so limited and there was no evidence that the licensing panel ignored them; and they accordingly were of the opinion that the refusal of the licences was invalid and allowed the company's appeal. For our part, we cannot see that the local authority did anything wrong at all. They were not obliged to hear Councillor Hancock, but they had a discretion to do so and, in the light of the facts found by the Crown Court, there can be no force in any suggestion that the company had no fair opportunity to respond to his observations. In any event any applicant for a licence of this kind is bound to expect the licensing authority to receive, and perhaps even to entertain themselves, moral objections and to expect to have to respond to such objections when making his application, as, so it appears from the court's findings, the company's representative did at the hearing. In our view, therefore, the court, having wrongly concluded that it had jurisdiction to consider the validity of the refusal of the licences, was also wrong in concluding that that refusal was invalid.

We would, therefore, answer the questions asked of this court as follows. The Crown Court at Plymouth asks:

- "(i) Whether it was within the power of the Crown Court to declare that the decision of the [Plymouth City Council] to refuse to grant a licence was invalid in so far as the challenge to the decision was raised as a defence to a prosecution under paragraphs 6 and 20 of the said Schedule 3. (ii) Whether it was within the power of the Crown Court to assert that the [company's] application for a licence had still to be determined."

The answer is No in each case.

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A The Crown Court at Portsmouth asks whether on the evidence put before the Crown Court and having regard to the cases cited the Crown Court was wrong in law in allowing the appeals of the company and Mr. Richards, to which the answer is Yes.

B The Crown Court at Manchester asks whether they were right in refusing to allow the company to challenge the validity of the Oldham Borough Council's refusal to grant it a licence, by way of a defence to a prosecution where the council sought to rely upon their decision to refuse the company a licence as a condition precedent to their said prosecution, to which the answer is also Yes.

*Appeals of Plymouth and Portsmouth
City Councils allowed with costs.
Company's appeal dismissed.
Leave to appeal refused.*

D *Solicitors: Kaye Tesler & Co.; Sharpe Pritchard & Co. for City Solicitor, Plymouth City Council; City Solicitor, Portsmouth City Council; Sharpe Pritchard & Co. for Director of Legal Services, Oldham City Council.*

[Reported by BARBARA SCULLY, Barrister-at-Law]

[HOUSE OF LORDS]

REGINA APPELLANT

AND

F STEER RESPONDENT

1987 April 30;
July 2

Lord Bridge of Harwich, Lord Griffiths,
Lord Ackner, Lord Oliver of Aylmerton
and Lord Goff of Chieveley

G *Crime—Criminal damage to property—Intention to endanger life—
Gun fired discharging bullets into house—Damage caused—
Recklessness as to whether lives of occupants endangered—
Whether causal link necessary between damage to property and
danger to life—Criminal Damage Act 1971 (c. 48), s. 1(2)(b)*

H The defendant, who had had some disagreement with his business partner, went to the partner's bungalow one night. After ringing the door bell he fired a rifle at the windows of the bedroom and lounge and at the front door. No injuries were caused to the people who were in the bungalow. The defendant was charged, inter alia, with damaging property with intent, being reckless as to whether the life of another would be thereby endangered, contrary to section 1(2) of the Criminal Damage Act 1971¹. The trial judge rejected a submission of no

¹ Criminal Damage Act 1971, s. 1(2): see post, p. 207E–G.

case to answer in relation to that count, whereupon the defendant changed his plea to guilty. The defendant appealed to the Court of Appeal (Criminal Division) which allowed the appeal.

On appeal by the Crown:—

Held, dismissing the appeal, that the Act of 1971 being concerned with criminal damage to property, the intention or recklessness envisaged by section 1(2)(b) of the Act of 1971 was directed to the possible dangers to life caused by the destroyed or damaged property and not to the dangers inherent in the method of causing that destruction or damage; that, accordingly, to obtain a conviction under section 1(2)(b) the prosecution were required to prove that the danger to life resulted from the destruction or damage to property; it was not sufficient for the prosecution to prove that the danger to life resulted from the act of the defendant which caused the destruction or damage (post, pp. 208H—209A, 211A—B, C—F).

Dictum of Parker L.J. in *Reg. v. Hardie* [1985] 1 W.L.R. 64, 67, C.A. distinguished.

Decision of the Court of Appeal (Criminal Division) [1986] 1 W.L.R. 1286; [1986] 3 All E.R. 611 affirmed.

The following case is referred to in the opinion of Lord Bridge of Harwich:
Reg. v. Hardie [1985] 1 W.L.R. 64; [1984] 3 All E.R. 848; 80 Cr.App.R. 157, C.A.

The following additional cases were cited in argument:

Reg. v. Caldwell [1982] A.C. 341; [1981] 2 W.L.R. 509; [1981] 1 All E.R. 961; 73 Cr.App.R. 13, H.L.(E.)

Reg. v. Criminal Injuries Compensation Board, Ex parte Clowes [1977] 1 W.L.R. 1353; [1977] 3 All E.R. 854; 65 Cr.App.R. 289, D.C.

Reg. v. McGrath and McKevitt (1881) 14 Cox C.C. 598

APPEAL from the Court of Appeal (Criminal Division).

This was an appeal by leave of the House of Lords (Lord Keith of Kinkel, Lord Templeman and Lord Griffiths) [1986] 1 W.L.R. 1380 dated 5 November 1986 by the prosecutor, the Chief Constable of the Humberside Constabulary, from the judgment dated 15 May 1986 of the Court of Appeal (Criminal Division) (Neill L.J., Peter Pain and Gatchouse J.J.) [1986] 1 W.L.R. 1286 allowing an appeal by the defendant, Dennis Steer, against his conviction on 18 December 1985 at Lincoln Crown Court, before Judge David Wilcox and a jury, on the second count of an indictment, which count charged him with damaging property with intent, being reckless as to whether the life of another would be thereby endangered contrary to section 1(2)(b) of the Criminal Damage Act 1971. On the judge's ruling as to the true construction of section 1(2)(b) of the Act of 1971 the defendant changed his plea to guilty on the second count and appealed on the ground, inter alia, that it was erroneous in law. The Court of Appeal (Criminal Division) in allowing the appeal, certified that the following point of law was involved in their decision, namely,

"Whether, upon a true construction of section 1(2)(b) of the Criminal Damage Act 1971, the prosecution are required to prove that the danger to life resulted from the destruction of or damage to property, or whether it is sufficient for the prosecution to prove that it resulted from the act of the defendant which caused the destruction or damage."

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Reg. v. Steer (H.L.(E.))

A Leave to appeal was refused.

The facts are set out in the opinion of Lord Bridge of Harwich.

David Farrer Q.C. and Keith Jackson for the Crown.

Martin Bethel Q.C. and Michael Mettyear for the defendant.

B Their Lordships took time for consideration.

2 July. LORD BRIDGE OF HARWICH. My Lords, in the early hours of 8 June 1985 the respondent went to the bungalow of his former business partner, David Gregory, against whom he bore some grudge. He was armed with an automatic .22 rifle. He rang the bell and woke Mr. and Mrs. Gregory, who looked out of their bedroom window. The respondent
 C fired a shot aimed at the bedroom window. He then fired two further shots, one at another window and one at the front door. Fortunately no one was hurt. It was never suggested that the first shot had been aimed at Mr. or Mrs. Gregory.

Arising from this incident the respondent was arraigned on an indictment containing three counts. He pleaded not guilty to possession of a firearm with intent to endanger life, contrary to section 16 of the Firearms Act 1968 (count 1) and to an offence of damaging property with intent, contrary to section 1(2) of the Criminal Damage Act 1971, which was alleged in the particulars as originally framed as having been committed "intending by the said damage to endanger the lives of David Gregory and Tina Gregory or being reckless as to whether the lives of David Gregory and Tina Gregory would be thereby endangered" (count
 D 2). He pleaded guilty to a separate offence of damaging property, contrary to section 1(1) of the Act of 1971 (count 3).
 E

Section 1 of the Act of 1971 provides:

"(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence. (2) A
 F person who without lawful excuse destroys or damages any property, whether belonging to himself or another—(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby
 G endangered; shall be guilty of an offence. (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson."

It is to be observed that the offence created by subsection (2), save that it may be committed by destroying or damaging one's own property, is simply an aggravated form of the offence created by subsection (1), in which the prosecution must prove, in addition to the ingredients of the offence under subsection (1), the further mental element specified by subsection (2)(b). In this case presumably count 2 was intended to relate to the damage done by the shot fired at the bedroom window and count 3 to the damage done by one or other or both of the other two shots. It is also significant to note the maximum penalties attaching to the three offences charged. For an offence under section 16 of the Act of 1968 it is 14 years' imprisonment, for
 H

an offence under section 1(2) of the Act of 1971 life imprisonment, for an offence under section 1(1) of the Act of 1971 10 years' imprisonment.

At some stage in the trial the particulars of count 2 were amended by deleting the words alleging an intent to endanger life and leaving only recklessness in that regard as the mental element relied on to establish the offence under section 1(2). The prosecution, it appears, presented the case on the footing that counts 1 and 2 were alternatives and, if the case had been left to the jury, the judge would presumably have directed them that, if they found that the respondent intended to endanger the lives of Mr. and Mrs. Gregory they should convict on count 1, but if they found that he was merely reckless with regard to such danger, they should acquit on count 1 and convict on count 2.

At the conclusion of the case for the prosecution, however, counsel for the respondent submitted that there was no case to answer on count 2 on the ground that, in so far as the lives of Mr. and Mrs. Gregory had been endangered, the danger had not been caused by the damage done to the bungalow, but by the shot fired from the respondent's rifle. Of course, it is obvious that any danger to life in this case was caused by the shot from the rifle itself, not by any trifling damage done to the bedroom window or to any property in the bedroom. But the judge rejected counsel's submission and accepted the submission made for the Crown that the phrase in section 1(2)(b) of the Act of 1971 "by the destruction or damage" refers on its true construction not only to the destruction or damage to property as the cause of the danger to life on which the mental element in the aggravated offence under the subsection depends, but also to the act of the defendant which causes that destruction or damage. On the basis of the judge's ruling the respondent changed his plea to guilty on count 2. He appealed against conviction on the ground that the judge's ruling was erroneous. The Court of Appeal (Criminal Division) (Neill L.J., Peter Pain and Gatehouse J.J.) allowed the appeal, but certified that their decision involved a question of law of general public importance in the following terms:

"Whether, upon a true construction of section 1(2)(b) of the Criminal Damage Act 1971, the prosecution are required to prove that the danger to life resulted from the destruction of or damage to the property, or whether it is sufficient for the prosecution to prove that it resulted from the act of the defendant which caused the destruction or damage."

The Crown now appeals by leave of your Lordships' House.

We must, of course, approach the matter on the footing, implicit in the outcome of the trial, that the respondent, in firing at the bedroom window, had no intent to endanger life, but accepts that he was reckless as to whether life would be endangered.

Under both limbs of section 1 of the Act of 1971 it is the essence of the offence which the section creates that the defendant has destroyed or damaged property. For the purpose of analysis it may be convenient to omit reference to destruction and to concentrate on the references to damage, which was all that was here involved. To be guilty under subsection (1) the defendant must have intended or been reckless as to the damage to property which he caused. To be guilty under subsection (2) he must additionally have intended to endanger life or been reckless

A as to whether life would be endangered "by the damage" to property
which he caused. This is the context in which the words must be
construed and it seems to me impossible to read the words "by the
damage" as meaning "by the damage or by the act which caused the
damage." Moreover, if the language of the statute has the meaning for
which the Crown contends, the words "by the destruction or damage"
B and "thereby" in subsection (2)(b) are mere surplusage. If the Crown's
submission is right, the only additional element necessary to convert a
subsection (1) offence into a subsection (2) offence is an intent to
endanger life or recklessness as to whether life would be endangered
simpliciter.

C It would suffice as a ground for dismissing this appeal if the statute
were ambiguous, since any such ambiguity in a criminal statute should
be resolved in favour of the defence. But I can find no ambiguity. It
seems to me that the meaning for which the respondent contends is the
only meaning which the language can bear.

D The contrary construction leads to anomalies which Parliament cannot
have intended. If A and B both discharge firearms in a public place,
being reckless as to whether life would be endangered, it would be
absurd that A, who incidentally causes some trifling damage to property,
should be guilty of an offence punishable with life imprisonment, but
that B, who causes no damage, should be guilty of no offence. In the
same circumstances, if A is merely reckless but B actually intends to
endanger life, it is scarcely less absurd that A should be guilty of the
graver offence under section 1(2) of the Act of 1971, B of the lesser
offence under section 16 of the Firearms Act 1968.

E Counsel for the Crown did not shrink from arguing that section 1(2)
of the Act of 1971 had created, in effect, a general offence of
endangering life with intent or recklessly, however the danger was
caused, but had incidentally included as a necessary, albeit insignificant,
ingredient of the offence that some damage to property should also be
caused. In certain fields of legislation it is sometimes difficult to
appreciate the rationale of particular provisions, but in a criminal statute
F it would need the clearest language to persuade me that the legislature
had acted so irrationally, indeed perversely, as acceptance of this
argument would imply.

G It was further argued that to affirm the construction of section
1(2)(b) adopted by the Court of Appeal would give rise to problems in
other cases in which it might be difficult or even impossible to distinguish
between the act causing damage to property and the ensuing damage
caused as the source of danger to life. In particular it was suggested that
in arson cases the jury would have to be directed that they could only
convict if the danger to life arose from falling beams or similar damage
caused by the fire, not if the danger arose from the heat, flames or
smoke generated by the fire itself. Arson is, of course, the prime
example of a form of criminal damage to property which, in the case of
H an occupied building, necessarily involves serious danger to life and
where the gravity of the consequence which may result as well from
recklessness as from a specific intent fully justifies the severity of the
penalty which the Act of 1971 provides for the offence. But the
argument in this case is misconceived. It is not the match and the
inflammable materials, the flaming firebrand or any other inflammatory
agent which the arsonist uses to start the fire which causes danger to
life, it is the ensuing conflagration which occurs as the property which

has been set on fire is damaged or destroyed. When the victim in the bedroom is overcome by the smoke or incinerated by the flames as the building burns, it would be absurd to say that this does not result from the damage to the building.

Counsel for the Crown put forward other examples of cases which he suggested ought to be liable to prosecution under section 1(2) of the Act of 1971 including that of the angry mob of striking miners who throw a hail of bricks through the window of the cottage occupied by the working miner and that of people who drop missiles from motorway bridges on passing vehicles. I believe that the criminal law provides adequate sanctions for these cases without the need to resort to section 1(2) of the Act of 1971. But if my belief is mistaken, this would still be no reason to distort the plain meaning of that subsection.

Some reference was also made to damage caused by explosives. This is the subject of specific provision under the Explosive Substances Act 1883 (46 & 47 Vict. c. 3) as amended. The offence created by section 3(1)(a) of that Act as substituted by section 7(1) of the Criminal Jurisdiction Act 1975, of doing "any act with intent to cause . . . by an explosive substance an explosion of a nature likely to endanger life, or cause serious injury to property" obviates the need to resort to the Act of 1971 when explosives are used.

The trial judge was, it seems, in large part persuaded to rule as he did in reliance on a sentence from the judgment of the Court of Appeal (Criminal Division) delivered by Parker L.J. in *Reg. v. Hardie* [1985] 1 W.L.R. 64, 67, where he said in reference to the state of mind of a defendant who commits the actus reus of an alleged offence under section 1(2) of the Act of 1971:

"If, when doing that act, he creates an obvious risk both that property will be destroyed and that the life of another will be endangered and gives no thought to the possibility of there being either risk, the requirements of the subsection are in our judgment clearly satisfied."

Reg. v. Hardie was concerned solely with the effect of self-administered tranquillising drugs on the state of mind of the defendant. It had nothing whatever to do with the issue of causation arising in the instant case. If I may say so without offence, the judge's error vividly illustrates the danger, which is particularly acute in the field of statutory construction, of reading a judicial dictum entirely out of context and treating the precise words used as relevant to the decision of an issue to which the author of the words had never applied his mind.

I can well understand that the prosecution in this case thought it necessary and appropriate that, even if they could not establish the intent to endanger life necessary to support a conviction under section 16 of the Act of 1968, they should include a count in the indictment to mark in some way the additional gravity of an offence of criminal damage to property in which a firearm is used. But they had no need to resort to section 1(2) of the Act of 1971. A person who, at the time of committing an offence under section 1 of the Act of 1971, has in his possession a firearm commits a distinct offence under section 17(2) of the Act of 1968: see Schedule 1 to the Act of 1968, as amended by section 11(7) of the Act of 1971. If the respondent had been charged with that offence in addition to the offence under section 1(1) of the Act of 1971, he must have pleaded guilty to both and, if the prosecution

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of Harwich

A were content to accept that there was no intent to endanger life, this would have been amply sufficient to mark the gravity of the respondent's criminal conduct in the incident at the Gregory bungalow.

I would accordingly dismiss the appeal. The certified question should be answered as follows:

B "Upon the true construction of section 1(2)(b) of the Criminal Damage Act 1971 the prosecution are required to prove that the danger to life resulted from the destruction of or damage to property; it is not sufficient for the prosecution to prove that it resulted from the act of the defendant which caused the destruction or damage."

C LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Bridge of Harwich. For the reasons which he has given I agree that the appeal should be dismissed and I would answer the certified question in the way which he has suggested.

D LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Bridge of Harwich. For the reasons which he has given I also agree that the appeal should be dismissed and the certified question answered in the manner indicated by him.

E LORD OLIVER OF AYLERTON. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Bridge of Harwich. For the reasons which he has given I agree that the appeal should be dismissed and the certified question answered in the sense which he has indicated.

F LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Bridge of Harwich. For the reasons which he has given I also agree that the appeal should be dismissed and the certified question answered in the manner indicated by him.

Appeal dismissed.

G *Solicitors: Crown Prosecution Service, Headquarters; Wilkin & Chapman, Grimsby.*

J. A. G.

H

[HOUSE OF LORDS]

McDERMID RESPONDENT

AND

NASH DREDGING & RECLAMATION CO. LTD. APPELLANTS

1987 May 5; Lord Bridge of Harwich, Lord Hailsham
 July 2 of St. Marylebone, Lord Brandon of Oakbrook,
 Lord Mackay of Clashfern and Lord Ackner

Negligence—Safe system of work—Ship—Deckhand instructed by employers to work on tug not owned by them—Tug's captain devising system for signalling when safe for tug to move—Captain moving tug without signal—Deckhand injured—Whether employers' duty to ensure operation of safe system—Delegation of duty to captain—Whether non-delegable duty

Shipping—Limitation of liability—Negligence—Categories of persons able to limit liability—"Any person interested in . . . the ship"—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 503(1)—Merchant Shipping (Liability of Shipowners and Others) Act 1958 (6 & 7 Eliz. 2, c. 62), s. 3(1)(2)(a)

Vicarious Liability—Master and servant—Course of employment—Deckhand instructed by employers to work on tug not owned by them—Injury to deckhand—Whether employers vicariously or personally liable for negligence of tugmaster employed by tug's owners

The plaintiff was employed by the defendants as a deckhand. In the course of his employment he worked on board a tug owned by a Dutch company and under the control of a Dutch captain employed by them. The plaintiff's work included untying ropes mooring the tug fore and aft to a dredger. The system used by the captain was that when the plaintiff had untied the ropes and it was safe for the captain to move the tug the plaintiff would give a double knock with his hand on the wheelhouse. At the time in question the plaintiff had untied the aft rope but was still in the course of untying the forward rope when the captain, without waiting for the plaintiff's signal, put the engine of the tug hard astern. As a result, the rope snaked round the plaintiff's leg, causing him serious injury. On his claim against the defendants for damages for, inter alia, negligence, Staughton J. held that his injuries had been caused by the captain's negligence, that the captain was to be deemed to have acted as the defendants' employee and that, therefore, the defendants were vicariously liable for his negligence to the plaintiff. He held, however, that the defendants were entitled to limit their liability by virtue of section 503 of the Merchant Shipping Act 1894 as extended by section 3 of the Merchant Shipping (Liability of Shipowners and Others) Act 1958¹ on the ground that the captain had been their servant within the meaning of section 3(2)(a) of the Act of 1958. The Court of Appeal dismissed an appeal by the defendants on the question of liability and allowed a cross-appeal by the plaintiff on the limitation point.

On appeal by the defendants:—

Held, dismissing the appeal, (1) that the defendants owed the plaintiff a duty of care to devise a safe system of work for

¹ Merchant Shipping (Liability of Shipowners and Others) Act 1958, s.3: see post, p. 219D–F.

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him and to see that that system was operated; that assuming that the captain's system of waiting for a double knock on the wheelhouse before putting the tug in motion could be called a safe system it had not been operated at the time of the plaintiff's accident and the captain's negligence in not operating it had not been casual or collateral but had been central to the operation of the system; that the defendants' duty of care was non-delegable in the sense that they were personally liable for its performance and could not escape their liability if it was delegated and not properly performed; and that, accordingly, although they had delegated the performance of their duty of care to the captain, they could not thereby avoid their own liability to the plaintiff (post, pp. 214A, 215A-D, 216A-D, 222H-223B, D-G, 224C-D).

(2) That under section 3(2)(a) of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 the captain had been the servant of the owners of the tug, not of the defendants; that on the true meaning of section 3(1) of the Act of 1958 "any person interested in . . . the ship" meant a person having a legal or equitable interest in the ship and, on the evidence, the whole legal and equitable interest in the tug had been in the owners; and that, accordingly, since the defendants did not fall within any of the other categories of persons in section 3 of the Act of 1958, they were not entitled to limit their liability to the plaintiff (post, pp. 214A, 216E-F, 223H-224B, C-D).

Decision of the Court of Appeal [1986] Q.B. 965; [1986] 3 W.L.R. 45; [1986] 2 All E.R. 676 affirmed.

The following cases are referred to in their Lordships' opinions:

Davie v. New Merton Board Mills Ltd. [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346, H.L.(E.)

Kondis v. State Transport Authority (1984) 55 A.L.J. 225

Wilsons & Clyde Coal Co. Ltd. v. English [1938] A.C. 57; [1937] 3 All E.R. 628, H.L.(Sc.)

Wingfield v. Ellerman's Wilson Line Ltd. [1960] 2 Lloyd's Rep. 16, C.A.

The following additional case was cited in argument:

Sharpe v. Haggith (1912) 28 T.L.R. 194, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the defendants, Nash Dredging & Reclamation Co. Ltd., by leave of the House of Lords from the judgment of the Court of Appeal (Fox, Parker and Neill L.JJ.) [1986] Q.B. 965 given on 16 April 1986 dismissing the defendants' appeal from the judgment of Staughton J. given on 25 July 1984 and allowing a cross-appeal by the plaintiff, Jamie McDermid.

The Court of Appeal refused the defendants leave to appeal, but on 10 July 1986 the Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Templeman and Lord Goff of Chieveley) [1986] 1 W.L.R. 978 allowed a petition by them for leave.

The facts are set out in the opinions of Lord Hailsham of St. Marylebone and Lord Brandon of Oakbrook.

Walter Aylen Q.C. and *David Melville* for the defendants.

Alan Tyrell Q.C. and *Roger Shawcross* for the plaintiff.

Their Lordships took time for consideration.

2 July. LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hailsham of St. Marylebone and Lord Brandon of Oakbrook. I agree with them both and for the reasons they give I would dismiss the appeal. A

LORD HAILSHAM OF ST. MARYLEBONE. My Lords, this was an action for damages for personal injuries by the plaintiff (respondent) against his employers, the defendants (appellants), as the result of an accident which took place as long ago as 22 June 1975. B

The fact that on the date of the hearing of this appeal on 5 May 1987 both the question of liability and the quantum of damages were still open after nearly 12 years for discussion does not shed a very favourable light on our system for dealing with litigation of this type. C

The plaintiff was employed as a deckhand by a contract in writing dated 18 June 1975 in connection with dredging work on a fjord at Lulea in Sweden. In the first sentence of this contract it was expressly agreed: "The employee shall safely comply with the lawful directions of the company's representatives. . ." It must be noted that the defendants' employers were a subsidiary (it is believed wholly-owned) of a Dutch company Stevin Baggeren B.V. ("Stevin"). The function of the defendants was to provide and pay the British staff engaged in the operation. D

At the time of the accident, by direction of the defendants, the plaintiff was working on the deck of a tug (the *Ina*) owned by Stevin and under the command of her Dutch skipper (Captain Sas) who was an employee of Stevin. The tug was in fact operated turn and turn about by Captain Sas and a British skipper (Captain Clifford) who was an employee of the defendants. At all material times, however, and by direction of the defendants under clause 1 of the contract of service, the *Ina* and the plaintiff were both under the total operational control of Captain Sas and subject to his orders. E

The accident may be very simply described. The plaintiff's duty, so far as material, was to tie and untie the *Ina* from a dredger to which she was made fast fore and aft by means in each case of a nylon rope attached to a bollard on the dredger by an eye and to the tug by a number of figure-of-eight loops and two half-hitches. At the time of the accident the plaintiff was under orders to untie with a view to the *Ina* going astern. He safely untied the aft rope and stowed it inboard the *Ina*. He then went forward to untie the forward rope from the dredger. His correct drill, had he completed it, would have been to slacken the rope on the *Ina*'s starboard bollards in order to reduce the tension, to allow the deckhand on the dredger (whom he could clearly see) to take the eye of the rope off the dredger's port bollard, and then haul the rope in and stow it safely inboard the *Ina*, proceed to the wheelhouse and give it a double knock with his hand, in order to signal to Captain Sas that it was safe to move. In the event, after he had loosened the forward rope from the *Ina*'s bollard, and before the deckhand on the dredger had had time to remove the eye of the rope from the bollard on the dredger, Captain Sas, who was at the wheel of the *Ina*, put the engine hard astern. As a result, the rope snaked round the plaintiff's leg, pulled him into the water and caused him injuries which involved the amputation of his leg and damage, recently (28 April 1986) assessed F G H

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Lord Hailsham
of St. Marylebone

A at £178,450.05 by Staughton J., to whom the case had been remitted for this purpose by the Court of Appeal.

B The plaintiff's claim in the proceedings was based on the allegation, inter alia, of a "non-delegable" duty resting on his employers to take reasonable care to provide a "safe system of work:" cf. *Wilsons & Clyde Coal Co. Ltd v. English* [1938] A.C. 57. The defendants did not, and could not, dispute the existence of such a duty of care, nor that it was "non-delegable" in the special sense in which the phrase is used in this connection. This special sense does not involve the proposition that the duty cannot be delegated in the sense that it is incapable of being the subject of delegation, but only that the employer cannot escape liability if the duty has been delegated and then not properly performed. Equally the defendants could not and did not attempt to dispute that it would be a central and crucial feature of any safe system on the instant facts that it would prevent so far as possible the occurrence of such an accident as actually happened, viz. injury to the plaintiff as the result of the use of the *Ina's* engine so as to move the *Ina* before both the ropes were clear of the dredger and stowed safely inboard and the plaintiff was in a position of safety.

D Since such a system could easily have been designed and put in operation at the time of the accident in about half-a-dozen different ways, and since it is quite obvious that such a system would have prevented the accident had it been in operation, and since the duty to provide it was "non-delegable" in the sense that the defendants cannot escape liability by claiming to have delegated performance of their duty, it is a little difficult to see what possible defence there could ever have been to these proceedings. There was indeed a preposterous suggestion in the defendants' pleading that the plaintiff had caused or contributed to his own misfortune himself. There was never the smallest evidence of this, and, no doubt prudently, the defendants called no evidence, whether by Captain Sas or anyone else, to substantiate it. This frantic attempt to avoid or reduce liability had already died a natural death before the case left the court of trial.

F Although the duty of providing a safe system of work was "non-delegable" in the special sense I have described, it had in fact been delegated on alternate shifts to Captain Sas and Captain Clifford in the circumstances I have described. In both cases the delegation covered, so far as can be ascertained, the whole operation of the *Ina*, the orders to the deckhand, the system of work to be followed, and since the skipper was at the wheel, the operation of the engine. Both Captain Sas and G Captain Clifford had designed different systems of work either of which, if followed, would probably have prevented the accident in the instant appeal. The trial judge appeared to think that the system designed by Captain Sas and applicable at the time of the accident to the plaintiff was "not unsafe." But this "system" involved at its crucial stage, i.e. the point of time at which it was necessary to ascertain for certain that both H the ropes were inboard and the deckhand safe, a double knock by the deckhand on the wheelhouse, which could not be delivered unless the deckhand were clear of danger. If the proper sequence was observed this would not happen until after the second rope was stowed inboard. The Court of Appeal doubted whether the "system," if it can be called such, was adequate, and I share this doubt. But it matters not. The accident happened because the *Ina* went full astern before the forward rope was clear of the dredger and with the plaintiff in a position of acute

peril. There was no double knock because Captain Sas did not attempt to operate the correct sequence and did in fact operate the engines with the eye of the rope still on the bollard of the dredger. The "system" was therefore not being operated and was therefore not being "provided" at all. It matters not whether one says that there was no "system" in operation at all, or whether one says that the system provided was unsafe, or whether one says that the system in fact provided was not in use at the crucial stage. In any event the defendants had delegated their duty to the plaintiff to Captain Sas, the duty had not been performed, and the defendants must pay for the breach of their "non-delegable" obligation. A B

Before your Lordships it was strenuously argued that the fact that Captain Sas operated the engine in such dangerous circumstances was the "casual" or "collateral" negligence of an employee of an independent contractor, i.e. Stevin. Since Stevin was itself the holding company of the defendants, the defendants being its wholly-owned subsidiary, I find this morally an unattractive proposition. But the fact was that the defendants had delegated their own "non-delegable" duty to Captain Sas who had charge of the whole operation and his negligence was not "collateral" or "casual" but central to the case and in total disregard of the duty owed to the plaintiff to see that the engine was not put in operation at all until it had been ascertained that it was safe to do so. Whether the system as designed by Captain Sas was adequately safe or not, whether it can truthfully be said that there was in any real sense a system at all, or whether there was a system not unsafe but not being operated, the defendants had delegated their own "non-delegable" duty and it had not been performed. C D E

I do not wish to add anything on the second point in the appeal which related to the attempt to limit the defendants' liability under section 503 of the Merchant Shipping Act 1984 as amended by section 3 of the Merchant Shipping (Liability of Shipowners and Others) Act 1958, except to say that I agree with the judgment of the Court of Appeal [1986] Q.B. 965, 980-982, and that the result is a necessary consequence of the correct analysis of the facts which I have endeavoured to give above. F

In the event this appeal must be dismissed with costs. In my view it is, and always was, unarguable.

LORD BRANDON OF OAKBROOK. My Lords, on 22 June 1975 the plaintiff, then aged 18, suffered a serious accident while working as deckhand on a tug called *Ina* in a fjord at Lulea in Sweden. In the accident his left leg was so badly injured that it had to be amputated at mid-thigh level, with grievous consequences for the whole of his future life. G

On 30 November 1977 the plaintiff brought an action in the High Court in England against the defendants, by whom he was employed at the time of the accident, claiming damages for the injuries caused to him by it. The action was tried by Staughton J. on 23, 24 and 25 July 1984. He held that the defendants were liable in negligence to the plaintiff but that they were entitled to limit their liability to £43,893 under the provisions relating to limitation of liability contained in the Merchant Shipping Acts 1894 to 1984. In view of his decision that the defendants were entitled to limit their liability to this sum, the judge did not assess the full amount of the damages which the plaintiff would otherwise have H

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A He was entitled to recover. He gave judgment for the plaintiff for £59,169.02 inclusive of agreed interest.

B The plaintiff appealed to the Court of Appeal against the judge's decision that the defendants were entitled to limit their liability. The defendants cross-appealed against the judge's decision that they were liable at all. The appeal and cross-appeal were heard by the Court of Appeal (Fox, Parker and Neill L.J.J.) [1986] Q.B. 965 on 14 and 15 January 1986. The reserved judgment of the court prepared by Neill L.J. was handed down on 16 April 1986. In that judgment the court allowed the plaintiff's appeal and dismissed the defendants' cross-appeal. It further remitted the case to the judge for him to assess the full amount of the damages which the plaintiff was entitled to recover. On 28 April 1986 Staughton J. assessed those damages at £178,450.05 inclusive of agreed interest.

C My Lords, the primary facts relevant to this appeal are not in dispute. The appellants are a wholly owned subsidiary of a Dutch dredging company, Stevin Baggèren B.V. In June 1975 the appellants and Stevin were together engaged in dredging operations for the Swedish government in the fjord at Lulea. The dredger was moored off-shore and a tug called *Ina*, owned by Stevin, was used in the operations. D These continued round the clock so that the complement of the tug worked shifts. There were two masters of the tug, each of whom worked a 12-hour shift. One of these was Captain Clifford, who was employed by the defendants. The other was Captain Sas, who was employed by Stevin.

E The part played by the plaintiff in the operations and the circumstances of his accident are concisely set out in the judgment of Staughton J. (transcript, pp. 35–36):

“The task in hand there was dredging a fjord. At first the plaintiff worked on the dredger for a few days; then he was transferred to being a deckhand on the tug *Ina*. The complement of the tug was a master, Captain Sas, the plaintiff as deckhand, and a greaser to look after the engines. It was used in the main to push barges from alongside the dredger to a dumping ground, but also to transport those working on the operation from and to the shore at the beginning and end of shifts. The task of the plaintiff as deckhand was to keep the deck clean and tidy, and to see to the tying up and untying of the tug, whether alongside the dredger or elsewhere. F This involved two man-made fibre ropes, each 1½ inches in diameter, with an eye at one end. The eye of one rope would be placed over a bollard on the dredger, and then the rope would be secured to two bollards on the tug by two figure-of-eight turns and two half-hitches. The remainder of the rope would then be coiled on the deck of the tug inboard of the two bollards. The same process would be carried out for each rope, except that one was secured to the for’ard end of the tug and one to the aft end. To untie the ropes the plaintiff would first slacken the aft rope by removing it from the two bollards on the tug, next it would be removed from the bollard on the dredger, and the plaintiff would haul it aboard the tug. He would then do the same with the for’ard rope. Finally, he would give two knocks on the side of the wheelhouse to indicate to Captain Sas that the ropes were both on board. On 22 July 1975, when the plaintiff had been working on the tug for two days, the G H

tug was tied up to the dredger, and the time came when she was to leave. Captain Sas, who did not speak much English, signed to the plaintiff to untie the ropes. The plaintiff took the aft rope off first as the tug was leaving with engine astern. He then moved to the for'ard rope and started removing it from the two bollards on board the tug. As he was doing so, Captain Sas put the engine astern prematurely; he started to move the tug away from the dredger. The plaintiff immediately stood back as he thought that the rope might break and injure him, but instead it was pulled through the bollard and he went with it. He has some recollection of the rope being round his left leg and of being pulled through the bollard. After that he was in the water, with his left leg very seriously injured."

The plaintiff sought to establish liability against the defendants on various grounds. Of these it is only necessary to consider two: the first that the accident was caused by the negligence of Captain Sas for which the defendants were vicariously liable; and the second that the accident was caused by the negligence of the defendants in failing to provide a safe system of work for the plaintiff.

With regard to the first ground of liability, the defendants did not admit that the accident had been caused by any negligence of Captain Sas. They further contended that, even if it had been so caused, Captain Sas was the servant of Stevin and not of the defendants, so that the defendants were not vicariously liable for the consequences of his negligence.

The defendants did not call Captain Sas to give evidence. In these circumstances Staughton J. rightly had no hesitation in finding, first, that Captain Sas had been negligent in putting the tug's engines astern prematurely, and, secondly, that the accident had been caused by his negligence in this respect. With regard to that negligence he said (transcript, p. 38):

"That may have taken the form of carelessness in not waiting for the plaintiff's signal before putting the engine astern, or else a deliberate, but dangerous, manoeuvre designed to encourage the plaintiff to perform his tasks more quickly."

On the question of the defendants' vicarious liability for the negligence of Captain Sas Staughton J. said (transcript, pp. 42-43):

"On the evidence, it seems to me that the defendants, through some person at Lulea, in effect instructed the plaintiff to work with and under Captain Sas pursuant to the plaintiff's contract of employment with the defendants. They made Captain Sas the foreman, boss or chargehand through whom their orders would reach the plaintiff, and to whom the plaintiff would render directly the service which he owed to the defendants. As between the plaintiff and the defendants, Captain Sas must be taken to have been the servant of the defendants. If that involves any novel doctrine, so be it. The common law would become obsolete if it did not develop to meet new situations."

With regard to the second ground of liability relied on by the plaintiff, Staughton J. found that the system of work provided for the plaintiff was not unsafe. In this connection he said (transcript, pp. 38-39):

A "The task of the plaintiff was a simple one and well within his capabilities. Given due care and attention on the part of himself and Captain Sas, there was nothing unsafe about it."

B In the result Staughton J. decided that the plaintiff succeeded against the defendants on the first ground of liability referred to above, namely, vicarious liability for the negligence of Captain Sas, but failed on the second ground of liability, namely, failure of the defendants to provide a safe system of work for the plaintiff.

C The defendants contended that, if they were liable to the plaintiff, they were entitled to limit the amount of their liability to £43,893 under the provisions relating to limitation of liability contained in the Merchant Shipping Acts. For the plaintiff it was not disputed that, if the defendants were entitled to limit their liability under these provisions, the amount of their limited liability was £43,893. It was disputed, however, that the defendants were entitled to limit their liability at all.

D The right to limit liability for certain occurrences, including accidents causing personal injury to some person, was given to shipowners only by section 503 (in Part VIII) of the Merchant Shipping Act 1894. That right was extended to persons other than shipowners by section 3 of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 which provides:

E "(1) The persons whose liability in connection with a ship is excluded or limited by Part VIII of the Merchant Shipping Act 1894 shall include any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship. (2) In relation to a claim arising from the act or omission of any person in his capacity as master or member of the crew or (otherwise than in that capacity) in the course of his employment as a servant of the owners or of any such person as is mentioned in subsection (1) of this section,—(a) the persons whose liability is excluded or limited as aforesaid shall also include the master, member of the crew or servant, and, in a case where the master or member of the crew is the servant of a person whose liability would not be excluded or limited apart from this paragraph, the person whose servant he is; . . ."

F Staughton J., having decided that, as between the plaintiff and the defendants, Captain Sas was to be taken to have been the servant of the defendants, went on to hold that the defendants were entitled to limit their liability, subject to any question of actual fault or privity, under subsection 2(a) above, on the ground that the plaintiff's claim arose from the act or omission of Captain Sas in his capacity as master of the tug *Ina* and that Captain Sas was at the time of such act or omission the servant of the defendants. Staughton J. went on to find that there had been no actual fault or privity of the defendants (a finding which was affirmed by the Court of Appeal and not challenged in your Lordships' House), and held that the defendants were therefore entitled to limit their liability as contended for by them.

G He concluded, after an examination of all the relevant evidence, that Neill L.J., giving the judgment of the Court of Appeal [1986] Q.B. 965, did not accept the judge's view that the defendants were liable to the plaintiff because Captain Sas was to be taken, as between the plaintiff and the defendants, to have been the servant of the defendants. He concluded, after an examination of all the relevant evidence, that

Captain Sas was, and remained at all material times, the servant of Stevin. He went on to say, however, that this circumstance did not conclude the issue of liability in favour of the defendants, because it was also necessary to consider the question whether the defendants were in breach of the personal duty of care owed by them to the plaintiff. In this connection he said, at p. 974:

“In the instant case the relevant facet of the general duty of the defendants to take reasonable care for the safety of the young plaintiff was the obligation to provide and maintain in operation a safe system of work.”

Neill L.J. then examined the evidence relating to the system of work, and in particular that of Captain Clifford, the other tugmaster, who alternated with Captain Sas in the command of the tug. Captain Clifford's evidence was that he did not rely on knocks by his deckhand on the outside of the wheelhouse in order to be assured that the deckhand had completed his work. He relied instead on one of three indications: a shout by the deckhand of “all gone,” a hand signal by the deckhand to that effect, or himself coming out of the wheelhouse and looking at the bollards on the tug. Having examined the evidence Neill L.J. said, at pp. 974-975:

“In these circumstances there was scope for a finding that the system used by Captain Sas was not a safe system, because it relied largely (if not exclusively) on a sound signal of a kind which was not distinctive like the shout ‘all gone,’ and which might be confused with one of the many other noises likely to be heard during dredging operations at sea. But the very experienced judge, who heard the evidence, came to the conclusion that the system of work was not unsafe. Furthermore, the judge concluded that the accident happened, not because of a fault in the system, but because Captain Sas either carelessly did not wait for the signal, or because he deliberately put the tug astern to make the plaintiff move more quickly. We have come to the conclusion, however, that in the circumstances of this case it is unrealistic to attempt to draw a clear dividing line between the system of work which Captain Sas laid down for the plaintiff to follow, and the actual conduct of Captain Sas which caused the accident and the plaintiff's injuries. Captain Sas did not give evidence and the precise sequence of events can only be a matter of conjecture. We consider that it is just as likely that Captain Sas mistook some other sound for a signal from the plaintiff as that he carelessly failed to wait for the plaintiff's signal or that he put the engines astern deliberately in order to make the plaintiff hurry up.”

Neill L.J. then discussed at length the principles of law governing the question of when employers may be held liable for the acts or omissions of a person who is not their servant. In the course of that discussion he referred to and cited from two well known English authorities, *Davie v. New Merton Board Mills Ltd.* [1959] A.C. 604 and *Wingfield v. Ellerman's Wilson Line Ltd.* [1960] 2 Lloyd's Rep. 16, and a recent decision of the High Court of Australia, *Kondis v. State Transport Authority* (1984) 55 A.L.R. 225.

3 W.L.R.

McDermid v. Nash Dredging Ltd. (H.L.(E.))

Lord Brandon
of Oakbrook

A He expressed his conclusions with regard to the proper principles of law to be applied and the proper approach to be followed, at pp. 979-980:

B “Neither in the cases to which we were referred in the course of the argument, however, nor in the other authorities to which we have had regard in the course of considering this judgment, have we been able to discover any general principle which provides a sure guide to the limits of vicarious liability in tort. It is clear that the legacy of the doctrine of common employment remains, together with the rather uneasy division between cases where an employer may be liable for the negligent performance of his personal duties by a third party and cases where the employer may be liable vicariously for the negligence of an employee or agent. It seems to C this court, therefore, that in a case where a plaintiff is suing in respect of injuries received by him in the course of his employment and while working at a place at which he is required by his employer to work, the only satisfactory approach is to look at all the circumstances in the light of the fact that it is the basic duty of the employer to take reasonable care so to conduct his operations as not to subject those employed by him to unnecessary risk. The relevant circumstances will include: (a) the skill and experience of the injured employee, (b) the nature of the task on which the employee was employed, (c) the place where the injured employee was employed and the degree of control which the employer exercised at that place, (d) the relationship, if any, between the injured employee and the individual tortfeasor, (e) the relationship, if any, between the employer and the individual tortfeasor, (f) the interest, if any, of the employer in the actual task which the individual tortfeasor was performing when the accident occurred.”

Neill L.J. went on to apply this statement of the proper principles of law to be applied and the proper approach to be followed to the facts of the present case, at p. 980:

F “It is true that the tug *Ina* was owned by Stevin and that Captain Sas was employed by Stevin. But Captain Sas and the plaintiff were working together in a small team of three to perform a contract which, as we understand the matter, the defendants and Stevin were carrying out together. Indeed, as we have already observed, on alternate shifts the captain of the tug was Captain Clifford, an employee of the defendants. The defendants put the plaintiff (who was a young and inexperienced deckhand) under the control and into the care of Captain Sas. He was their agent or delegate to take reasonable care to devise a safe system of work on board the tug. In the circumstances of this case, he was also the agent or delegate to take reasonable care to see that the safe system was carried out. The defendants themselves, of course, were a limited company with headquarters in Guildford. They could only operate through their employees or other agents. It seems to us that on any sensible view of the doctrine of vicarious liability Captain Sas was the agent or delegate of the defendants to perform their duty towards the plaintiff. If there had been clear evidence that Captain Sas had put the tug astern when he *knew* that the plaintiff had not released the rope, we would have felt great difficulty in regarding the defendants as being vicariously responsible for such an action. The more

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probable cause of this accident was the absence of a safe system, or a careless disregard by Captain Sas of the risks which his unsafe method of work entailed. With all due respect to the judge, we would decide the issue of liability in favour of the plaintiff, not because we think that Captain Sas 'must be taken to have been the servant of' the defendants, but because he was the person entrusted by the defendants with performing their duty to take reasonable care for the safety of this young man."

Neill L.J. then turned to the issue of limitation of liability. After setting out the relevant parts of section 503 of the Act of 1894 and section 3 of the Act of 1958, he said that the defendants would only be entitled to limit their liability if they could show that they fell into one or more of the following categories: (1) the owners of the tug, (2) the charterers of the tug, (3) a person interested in the tug, (4) a person in possession of the tug, (5) the manager or operator of the tug, (6) the masters of Captain Sas. The judge, he said, had held that the defendants were entitled to limit their liability on the ground that they fell into category (6), namely, masters of Captain Sas. On the Court of Appeal's view of the matter, however, Stevin were the masters of Captain Sas and the defendants were not. The defendants did not fall into any of the other categories either. Accordingly they were not entitled to limit their liability.

My Lords, I consider first the primary issue as to whether the defendants are liable to the plaintiff at all, either on the ground relied on by Staughton J. or on the different ground relied on by the Court of Appeal. In relation to this issue I would make a number of observations. First, there was, in my opinion, no material on which Staughton J. was entitled to find that a possible explanation of the action of Captain Sas in putting the engines astern prematurely was that he did so deliberately in order to encourage the plaintiff to perform his tasks more quickly. There was no evidence that Captain Sas thought that the plaintiff worked too slowly, and, in the absence of such evidence, the suggestion that Captain Sas deliberately put the plaintiff in danger in order to teach him a lesson is not one which ought to be entertained. Secondly, I agree with the Court of Appeal that Captain Sas was, and remained at all material times, the servant of Stevin, and that Staughton J. was wrong in holding that, as between the plaintiff and the defendants, Captain Sas must be taken to have been the servant of the defendants. Thirdly, I agree with the Court of Appeal that the real question in the case is whether the defendants were in breach of the duty of care which they owed to the plaintiff in not devising and operating a safe system of work for him. Fourthly, I agree with the Court of Appeal that there was scope on the evidence for a finding that the system of work devised by Captain Sas, under which the plaintiff was to inform him that he had completed his work of unmooring by knocking on the outside of the wheelhouse was unsafe. However, for reasons which will become apparent, I do not consider that it is necessary to reach a conclusion on that point.

My Lords, the Court of Appeal regarded the case as raising difficult questions of law on which clear authority was not easy to find. With great respect to the elaborate judgment of that court, I think that they have treated the case as more difficult than it really is. A statement of the relevant principle of law can be divided into three parts. First, an

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of Oakbrook

A employer owes to his employee a duty to exercise reasonable care to ensure that the system of work provided for him is a safe one. Secondly, the provision of a safe system of work has two aspects: (a) the devising of such a system and (b) the operation of it. Thirdly, the duty concerned has been described alternatively as either personal or non-delegable. The meaning of these expressions is not self-evident and needs explaining. B The essential characteristic of the duty is that, if it is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for the non-performance of the duty.

C In the present case the relevant system of work in relation to the plaintiff was the system for unmooring the tug *Ina*. In the events which occurred the defendants delegated both the devising and the operating of such system to Captain Sas, who was not their servant. An essential feature of such system, if it was to be a safe one, was that Captain Sas would not work the tug's engines ahead or astern until he knew that the plaintiff had completed his work of unmooring the tug. The system which Captain Sas devised was one under which the plaintiff would let him know that he had completed that work by giving two knocks on the D outside of the wheelhouse. I have already said that I agree with the Court of Appeal that there was scope, on the evidence, for a finding that that system was not a safe one. I shall assume, however, in the absence of any contrary finding by Staughton J., that that system, as devised by Captain Sas, was safe. The crucial point, however, is that, on the occasion of the plaintiff's accident, Captain Sas did not operate that E system. He negligently failed to operate it in that he put the tug's engines astern at a time when the plaintiff had not given, and he, Captain Sas, could not therefore have heard, the prescribed signal of two knocks by the plaintiff on the outside of the wheelhouse. For this failure by Captain Sas to operate the system which he had devised, the defendants, as the plaintiff's employers, are personally, not vicariously, liable to him.

F It was contended for the defendants that the negligence of Captain Sas was not negligence in failing to operate the safe system which he had devised. It was rather casual negligence in the course of operating such system, for which the defendants, since Captain Sas was not their servant, were not liable. I cannot accept that contention. The negligence of Captain Sas was not casual but central. It involved abandoning the G safe system of work which he had devised and operating in its place a manifestly unsafe system. In the result there was a failure by the defendants, not in devising a safe system of work for the plaintiff, but in operating one.

H On these grounds, which while not differing in substance from those relied on by the Court of Appeal are perhaps more simply and directly expressed, I agree with that court that the defendants are liable to the plaintiff.

I turn to the secondary issue of limitation of liability. With regard to this, I agree entirely with the analysis of the relevant statutory provisions made by the Court of Appeal. In order to succeed on limitation, the defendants had to bring themselves within the six categories of persons specified by Neill L.J., to which I referred earlier. On the footing that Captain Sas was not to be taken to have been the defendants' servant, they could not bring themselves within category (6). Nor, in my opinion,

specified by Neill L.J., to which I referred earlier. On the footing that Captain Sas was not to be taken to have been the defendants' servant, they could not bring themselves within category (6). Nor, in my opinion, could they bring themselves within any of the other categories, (1) to (5). Before your Lordships counsel for the defendants submitted that they came within category (3) as persons interested in the tug. In my opinion the expression "any person interested in . . . the ship," as used in section 3(1) of the Act of 1958, means a person having a legal or equitable interest in the ship. In the present case the whole legal and equitable interest in the tug *Ina* was, on the evidence, in Stevin. I do not therefore think that there is any substance in this submission.

My Lords, for the reasons which I have given, I consider that the Court of Appeal decided rightly both the issues which arise on this appeal, and I would accordingly dismiss the appeal with costs.

LORD MACKAY OF CLASHFERN. My Lords, for the reasons given in the speeches of my noble and learned friends Lord Hailsham of St. Marylebone and Lord Brandon of Oakbrook, with which I agree, I would dismiss the appeal.

LORD ACKNER. My Lords, for the reasons given in the speeches of my noble and learned friends Lord Hailsham of St. Marylebone and Lord Brandon of Oakbrook, with which I agree, I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Mackrell & Co.; Penningtons Ward Bowie for Woodford & Ackroyd, Southampton.

M. G.

[QUEEN'S BENCH DIVISION]

REGINA v. LIVERPOOL JUVENILE COURT, *Ex parte R.*

1987 March 20;
April 10

Russell L.J. and Otton J.

Justices—Evidence—Admissibility—Confession—Summary proceedings—Defendant representing that confession improperly obtained—Whether justices required to hold trial within a trial—Whether justices required to rule on admissibility before close of prosecution case—Police and Criminal Evidence Act 1984, s. 76(2)¹

The defendant appeared before the juvenile court for trial on a charge of burglary. At the beginning of the hearing the prosecutor intimated to the justices that he intended to rely on the defendant's confession, which was the only evidence indicating his guilt, and that the defendant intended to challenge

¹ Police and Criminal Evidence Act 1984, s. 76(2); see post, p. 227A-B.

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A the admissibility of the confession, and he invited them to determine the question of admissibility as a preliminary issue. The defendant's solicitor supported that invitation and informed the justices that he wished to call the defendant to give evidence on the issue of admissibility alone, which he wished to have resolved before deciding whether to call the defendant in the substantive trial. The justices refused to hold a preliminary inquiry and adjourned the trial to enable the defendant to apply for judicial review of their refusal.

B On the defendant's application for judicial review by way of an order of mandamus requiring the juvenile court to hold an inquiry into the admissibility of the defendant's confession:—

C *Held*, granting the application, that section 76(2) of the Police and Criminal Evidence Act 1984 required justices conducting a summary trial to hold a trial within a trial to determine the admissibility of a confession made by the defendant if it was represented to them by the defendant that it was or might have been obtained by oppression or in consequence of anything said or done which was likely to render unreliable any confession which might be made by the defendant in consequence thereof; that the defendant might give evidence on such a trial within a trial confined to the question of admissibility and, if he did, could not at that stage be cross-examined as to the truth or otherwise of the confession; that where such a trial within a trial had been held the defendant was entitled to a ruling on the admissibility of the confession before, or at, the end of the prosecution case; and that, accordingly, the defendant was entitled to the relief sought (post, pp. 228F–G, 230E, F–H).

D *Wong Kam-ming v. The Queen* [1980] A.C. 247, P.C. applied.

E *S.F.J. (An Infant) v. Chief Constable of Kent*, The Times, 17 June 1982, D.C. considered.

F *Per curiam*. If no representation is made before the close of the prosecution case that the confession was or may have been obtained by one of the processes set out in section 76(2) of the Act of 1984 it is still open to the defendant to raise admissibility or weight of the confession at any subsequent stage of the trial; it should never be necessary to call the prosecution evidence relating to the obtaining of a confession twice (post, pp. 230H–231B). Different considerations may prevail where justices are concerned with committal proceedings (post, p. 231B–C).

The following cases are referred to in the judgment of Russell L.J.:

A.D.C. (*An Infant*) v. *Chief Constable of Greater Manchester* (unreported), 15 March 1983, D.C.

G *Conway v. Hotten* [1976] 2 All E.R. 213, D.C.

Reg. v. Oxford City Justices, Ex parte Berry [1987] 1 All E.R. 1244, D.C.

S.F.J. (An Infant) v. Chief Constable of Kent, The Times, 17 June 1982, D.C.

Vel (Kevin) v. Chief Constable of North Wales, The Times, 14 February 1987, D.C.

Williams v. Mohamed [1977] R.T.R. 12, D.C.

H *Wong Kam-ming v. The Queen* [1980] A.C. 247; [1979] 2 W.L.R. 81; [1979] 1 All E.R. 939, P.C.

The following additional cases were cited in argument:

Ajodha v. The State [1982] A.C. 204; [1981] 3 W.L.R. 1; [1981] 2 All E.R. 193; 73 Cr.App.R. 129, P.C.

Reg. v. Epping and Ongar Justices, Ex parte Manby [1986] Crim.L.R. 555, D.C.

Reg. v. Millard [1987] Crim.L.R. 196

A

APPLICATION for judicial review.

On an application for judicial review, made pursuant to leave granted by Taylor J. on 6 April 1987, the defendant, a minor, by his father and next friend, sought an order of mandamus requiring the Liverpool Juvenile Court to hold an inquiry "by way of voire dire" into the admissibility of a confession made by the defendant on 10 October 1986. The grounds of the application were that the justices, in declining to embark on such an inquiry in the course of the defendant's trial on a charge of burglary contrary to section 9(1)(b) of the Theft Act 1968, following submissions by both the prosecutor and the defendant's solicitor that section 76(2) of the Police and Criminal Evidence Act 1984 obliged them to do so in order to determine whether they should admit in evidence the confession (which was the only evidence against the defendant), had failed to discharge their duty under section 76(2) and had acted in excess of jurisdiction, and that therefore mandamus should issue to compel the justices to embark on the performance of their statutory duty.

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The facts are stated in the judgment of Russell L.J.

D

Andrew Moran for the defendant.

David Maddison for the prosecutor.

The justices did not appear and were not represented.

Cur. adv. vult.

E

10 April. RUSSELL L.J. read the following judgment. This case raises important procedural points concerned with criminal proceedings in the magistrates' court and the impact upon those proceedings of section 76(2) of the Police and Criminal Evidence Act 1984. It is an application for judicial review, the relief sought being mandamus requiring the Liverpool Juvenile Court "to hold an inquiry by way of voire dire into the admissibility of a confession made by [the defendant] on 10 October 1986." We are told that the issues raised have been the subject of controversy amongst justices and justices' clerks up and down the country.

F

The background can be very shortly stated. The defendant, who makes this application by his father, is 15 years of age. On 3 February 1987 he appeared before the justices, sitting as a juvenile court at Liverpool, charged with the offence of burglary. He denied the charge. The allegation was that on 8 October 1986 he had entered 3, Sheehan Heights, Liverpool 5, as a trespasser and had stolen a pension book and £3 in cash, contrary to section 9(1)(b) of the Theft Act 1968.

G

When the case was called on the solicitor prosecuting intimated to the justices that the prosecution sought to rely upon a confession made by the defendant to two detective police officers who had interviewed him on 10 October 1986. That confession, the solicitor indicated, was the only evidence available to the prosecution demonstrating guilt. The solicitor further indicated to the court that he understood that the admissibility of the confession was to be challenged and he invited the court to determine its admissibility as a preliminary issue. The solicitor drew the attention of the justices to the provisions of section 76(2) of the Police and Criminal Evidence Act 1984 which reads:

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A "If, in any proceedings where the prosecution proposes to give in
evidence a confession made by an accused person, it is represented
to the court that the confession was or may have been obtained—
(a) by oppression of the person who made it; or (b) in consequence
of anything said or done which was likely, in the circumstances
existing at the time, to render unreliable any confession which
might be made by him in consequence thereof, the court shall not
B allow the confession to be given in evidence against him except in
so far as the prosecution proves to the court beyond reasonable
doubt that the confession (notwithstanding that it may be true) was
not obtained as aforesaid."

C The solicitor acting for the defendant supported the prosecution's
application and, so we are told by counsel, indicated to the justices that,
for the purpose of determining the admissibility of the confession which
the defendant alleged had been obtained improperly, he might wish to
call the defendant upon the issue of admissibility alone. The justices
were informed that in that event, during the preliminary inquiry, no
questions could properly be put to the defendant outside the scope of
the inquiry as to admissibility. Further, we were told that the solicitor
D acting for the defendant indicated to the justices that he wished to have
the question of admissibility resolved and a ruling made upon it before
taking any decision as to the calling of the defendant in the substantive
trial of the charge.

E The justices retired and, having considered the submissions, the
chairman thereafter announced that they were not willing to hold any
preliminary inquiry, that decision having been taken after consultation
with the deputy clerk to the justices. The case was thereupon adjourned
to enable the current application for judicial review to be made.

F We have before us an affidavit sworn by Mr. John Edmund Pearson
who is the clerk to the justices for the petty sessional area of the City of
Liverpool. In it he points out that he does not issue directions to justices
upon matters of law and indeed has no power to do so, but his practice
was, and is, to make known to the individual court clerks his views on
points of law and he expects those clerks when advising justices to
inform them of his views. That seems to me to be a perfectly proper
procedure.

G His affidavit, after making reference to observations of Lord Lane
C.J. in *S.F.J. (An Infant) v. Chief Constable of Kent*, The Times, 17
June 1982 and Lord Widgery C.J. in *Williams v. Mohamed* [1977]
R.T.R. 12, continues:

H "I came to the conclusion that the proper advice to be given to
magistrates was that they could not hold a trial within a trial and
that they should be cautious about deciding to deal with preliminary
points and that the admissibility of a statement would not seem to
be an appropriate matter to be decided by way of a preliminary
point. After the enactment of the Police and Criminal Evidence Act
1984 the question was raised as to whether sections 76 and 78
affected the way in which justices should deal with issues of the
kind raised in the present case. Having looked at the two sections I
came to the conclusion that the procedure for dealing with the way
in which the admissibility of a confession should be dealt with was
not affected by either of those sections. I advised my court clerks
accordingly and told them that the advice that I would give to

magistrates was that neither of those sections affected the decision in *S.F.J. (An Infant) v. Chief Constable of Kent*. I observe that in *Vel (Kevin) v. Chief Constable of North Wales*, *The Times*, 14 February 1987 it was held that section 78 did not affect the procedure laid down in the case of *S.F.J. (An Infant) v. Chief Constable of Kent*."

In a sentence the submission made on behalf of the applicant was that that advice is inappropriate having regard to sections 76 and 78 of the Act, and in the light of section 76(2) the law has changed so as to require magistrates to hold, what in the Crown Court would be referred to as, a trial within a trial or an inquiry on the *voire dire*. The submissions made before us by Mr. Moran on behalf of the applicant were supported, or at least not resisted, by Mr. Maddison who appeared on behalf of the Crown Prosecution Service.

First, counsel submitted that the terms of section 76(2) were mandatory and admitted of only one construction, namely that the court had to decide, once a representation was made to it, whether a confession had been properly or improperly obtained before taking a decision to "allow the confession to be given in evidence." There were, therefore, two stages: first, the inquiry as to admissibility; and secondly, the admission of the confession in evidence if, and only if, as a result of the first stage the justices found that the confession "(notwithstanding that it may be true) was not obtained" by one or other of the processes set out in sub-paragraphs (a) and (b) of section 76(2). These two stages, quite separate and distinct the one from the other, represented a change in practice which the section required. Counsel acknowledged that prior to the passing of the Act, the justices had a discretion to consider whether or not in any particular case it was appropriate for them to embark upon a separate trial within a trial. The section had removed that discretion once a representation was made to the court. There remained, however, a discretion vested in the defence as to whether an attack upon a confession should be mounted in a trial within a trial or as part of the substantive hearing.

A trial within a trial took place only if it was "represented to the court that the confession was or may have been obtained" by one or other of the improper processes.

Two advantages to the defendant were indicated to us, as they were to the justices. Upon the authority of *Wong Kam-ming v. The Queen* [1980] A.C. 247, a defendant cannot be asked about the truth of a confession during an inquiry as to its admissibility. The defendant was therefore entitled to give evidence as to admissibility under the umbrella of that protection. If the justices declined to deal with the matter quite separately that protection would be lost. Further, submitted counsel, a defendant is entitled to know the strength of the case which he has to meet at the end of the prosecution case. This may affect his decision whether to go into the witness box. A ruling upon admissibility prior to or at the closure of the prosecution case was therefore important to the defendant.

Counsel referred us to a number of authorities. These, it was submitted, highlighted the common law position before the passing of the Police and Criminal Evidence Act 1984. Reverting to the authority cited in his affidavit by Mr. Pearson, namely *S.F.J. (An Infant) v. Chief Constable of Kent*, *The Times*, 17 June 1982, that was a decision of the

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A Divisional Court on 10 June 1982 and was an appeal by way of case stated. It was there submitted that justices were required to hear the evidence of a police officer proving a confession twice, once on the *voire dire* to prove admissibility and later in the substantive trial. Rejecting the submission, Lord Lane C.J. said, according to the transcript:

B "It is perfectly correct to speak of a trial within a trial when the case is one which is being conducted by a judge and jury. Frequently, and in modern times even more frequently, the jury is asked to leave the court when an issue is properly tried by the judge on a matter with which the jury at that stage have no concern. More often than not it is a question of the admissibility of evidence, and for obvious reasons that is conducted in the absence of the jury by the judge, the reason being that it is no good conducting the matter in front of the jury, because if the evidence is held to be inadmissible, the jury will then have heard all sorts of matters which they have no business to hear. Hence the reason for the trial within a trial.

D "But where the matter is being conducted by the magistrates' court, then there is no question of having a trial within a trial, because the justices are the judges both of fact and of law. They are the people who not only have to determine the question of admissibility, but also the question of guilt or innocence, namely the main issue of the trial. There may, during the course of the trial before the justices, be all sorts of subsidiary or preliminary or incidental matters which they have to decide: amongst them maybe, as was the case here, questions of admissibility of evidence. They decide those as separate issues, not as a trial within a trial. Consequently there was no need in the present case for the evidence which they had heard relating to the voluntary nature or otherwise of the oral and written statements by the appellant to be repeated to the justices after the issue of admissibility had been determined."

Later, however, Lord Lane C.J. said:

F "I find it quite impossible to lay down any general rule as to when justices should announce their decision on this type of point, and indeed when the point itself should necessarily be taken. Every case will be different. Some sort of preliminary point, for instance with regard to the admissibility of a document or something like that, can plainly, with the assistance perhaps of the clerk, be decided straightaway. Other points, such as the one with which we are dealing here, may require a decision at a later stage of the case, possibly after further argument. It may be that in some cases the defendant will be entitled to know what the decision of the justices with regard to the admissibility of a confession is at the close of the prosecution case in order to enable him to know what proper course he should take with regard to giving evidence and calling evidence and so on."

This last observation, submits counsel, is the very point which the section now resolves.

It was taken up by Robert Goff L.J. in *A.D.C. (An Infant) v. Chief Constable of Greater Manchester* (unreported), 15 March 1983, when sitting as a Divisional Court with McNeill J. After referring to and approving the words of Lord Lane C.J. in *S.F.J. (An Infant) v. Chief*

Constable of Kent and words in a similar vein by Lord Widgery C.J. in *Williams v. Mohamed* [1977] R.T.R. 12, Robert Goff L.J. said:

“I recognise that in very many cases it would indeed be proper for justices to deal with the issue of admissibility of a confession before the close of the prosecution case. To give a very simple and perhaps extreme example, if the only evidence before justices is the evidence of a confession and nothing else, then as a matter of common justice the justices ought to deal with the issue of the admissibility of that confession as a preliminary point, before the close of the prosecution case, so that the defendant can then decide whether to make a submission of no case to answer.”

This situation is precisely the point in the instant case, but it is submitted that by virtue of section 76(2) it is no longer a matter for the exercise of discretion by the justices. They are now required to hold a trial within a trial. Should they admit the confession in consequence of the preliminary inquiry but later hear further evidence affecting its weight or admissibility, the justices may subsequently allow it to play no part in their findings. This situation may also arise if the defence chooses not to avail itself of the option to require a preliminary inquiry but chooses to attack the confession during the course of the substantive hearing. In either event there is no need for the evidence as to the obtaining of the confession to be given twice although, as earlier indicated, a defendant may have to return to the witness box after the trial within a trial: see *Conway v. Hotten* [1976] 2 All E.R. 213.

Finally, counsel submitted that should the defence not avail itself of the right to a trial within a trial by virtue of section 76(2) there remained an inherent jurisdiction in the court to exclude a confession at a later stage in the proceedings as well as by virtue of section 78 of the Act which specifically refers to “the circumstances in which the evidence was obtained.”

For my part I have come to the conclusion that all the submissions of counsel to which I have referred are valid. I do not think that to give effect to them would result in any insurmountable practical difficulties in the magistrates’ court in the summary disposal of criminal offences and, indeed, in some cases the new procedure could result in a saving of time where exclusion of evidence in the way of a confession is finally ruled upon at the end of the prosecution case.

To summarise the effect of this judgment I would, therefore, rule that:

1. The effect of section 76(2) of the Police and Criminal Evidence Act 1984 is that in summary proceedings justices must now hold a trial within a trial if it is represented to them by the defence that a confession was or may have been obtained by either of the improper processes appearing in sub-paragraphs (a) or (b) section 76(2).

2. In such a trial within a trial the defendant may give evidence confined to the question of admissibility and the justices will not be concerned with the truth or otherwise of the confession.

3. In consequence of paragraphs 1 and 2 above, the defendant is entitled to a ruling upon admissibility of a confession before, or at, the end of the prosecution case.

4. There remains a discretion open to the defendant as to the stage at which an attack is to be made upon an alleged confession. A trial within a trial will only take place before the close of the prosecution

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A case if it is represented to the court that the confession was, or may have been, obtained by one or other of the processes set out in subparagraphs (a) or (b) section 76(2). If no such representation is made the defendant is at liberty to raise admissibility or weight of the confession at any subsequent stage of the trial. For the avoidance of doubt, I consider that "representation" is not the same as, nor does it include, cross-examination. Thus the court is not required to embark upon, nor is the defence bound to proceed upon, a *voire dire* merely because of a suggestion in cross-examination that the alleged confession was obtained improperly.

5. It should never be necessary to call the prosecution evidence relating to the obtaining of a confession twice.

I wish to make it plain that the above rulings are confined to the summary disposal of criminal offences. They should not be taken as applicable in all cases where the justices are concerned with committal proceedings where different considerations may prevail: see *Reg. v. Oxford City Justices, Ex parte Berry* [1987] 1 All E.R. 1244, a decision of the Divisional Court. Nor is this judgment intended to lay down any guidance as to the trial of indictable offences in the Crown Court.

For my part I would grant this application for judicial review and direct that the order of mandamus should go in the form in which relief is sought in the application.

OTTON J. I agree.

Order accordingly.

Defendant's costs from central funds.

Legal aid taxation of defendant's costs.

Solicitors: R. M. Broudie & Co., Liverpool, Crown Prosecution Service, Merseyside.

[Reported by CLIVE SCOWEN ESQ., Barrister-at-Law]

[HOUSE OF LORDS]

HOTSON RESPONDENT
AND
EAST BERKSHIRE AREA HEALTH AUTHORITY APPELLANTS

1987 May 11, 12, 13;
July 2

Lord Bridge of Harwich, Lord Brandon of
Oakbrook, Lord Mackay of Clashfern,
Lord Ackner and Lord Goff of Chieveley

Negligence—Hospital—Failure to diagnose injury—Delay of five days in treatment of injury from fall—Plaintiff suffering permanent disability—25 per cent. chance that plaintiff's disability attributable to hospital's delay in treating injury—Whether plaintiff entitled to damages for loss of chance of good recovery—On balance of probabilities fall causing disability

The plaintiff, then aged 13, fell some 12 feet while climbing a tree and sustained an acute traumatic fracture of the left femoral epiphysis. He was taken to hospital, but his injury was not correctly diagnosed or treated for five days. In the event, he suffered avascular necrosis of the epiphysis, involving disability of the hip joint with the virtual certainty that osteoarthritis would later develop. He brought an action for damages against, inter alia, the defendant health authority, who admitted negligence in failing to diagnose and treat his injury promptly. Simon Brown J. found that even if the health authority had diagnosed the injury correctly and treated the plaintiff promptly there had been a high probability, which he assessed as a 75 per cent. risk, that avascular necrosis would still have developed. He held that the plaintiff was entitled to damages for the loss of the 25 per cent. chance that he would have made a nearly full recovery and awarded him £11,500. The Court of Appeal dismissed an appeal by the health authority.

On appeal by the health authority:—

Held, allowing the appeal, that it was for the plaintiff to establish on a balance of probabilities that the delay in treatment had at least materially contributed to the development of the avascular necrosis and for the judge to resolve on a balance of probabilities the conflict of medical evidence as to what had caused the avascular necrosis; that the judge's findings of fact were unmistakably to the effect that on a balance of probabilities the plaintiff's fall had left insufficient blood vessels intact to keep the epiphysis alive, which amounted to a finding of fact that the fall had been the sole cause of the avascular necrosis; and that, accordingly, the plaintiff had failed on the issue of causation and no question of quantification had arisen (post, pp. 237E–G, 238D–F, 240C–D, 244E–F, 245A–B, 246G–247A, F–G, 248E).

Per Lord Bridge of Harwich. (i) There are formidable difficulties in the way of accepting the superficially attractive analogy between the principle applied in cases of damages for a lost chance in actions based on contract or tort and the principle of awarding damages for the lost chance of avoiding personal injury or, in medical negligence cases, for the lost chance of a better medical result which might have been achieved by prompt diagnosis and correct treatment, but the present appeal is not a suitable occasion for reaching a settled conclusion (post, pp. 237H–238B).

(ii) If the plaintiff had proved on a balance of probabilities that the authority's negligent failure to diagnose and treat his

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injury promptly had materially contributed to the development of avascular necrosis, no principle of English law would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed (post, p. 238B-C).

Per Lord Mackay of Clashfern. It would be unwise in the present case to lay it down as a rule that a plaintiff could never succeed by proving loss of a chance in a medical negligence case (post, p. 240H).

Per Lord Ackner. The debate on the loss of a chance cannot arise where there has been a positive finding that before the duty arose the damage complained of had already been sustained or had become inevitable (post, p. 247C). Once liability is established on the balance of probabilities, the loss which the plaintiff has sustained is payable in full. It is not discounted by reducing his claim by the extent to which he has failed to prove his case with 100 per cent. certainty (post, p. 248A).

Decision of the Court of Appeal [1987] 2 W.L.R. 287; [1987] 1 All E.R. 210 reversed.

The following cases are referred to in their Lordships' opinions:

- Bagley v. North Herts Health Authority* (1986) 136 N.L.J. 1014
Bonnington Castings Ltd. v. Wardlaw [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615, H.L.(E.)
Chaplin v. Hicks [1911] 2 K.B. 786, C.A.
Hamil v. Bashline (1978) 481 Pa. 256; 392 A.2d 1280
Herskovits v. Group Health Cooperative of Puget Sound (1983) 664 P.2d 474
Hicks v. United States (1966) 368 F.2d 626
Kenyon v. Bell, 1953 S.C. 125
Kitchen v. Royal Air Force Association [1958] 1 W.L.R. 563; [1958] 2 All E.R. 241, C.A.
Lavender v. Kurn (1946) 327 U.S. 645
McGhee v. National Coal Board [1973] 1 W.L.R. 1; [1972] 3 All E.R. 1008, H.L.(Sc.)
Mallett v. McMonagle [1970] A.C. 166; [1969] 2 W.L.R. 767; [1969] 2 All E.R. 178, H.L.(N.I.)

The following additional cases were cited in argument:

- Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428; [1968] 2 W.L.R. 422; [1968] 1 All E.R. 1068
Cork v. Kirby Maclean Ltd. [1952] 2 All E.R. 402, C.A.
Cutler v. Vauxhall Motors Ltd. [1971] 1 Q.B. 418; [1970] 2 W.L.R. 961; [1970] 2 All E.R. 56, C.A.
Davies v. Taylor [1974] A.C. 207; [1972] 3 W.L.R. 801; [1972] 3 All E.R. 836, H.L.(E.)
Dunbar v. A. & B. Painters Ltd. [1986] 2 Lloyd's Rep. 38, C.A.
Gauntlett v. Northampton Health Authority (unreported), 12 December 1985; Court of Appeal (Civil Division) Transcript No. 835 of 1985, C.A.
Ketteman v. Hansel Properties Ltd. [1987] 2 W.L.R. 312, H.L.(E.)
London & North Eastern Railway Co. v. B.A. Collieries Ltd. [1945] A.C. 143; [1945] 1 All E.R. 51, H.L.(E.)
McWilliams v. Sir William Arrol & Co. Ltd. [1962] 1 W.L.R. 295; [1962] 1 All E.R. 623, H.L.(Sc.)
Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1979] Ch. 384; [1978] 3 W.L.R. 167; [1978] 3 All E.R. 571
Robinson v. Post Office [1974] 1 W.L.R. 1176; [1974] 2 All E.R. 737, C.A.
Saif Ali v. Sydney Mitchell & Co. [1980] A.C. 198; [1978] 3 W.L.R. 849; [1978] 3 All E.R. 1033, H.L.(E.)

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Sykes v. Midland Bank Executor and Trustee Co. Ltd. [1971] 1 Q.B. 113; [1970] 3 W.L.R. 273; [1970] 2 All E.R. 471, C.A.

A

APPEAL from the Court of Appeal.

This was an appeal by the fourth defendants, the East Berkshire Area Health Authority, by leave of the House of Lords from the judgment of the Court of Appeal (Sir John Donaldson M.R., Dillon and Croom-Johnson L.J.J.) [1987] 2 W.L.R. 287 given on 14 November 1986 dismissing an appeal by the health authority and a cross-appeal by the plaintiff, Stephen John Hotson, from a judgment of Simon Brown J. [1985] 1 W.L.R. 1036 given on 15 March 1985.

B

The Court of Appeal refused the health authority leave to appeal, but on 5 February 1987 the Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Ackner and Lord Goff of Chieveley) [1987] 1 W.L.R. 224 allowed a petition by them for leave.

C

The facts are set out in their Lordships' opinions.

Adrian Whitfield Q.C., Kieran Coonan and Andrew Grubb for the health authority.

Graeme Williams Q.C. and David Ashton for the plaintiff.

D

Their Lordships took time for consideration.

2 July. LORD BRIDGE OF HARWICH. My Lords, the respondent plaintiff is now 23 years of age. On 26 April 1977, as a schoolboy of 13, whilst playing in the school lunch hour he climbed a tree to which a rope was attached, lost his hold on the rope and fell some 12 feet to the ground. He sustained an acute traumatic fracture of the left femoral epiphysis. Within hours he was taken to St. Luke's Hospital, Maidenhead, for which the appellant health authority ("the authority") was responsible. Members of the hospital staff examined him, but failed to diagnose the injury and he was sent home. For five days he was in severe pain. On 1 May 1977 he was taken to the hospital once more and this time X-rays of his hip yielded the correct diagnosis. He was put on immediate traction, treated as an emergency case and transferred to the Heatherwood Hospital where, on the following day, he was operated on by manipulation and reduction of the fracture and pinning of the joint. In the event the plaintiff suffered an avascular necrosis of the epiphysis. The femoral epiphysis is a layer of cartilage separating the bony head from the bony neck of the femur in a growing body. Avascular necrosis results from a failure of the blood supply to the epiphysis and causes deformity in the maturing head of the femur. This in turn involves a greater or lesser degree of disability of the hip joint with a virtual certainty that it will in due course be aggravated by osteoarthritis developing within the joint.

E

F

G

The plaintiff sued the authority, who admitted negligence in failing to diagnose the injury on 26 April 1977. Simon Brown J. [1985] 1 W.L.R. 1036, in a judgment delivered on 15 March 1985, awarded £150 damages for the pain suffered by the plaintiff from 26 April to 1 May 1977 which he would have been spared by prompt diagnosis and treatment. This element of the damages is not in dispute. The authority denied liability for any other element of damages. The judge expressed his findings of fact as follows, at pp. 1040-1041:

H

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A “(1) Even had the health authority correctly diagnosed and treated
the plaintiff on 26 April there is a high probability, which I assess as
a 75 per cent. risk, that the plaintiff’s injury would have followed
the same course as it in fact has, that is, he would have developed
avascular necrosis of the whole femoral head with all the same
adverse consequences as have already ensued and with all the same
adverse future prospects. (2) That 75 per cent. risk was translated
B by the health authority’s admitted breach of duty into an inevitability.
Putting it the other way, their delay in diagnosis denied the plaintiff
the 25 per cent. chance that, given immediate treatment, avascular
necrosis would not have developed. (3) Had avascular necrosis not
developed, the plaintiff would have made a very nearly full recovery.
C (4) The reason why the delay sealed the plaintiff’s fate was because
it allowed the pressure caused by haemarthrosis—the bleeding of
ruptured blood vessels into the joint—to compress and thus block
the intact but distorted remaining vessels with the result that even
had the fall left intact sufficient vessels to keep the epiphysis alive
(which, as finding (1) makes plain, I think possible but improbable)
such vessels would have become occluded and ineffective for this
D purpose.”

On the basis of these findings he held, as a matter of law, that the
plaintiff was entitled to damages for the loss of the 25 per cent. chance
that, if the injury had been promptly diagnosed and treated, it would
not have resulted in avascular necrosis of the epiphysis and the plaintiff
would have made a very nearly full recovery. He proceeded to assess
E the damages attributable to the consequences of the avascular necrosis
at £46,000. Discounting this by 75 per cent., he awarded the plaintiff
£11,500 for the lost chance of recovery. The authority’s appeal against
this element in the award of damages was dismissed by the Court of
Appeal (Sir John Donaldson M.R., Dillon and Croom-Johnson L.JJ.)
[1987] 2 W.L.R. 287 on 14 November 1986. The authority now appeal
F by leave of your Lordships’ House.

I would observe at the outset that the damages referable to the
plaintiff’s pain during the five days by which treatment was delayed in
consequence of failure to diagnose the injury correctly, although
sufficient to establish the authority’s liability for the tort of negligence,
have no relevance to their liability in respect of the avascular necrosis.
G There was no causal connection between the plaintiff’s physical pain and
the development of the necrosis. If the injury had been painless, the
plaintiff would have to establish the necessary causal link between the
necrosis and the authority’s breach of duty in order to succeed. It makes
no difference that the five days’ pain gave him a cause of action in
respect of an unrelated element of damage.

H Before examining the judge’s findings more closely, it is necessary to
say something of the conflict of expert medical evidence which the judge
had to resolve. The evidence is highly technical and not altogether easy
to follow. But at least this much is clear, that the failure of the blood
supply to the epiphysis which caused the avascular necrosis could itself
only have been caused in one of two ways: either the injury sustained in
the fall caused the rupture of such a high proportion of the vessels
supplying the epiphysis with blood that necrosis was bound to develop,
or the blood vessels remaining intact were sufficient to keep the epiphysis

alive but were subsequently occluded by pressure within the joint caused by haematoma (bruising) or haematosi (bleeding into the joint).

The plaintiff's expert witness was extremely tentative in his view as to the part which the delay in treatment may have played in causing avascular necrosis. In his evidence-in-chief he described the risk of the plaintiff suffering avascular necrosis even if promptly treated as "very considerable" and "very high." He said:

"Statistically, on reports published, he had a marginally better chance of escaping it than having avascular necrosis had it been treated expeditiously."

He was asked:

"Was there a chance, if the condition had been diagnosed and treated promptly, that no avascular necrosis would have occurred at all in any part?"

He replied: "There was a small chance, yes." But he also said that the delay in treatment had made the development of total avascular necrosis of the epiphysis inevitable. His first three answers to questions put to him in cross-examination were as follows:

"Q. As I understand it, Mr. Bucknill, you accept that even if there had been no delay, it is likely that there would have been avascular necrosis of the whole head? A. Yes, indeed. Q. And so the probabilities are that the delay in this case made no difference to the eventual outcome of this head? A. As I said, I think it made it inevitable that avascular necrosis occurred rather than likely. Q. In other words, what was always a probability became inevitable? A. Yes."

Later he modified these answers. He said that, given prompt treatment, he thought avascular necrosis was "likely but not probable." He explained that by "likely" he meant about a 40 per cent. chance, by "probable" he meant something over 60 per cent. He also explained his view that delay would have made a total avascular necrosis inevitable by the occlusion of intact blood vessels resulting from haematoma.

By contrast the authority's expert witness was emphatic, even dogmatic, in his evidence. His opinion was that the initial traumatic rupture of the blood vessels caused by the fall must have been so extensive that avascular necrosis was bound to result. He rejected the theory that the failure of the blood supply could be attributed to a haematoma, a condition which, in his opinion, would not occur in this injury. In this connection he distinguished between a haematoma and a haematosi, a condition which could occur in this injury but which would not, in his opinion, occlude intact blood vessels.

The judge indicated his assessment of these two witnesses as follows:

"I regret that I found certain parts of the evidence of both experts, highly qualified and experienced although they both undoubtedly are, difficult to accept, either as a result of internal inconsistency within their evidence or because of what seemed to be an intrinsic want of logic in some particular expressed view. I recognise that the explanation for this may well lie in the deficiencies of my own medical understanding, but the forensic process requires only that I do my best. In the result I find myself unattracted to, and finally unable to accept, either of the competing extreme views."

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of Harwich

A In analysing the issue of law arising from his findings the judge said [1985] 1 W.L.R. 1036, 1043–1044:

B “In the end the problem comes down to one of classification. Is this on true analysis a case where the plaintiff is concerned to establish causative negligence or is it rather a case where the real question is the proper quantum of damage? Clearly the case hovers near the border. Its proper solution in my judgment depends upon categorising it correctly between the two. If the issue is one of causation then the health authority succeed since the plaintiff will have failed to prove his claim on the balance of probabilities. He will be lacking an essential ingredient of his cause of action. If, however, the issue is one of quantification then the plaintiff succeeds because it is trite law that the quantum of a recognised head of damage must be evaluated according to the chances of the loss occurring.”

C He reached the conclusion that the question was one of quantification and thus arrived at his award to the plaintiff of one quarter of the damages appropriate to compensate him for the consequences of the avascular necrosis.

D It is here, with respect, that I part company with the judge. The plaintiff's claim was for damages for physical injury and consequential loss alleged to have been caused by the authority's breach of their duty of care. In some cases, perhaps particularly medical negligence cases, causation may be so shrouded in mystery that the court can only measure statistical chances. But that was not so here. On the evidence there was a clear conflict as to what had caused the avascular necrosis.

E The authority's evidence was that the sole cause was the original traumatic injury to the hip. The plaintiff's evidence, at its highest, was that the delay in treatment was a material contributory cause. This was a conflict, like any other about some relevant past event, which the judge could not avoid resolving on a balance of probabilities. Unless the plaintiff proved on a balance of probabilities that the delayed treatment was at least a material contributory cause of the avascular necrosis he failed on the issue of causation and no question of quantification could arise. But the judge's findings of fact, as stated in the numbered paragraphs (1) and (4) which I have set out earlier in this opinion, are unmistakably to the effect that on a balance of probabilities the injury caused by the plaintiff's fall left insufficient blood vessels intact to keep the epiphysis alive. This amounts to a finding of fact that the fall was the sole cause of the avascular necrosis.

G The upshot is that the appeal must be allowed on the narrow ground that the plaintiff failed to establish a cause of action in respect of the avascular necrosis and its consequences. Your Lordships were invited to approach the appeal more broadly and to decide whether, in a claim for damages for personal injury, it can ever be appropriate, where the cause of the injury is unascertainable and all the plaintiff can show is a statistical chance which is less than even that, but for the defendant's breach of duty, he would not have suffered the injury, to award him a proportionate fraction of the full damages appropriate to compensate for the injury as the measure of damages for the lost chance.

H There is a superficially attractive analogy between the principle applied in such cases as *Chaplin v. Hicks* [1911] 2 K.B. 786 (award of damages for breach of contract assessed by reference to the lost chance of securing valuable employment if the contract had been performed)

and *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 (damages for solicitors' negligence assessed by reference to the lost chance of prosecuting a successful civil action) and the principle of awarding damages for the lost chance of avoiding personal injury or, in medical negligence cases, for the lost chance of a better medical result which might have been achieved by prompt diagnosis and correct treatment. I think there are formidable difficulties in the way of accepting the analogy. But I do not see this appeal as a suitable occasion for reaching a settled conclusion as to whether the analogy can ever be applied. A B

As I have said, there was in this case an inescapable issue of causation first to be resolved. But if the plaintiff had proved on a balance of probabilities that the authority's negligent failure to diagnose and treat his injury promptly had materially contributed to the development of avascular necrosis, I know of no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed. The decisions of this House in *Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613 and *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 give no support to such a view. C D

I would allow the appeal to the extent of reducing the damages awarded to the plaintiff by £11,500 and the amount of any interest on that sum which is included in the award.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Ackner. I agree with all three speeches, and for the reasons contained in them I would allow the appeal. E

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Bridge of Harwich and Lord Ackner. I agree with them that this appeal should be allowed for the reasons which they have given. F

In their printed case the authority first took the position that they were entitled to succeed in this appeal because the plaintiff had not proved that any loss or damage (other than five days' pain and suffering) had been caused by the authority's breach of duty. They also submitted that damages for loss of a chance were not recoverable in tort and at the close of the hearing Mr. Whitfield, for the authority, invited your Lordships to decide this case not only on the ground of fact which he submitted was available but also on the more general ground that damages for loss of a chance could not be awarded. This latter submission has been discussed in the course of the hearing very fully and I wish to add some observations, particularly on that aspect of the case. G H

When Mr. Williams, who appeared for the plaintiff, was invited to say what he meant by a chance he said that in relation to the facts of this case as found by the judge what was meant by a chance was that if 100 people had suffered the same injury as the plaintiff 75 of them would have developed avascular necrosis of the whole femoral head and 25 would not. This, he said, was an asset possessed by the plaintiff when he arrived at the authority's hospital on 26 April 1977. It was this asset

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A which Mr. Williams submits the plaintiff lost in consequence of the negligent failure of the authority to diagnose his injury properly until 1 May 1977.

B The case closest on its facts to the present from the United Kingdom, cited at the hearing before your Lordships, is *Kenyon v. Bell*, 1953 S.C. 125. In that case the lower lid of a child's eye was cut as a result of an accident and subsequently the eye had to be removed by operation. An
C action for damages was raised against the medical practitioner who had first treated the injury, alleging that he had failed to exercise reasonable care and ordinary professional skill in carrying out his examination and treatment of the injury and that as a result the child had not been given certain treatment which "would have made the saving of the eye a
D certainty or alternatively . . . would have materially increased the chance of saving the eye." The medical practitioner contended that since all that was being offered to be proved was the weaker of the two alternative statements the case should not be allowed to proceed to proof since the weaker alternative alleging that the treatment would materially have increased the chance of saving the eye did not justify a claim for damages. Lord Guthrie held that the loss of a chance of saving the eye was not of itself a matter which would entitle the claim to
E succeed but founding particularly on the use of the word "material" in the pleadings to qualify the chance of saving the eye by proper treatment Lord Guthrie held that on the evidence the chance of saving the eye by proper treatment might be proved to be so material that the natural and reasonable inference to draw from the evidence would be that the loss of the eye was due to the absence of such treatment. In that event, the claim would succeed. Accordingly he allowed it to go to proof. This illustrates that where what is at issue is a patient's condition on being
F presented to a medical practitioner the question whether the condition was such that proper treatment could effect a particular result is to be determined on the balance of probabilities and that one way of describing that balance is to say that there was at that time a sufficient chance that the particular result could be attained to justify holding that the loss of that result was caused by the absence of proper treatment. On the other hand, Lord Guthrie makes it clear that, in his opinion, while the fault could be charged against the doctor as being failure to give the child the opportunity of having an eye preserved by proper treatment, unless the eye would have been saved by such treatment no loss would have been established and no claim for damages justified in respect thereof.

G After the proof, Lord Strachan in a decision, which is unreported, of 9 April 1954 held that the defender had established that the boy's eye was irreparably injured on 15 March 1951 and that no treatment could have made any difference because the initial injury involved a perforating wound of the sclera with consequent haemorrhaging into the interior of the eye.

H In my opinion, it is perfectly correct to apply the same approach in the present case: what was the plaintiff's condition on being first presented at the hospital? Did he have intact sufficient blood vessels to keep the affected epiphysis alive? The judge had evidence from the authority's expert which amounted to an assertion that the probability was 100 per cent. that the fall had not left intact sufficient vessels to keep the epiphysis alive while he had evidence from Mr. Bucknill, for the plaintiff, which although not entirely consistently suggested that the probability was perhaps between 40 and 60 per cent., say 50 per cent.,

that sufficient vessels were left intact to keep the epiphysis alive. The concluding sentence in the judge's fourth finding in fact makes it plain, in my opinion, that he took the view, weighing that testimony along with all the other matters before him, that it was more probable than not that insufficient vessels had been left intact by the fall to maintain an adequate blood supply to the epiphysis and he expressed this balance by saying that it was 75 per cent. to 25 per cent., a result reached perhaps as Mr. Williams suggested by going for a figure midway between the competing estimates given by the parties' experts in evidence. Although various statistics were given in evidence, I do not read any of them as dealing with the particular probability which the judge assessed at 75 per cent. to 25 per cent. In the circumstances of this case the probable effect of delay in treatment was determined by the state of facts existing when the plaintiff was first presented to the hospital. It is not, in my opinion, correct to say that on arrival at the hospital he had a 25 per cent. chance of recovery. If insufficient blood vessels were left intact by the fall he had no prospect of avoiding complete avascular necrosis whereas if sufficient blood vessels were left intact on the judge's findings no further damage to the blood supply would have resulted if he had been given immediate treatment, and he would not have suffered the avascular necrosis.

As I have said, the fundamental question of fact to be answered in this case related to a point in time before the negligent failure to treat began. It must, therefore, be a matter of past fact. It did not raise any question of what might have been the situation in a hypothetical state of facts. To this problem the words of Lord Diplock in *Mallett v. McMonagle* [1970] A.C. 166, 176 apply:

"In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain."

In this respect this case is the same, in principle, as any other in which the state of facts existing before alleged negligence came into play has to be determined. For example, if a claimant alleges that he sustained a certain fracture in a fall at work and there is evidence that he had indeed fallen at work, but that shortly before he had fallen at home and sustained the fracture, the court would have to determine where the truth lay. If the claimant denied the previous fall, there would be evidence, both for and against the allegation, that he had so fallen. The issue would be resolved on the balance of probabilities. If the court held on that balance that the fracture was sustained at home, there could be no question of saying that since all that had been established was that it was more probable than not that the injury was not work-related, there was a possibility that it was work-related and that this possibility or chance was a proper subject of compensation.

I should add in this context that where on disputed evidence a judge reaches a conclusion on the balance of probabilities it will not usually be easy to assess a specific measure of probability for the conclusion at which he has arrived. As my noble and learned friend Lord Bridge of Harwich observed in the course of the hearing, a judge deciding disputed questions of fact will not ordinarily do it by use of a calculator.

On the other hand, I consider that it would be unwise in the present case to lay it down as a rule that a plaintiff could never succeed by proving loss of a chance in a medical negligence case. In *McGhee v.*

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A *National Coal Board* [1973] 1 W.L.R. 1 this House held that where it was proved that the failure to provide washing facilities for the pursuer at the end of his shift had materially increased the risk that he would contract dermatitis it was proper to hold that the failure to provide such facilities was a cause to a material extent of his contracting dermatitis and thus entitled him to damages from his employers for their negligent failure measured by his loss resulting from dermatitis. Material increase

B of the risk of contraction of dermatitis is equivalent to material decrease in the chance of escaping dermatitis. Although no precise figures could be given in that case for the purpose of illustration and comparison with this case one might, for example, say that it was established that of 100 people working under the same conditions as the pursuer and without facilities for washing at the end of their shift 70 contracted dermatitis: of

C 100 people working in the same conditions as the pursuer when washing facilities were provided for them at the end of the shift 30 contracted dermatitis. Assuming nothing more were known about the matter than that, the decision of this House may be taken as holding that in the circumstances of that case it was reasonable to infer that there was a relationship between contraction of dermatitis in these conditions and the absence of washing facilities and therefore it was reasonable to hold

D that absence of washing facilities was likely to have made a material contribution to the causation of the dermatitis. Although neither party in the present appeal placed particular reliance on the decision in *McGhee* since it was recognised that *McGhee* is far removed on its facts from the circumstances of the present appeal your Lordships were also informed that cases are likely soon to come before the House in which

E the decision in *McGhee* will be subjected to close analysis. Obviously in approaching the matter on the basis adopted in *McGhee* much will depend on what is known of the reasons for the differences in the figures which I have used to illustrate the position. In these circumstances I think it unwise to do more than say that unless and until this House departs from the decision in *McGhee* your Lordships cannot affirm the proposition that in no circumstances can evidence of loss of a chance

F resulting from the breach of a duty of care found a successful claim of damages, although there was no suggestion that the House regarded such a chance as an asset in any sense.

By agreement of the parties we were supplied with a list of American authorities relevant to the questions arising in this appeal, although they were not examined in detail. Of the cases referred to, the one that I

G have found most interesting and instructive is *Herskovits v. Group Health Cooperative of Puget Sound* (1983) 664 P.2d 474, a decision of the Supreme Court of Washington en banc. In this case the claim arose in respect of Mr. Herskovits' death. He was seen at Group Health Hospital at a time when he was suffering from a tumour but this was not diagnosed on first examination. The medical evidence available suggested that at that stage, assuming the tumour was a stage 1 tumour, the

H chance of survival for more than five years was 39 per cent. When he was treated later the tumour was a stage 2 tumour and the chance of surviving more than five years was 25 per cent. The defendant moved for summary judgment on the basis that, taking the most favourable view of the evidence that was possible, the case could not succeed. The Superior Court of King County granted the motion. This decision was reversed by a majority on appeal to the Supreme Court. The first judgment for the majority in the Supreme Court was delivered by Dore

J. Early in his judgment he read from section 323 of the American Restatement, Second, Torts, vol. 2 (1965), which is in these terms:

“One who undertakes, gratuitously or for consideration, to render services to another which he should recognise as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm . . .”

After noting that the Supreme Court of Washington had not faced the issue of whether, under this paragraph, proof that the defendant’s conduct had increased the risk of death by decreasing the chances of survival was sufficient to take the issue of proximate cause to the jury he said, at p. 476:

“Some courts in other jurisdictions have allowed the proximate cause issue to go to the jury on this type of proof. . . These courts emphasised the fact that defendants’ conduct deprived the decedents of a ‘significant’ chance to survive or recover, rather than requiring proof that with absolute certainty the defendants’ conduct caused the physical injury. The underlying reason is that it is not for the wrongdoer, who put the possibility of recovery beyond realisation, to say afterward that the result was inevitable Other jurisdictions have rejected this approach, generally holding that unless the plaintiff is able to show that it was *more likely than not* that the harm was caused by the defendant’s negligence, proof of a decreased chance of survival is not enough to take the proximate cause question to the jury. . . . These courts have concluded that the defendant should not be liable where the decedent more than likely would have died anyway.”

To the question whether the plaintiff should be allowed, in the case before him, to proceed to a jury he returned an affirmative answer; and gave as the reason, at p. 477:

“To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 per cent. chance of survival, regardless of how flagrant the negligence.”

In support of this reasoning he referred to *Hamil v. Bashline* (1978) 481 Pa. 256; 392 A.2d 1280, a decision of the Pennsylvania Supreme Court, and said:

“The *Hamil* court distinguished the facts of that case from the general tort case in which a plaintiff alleges that a defendant’s act or omission set in motion a force which resulted in harm. In the typical tort case, the ‘but for’ test, requiring proof that damages or death probably would not have occurred ‘but for’ the negligent conduct of the defendant, is appropriate. In *Hamil* and the instant case, however, the defendant’s act or omission failed in a *duty* to protect against harm from *another source*. Thus, as the *Hamil* court noted, the fact finder is put in the position of having to consider not only what *did* occur, but also what *might* have occurred.”

He goes on to quote from *Hamil*, 481 Pa. 256, 271; 392 A.2d 1280, 1287–1288:

“‘Such cases by their very nature elude the degree of certainty one would prefer and upon which the law normally insists before a

A person may be held liable. Nevertheless, in order that an actor is not completely insulated because of uncertainties as to the consequence of his negligent conduct, section 323(a) [of the *Restatement, Second, Torts*] tacitly acknowledges this difficulty and permits the issue to go to the jury upon a less than normal threshold of proof.”

B He goes on, at pp. 477–478, to refer to another decision, namely *Hicks v. United States* (1966) 368 F.2d 626, as containing a succinct statement of the relevant doctrine, at p. 632, and quotes:

C “‘Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a *certainty* that the patient would have lived had she been hospitalised and operated on promptly.’”

He refers also to a general observation in the Supreme Court of the United States dealing with a contention similar to that argued before him by the doctors and the hospital. In *Lavender v. Kurn* (1946) 327 U.S. 645, 653 the Supreme Court said:

D “It is no answer to say that the jury’s verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.”

E He therefore concluded, at p. 479, that the evidence available which showed at maximum a reduction in the 39 per cent. chance of five years’ survival to a 25 per cent. chance of five years’ survival was sufficient to allow the case to go to the jury on the basis that the jury would be entitled to infer from that evidence that the delay in treatment was a proximate cause of the decedent’s death. He pointed out, however, that

F causing reduction of the opportunity to recover (also described as a loss of chance) by one’s negligence did not necessitate a total recovery against the negligent party for all damages caused by the victim’s death. He held that damages should be awarded to the injured party and his family based only on damages caused directly by premature death, such as lost earnings and additional medical expenses and the like.

G The approach of Dore J. bears some resemblance to the approach taken by some members of this House in *McGhee v. National Coal Board* [1973] 1 W.L.R. 1, and by Lord Guthrie in *Kenyon v. Bell*, 1953 S.C. 125. Brachtenbach J. dissented. He warned against the danger of using statistics as a basis on which to prove proximate cause and indicated that it was necessary at the minimum to produce evidence connecting the statistics to the facts of the case. He gave an interesting

H illustration of a town in which there were only two cab companies, one with three blue cabs and the other with one yellow cab. If a person was knocked down by a cab whose colour had not been observed it would be wrong to suggest that there was a 75 per cent. chance that the victim was run down by a blue cab and that accordingly it was more probable than not that the cab that ran him down was blue and therefore that the company running the blue cabs would be responsible for negligence in the running down. He pointed out that before any inference that it was

a blue cab would be appropriate further facts would be required as, for example, that a blue cab had been seen in the immediate vicinity at the time of the accident or that a blue cab had been found with a large dent in the very part of the cab which had struck the victim. He concluded that the evidence available was not sufficient to justify the case going to the jury and noted, at p. 491:

"The apparent harshness of this conclusion cannot be overlooked. The combination of the loss of a loved one to cancer and a doctor's negligence in diagnosis seems to compel a finding of liability. Nonetheless, justice must be dealt with an even hand. To hold a defendant liable without proof that his actions *caused* plaintiff harm would open up untold abuses of the litigation system."

Pearson J. agreed that the appeal should be allowed but did not agree with the reasoning by which that result was supported by Dore J. Pearson J., after examining the authorities and an academic article, stated that he was persuaded that a middle course between the reasoning of Dore J. and Brachtenbach J. was correct and concluded, at p. 487: "that the best resolution of the issue before us is to recognise the loss of a less than even chance as an actionable injury." He recognised that this also required that the damage payable be determined by the application of that chance expressed as a percentage to the damages that would be payable on establishing full liability.

I have selected references to the view expressed by the judges who took part in this decision to illustrate the variety of views open in this difficult area of the law. These confirm me in the view that it would not be right in the present case to affirm the general proposition for which Mr. Whitfield contended. On the other hand, none of the views canvassed in *Herskovits'* case, 644 P.2d 474 would lead to the plaintiff succeeding in the present case since the judge's findings in fact mean that the sole cause of the plaintiff's avascular necrosis was the injury he sustained in the original fall, and that implies, as I have said, that when he arrived at the authority's hospital for the first time he had no chance of avoiding it. Accordingly, the subsequent negligence of the authority did not cause him the loss of such a chance.

I have the impression from reading the judgments of the Court of Appeal that this aspect of the facts in the present case may not have been in the forefront of the discussion there. Much of the judgment of the Court of Appeal will remain for consideration in the future.

LORD ACKNER. My Lords, this appeal, as Mr. Graeme Williams for the respondent (the plaintiff in the action) submitted, raises a short point of classification. Adopting, although somewhat adapting, the words of Dillon L.J. [1978] 2 W.L.R. 287, 298, in his short judgment the fundamental question is "What does the law regard as the damage which the plaintiff has suffered? Was it the onset of avascular necrosis or was it the loss of the chance of avoiding that condition?"

The claim, as pleaded, is a simple one for damages for personal injuries suffered as a result of negligent treatment. Paragraph 9 of the amended statement of claim alleges:

"The plaintiff now suffers from a permanent deformity of the left hip and a loss of movement therein and wasting of the left leg with a resultant limp, none of which injuries the plaintiff would have

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A suffered save for the aforesaid negligence of the defendants which is hereinafter set out."

To establish his cause of action, the plaintiff had to prove that the defendants (the appellants) were under the duty alleged, that they broke that duty and that as a result of that breach of duty he suffered the injuries alleged. It is, of course, axiomatic that the facts upon which liability is based must be proved on the balance of probabilities.

It is common ground that the defendants, in breach of their duty, failed to treat the plaintiff for five days and that as a consequence of that breach of duty he suffered pain during that period for which he was properly compensated by the award made by the trial judge of £150. The permanent deformity of the hip and other injuries described in the statement of claim were in an entirely separate and unrelated category and were due to the avascular necrosis of the left femoral epiphysis.

The judge explained most helpfully the mechanism by which the avascular necrosis with the resultant distortion and collapse of the epiphysis can occur [1985] 1 W.L.R. 1036, 1038-1039:

"The femoral epiphysis (the epiphysis as I shall refer to it henceforth) is the spongy extremity of the upper femur, its surface being covered with cartilage, which slots into the cavity of the acetabulum to form the hip joint. In a child the epiphysis is connected to the neck of the femur by an epiphysial plate (sometimes called a growth plate) which is essentially a sandwich filling of cartilage between, on the upper side, the epiphysis and on the lower side the bony femoral neck. The plate exists only in a growing skeleton and indeed it enables the bone to grow; in maturity it forms bone across the gap. The major threat created by an injury such as the plaintiff's is that it will so interfere with the blood supply to the epiphysis that avascular necrosis will develop. This is a condition whereby through lack of sufficient blood the epiphysis becomes de-mineralised, weakened and softened and thus denser, distorted and deformed. When that occurs, not only does it cause misshapeness of the joint with associated pain, restriction in mobility and general disability, but it also carries with it the virtual certainty that osteoarthritis will develop within the joint."

At the trial it was contended on the plaintiff's behalf, thereby departing from paragraph 9 of the amended statement of claim, to which I have already made reference, that the defendants' failure to diagnose and treat the injury immediately when he first attended hospital rather than when he returned five days later substantially increased the risk that avascular necrosis would develop and thus give rise to the long-term disability which resulted. The defendants contended, relying upon the expert evidence of their surgeon Mr. Bonney, that the initial injury when the plaintiff fell and thereby sustained the fracture separation of the left femoral epiphysis, was so severe that the avascular necrosis of the epiphysis was, thereafter and in any event, inevitable. It was thus argued that the delay would not have increased the risk of avascular necrosis.

The vital issue of fact which the judge had to determine was whether or not the fall left intact sufficient blood vessels to keep the epiphysis alive. If it did not, then the subsequent failure to diagnose and treat the injuries for a period of five days could not be responsible for the

avascular necrosis. The judge, again most helpfully, gave a simple and short explanation of the system of blood supply to the epiphysis and the likely effect upon that supply of the injury sustained by the plaintiff when he fell. He said, at p. 1041:

“There are in a child three sets of blood vessels to the epiphysis: those running along the back of the femoral neck, those running along the front, and those which run through the round ligament. It was common ground between the experts (a) that the blood supply along the front of the femoral neck (some 20 per cent. of the total supply) would have been ruptured by the fall when the femoral shaft rotated; and (b) that the supply through the round ligament (something less than 30 per cent. of the total) would not have been ruptured.”

Thus the essential question to determine was—what was the effect of the fall upon the remaining 50 per cent. of the blood supply which was to be found in the blood vessels running along the back of the femoral neck? Mr. Bonney took the view that these blood vessels *must have been* ruptured by the fall. The plaintiff’s surgeon, Mr. Bucknill, disagreed, contending that the effect of the fall was to rotate the femur externally so as to lessen the tension upon the rear vessels. He could see no good reason to conclude that these would have been severed.

The judge was unable to accept either of the competing extreme views. His conclusions were, at pp. 1040–1041:

“(1) Even had the health authority correctly diagnosed and treated the plaintiff on 26 April there is a high probability, which I assess as a 75 per cent. risk, that the plaintiff’s injury would have followed the same course as it in fact has, that is, he would have developed avascular necrosis of the whole femoral head with all the same adverse consequences as have already ensued and with all the same adverse future prospects. . . . (4) The reason why the delay sealed the plaintiff’s fate was because it allowed the pressure caused by haemarthrosis—the bleeding of ruptured blood vessels into the joint—to compress and thus block the intact but distorted remaining vessels with the result that even had the fall left intact sufficient vessels to keep the epiphysis alive (*which, as finding (1) makes plain, I think possible but improbable*) such vessels would have become occluded and ineffective for this purpose.” (Emphasis added.)

The judge was thus making clear that he accepted Mr. Bonney’s opinion to this extent, viz. that the blood vessels running along the back of the femoral neck containing approximately one-half of the total blood supply must have been, *on the balance of probabilities*, ruptured by the fall.

He thus found that immediately after the fall, that is before admission to hospital and therefore *before* the duty was imposed upon the defendants properly to diagnose and treat, the epiphysis was doomed. Accordingly the judge had determined as a matter of fact, on the balance of probabilities, that the compression and blocking of the blood vessels had had no effect on the plaintiff’s ultimate condition. In determining what happened in the past the court decides on the balance of probabilities. Anything that is more probable than not is treated as certainty: *Mallet v. McMonagle* [1970] A.C. 166, 176, *per* Lord Diplock.

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A In the result the judge had by his clear findings decided that the negligence of the defendants in failing to diagnose and treat for a period of five days had not caused the deformed left hip. The judge, in agreement with the submission made to your Lordships by counsel for the defendants, said in terms that in the end the problem came down to one of classification [1985] 1 W.L.R. 1036, 1043–1044:

B “Is this on true analysis a case where the plaintiff is concerned to establish causative negligence or is it rather a case where the real question is the proper quantum of damage?”

The judge thought, at p. 1044, that the case “hovers near the border.” To my mind, the first issue which the judge had to determine was an issue of causation—did the breach of duty cause the damage alleged. If it did not, as the judge so held, then no question of quantifying damage arises. The debate on the loss of a chance cannot arise where there has been a positive finding that before the duty arose the damage complained of had already been sustained or had become inevitable.

C *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 has no relevance to this appeal. In that case there was an undoubted breach of contract which caused the plaintiff to suffer more than nominal damages. By reason of the solicitor’s negligence, she had lost a worthwhile action. What the court there had to do was to value that action. It is, of course, obvious that it is not only actions that are bound to succeed that have a value. Every action with a prospect of success has a value and it is a familiar task for the court to assess that value where negligence has prevented such an action being brought. Again, *Chaplin v. Hicks* [1911] 2 K.B. 786, strongly relied upon by the plaintiff, provides no assistance. In that case a young lady actress-to-be had made a contract with the defendant under which she had an opportunity of appearing in a competition in which, if successful, she would have obtained a remunerative engagement as an actress. In the words of Fletcher Moulton L.J., at p. 797:

F “The contract gave the plaintiff a right of considerable value, one for which many people would give money; therefore to hold that the plaintiff was entitled to no damages for being deprived of such a right because the final result depended on a contingency or chance would have been a misdirection.”

G In a sentence, the plaintiff was not entitled to any damages in respect of the deformed hip because the judge had decided that this was not caused by the admitted breach by the defendants of their duty of care but was caused by the separation of the left femoral epiphysis when he fell some 12 feet from a rope on which he had been swinging.

H On this simple basis I would allow this appeal. I have sought to stress that this case was a relatively simple case concerned with the proof of causation, upon which the plaintiff failed, because he was unable to prove, on the balance of probabilities, that his deformed hip was caused by the defendants’ breach of duty in delaying over a period of five days a proper diagnosis and treatment. Where *causation* is in issue, the judge decides that issue on the balance of the probabilities. Unless there is some special situation, e.g. joint defendants where the apportionment of liability between them is required, there is no point or purpose in expressing in percentage terms the certainty or near certainty which the plaintiff has achieved in establishing his cause of action.

Once liability is established, on the balance of probabilities, the loss which the plaintiff has sustained is payable in full. It is not discounted by reducing his claim by the extent to which he has failed to prove his case with 100 per cent. certainty. The decision by Simon Brown J. in the subsequent case of *Bagley v. North Herts Health Authority*, reported only in (1986) 136 N.L.J. 1014, in which he discounted an award for a stillbirth, because there was a five per cent. risk that the plaintiff would have had a stillborn child even if the hospital had not been negligent, was clearly wrong. In that case, the plaintiff had established on a balance of probabilities, indeed with near certainty, that the hospital's negligence had caused the stillbirth. Causation was thus fully established. Such a finding does not permit any discounting—to do so would be to propound a wholly new doctrine which has no support in principle or authority and would give rise to many complications in the search for mathematical or statistical exactitude.

Of course, where the cause of action has been established, the assessment of that part of the plaintiff's loss where the future is uncertain involves the evaluation of that uncertainty. In *Bagley*, if the child had, by reason of the hospital's breach of duty, been born with brain injury, which could lead in later life to epilepsy, then it would have been a classic case for the evaluation, *inter alia*, of the chance of epilepsy occurring and discounting, to the extent that the chance of that happening fell below 100 per cent., what would have been the sum of damages appropriate if epilepsy was a certain consequence.

I would accordingly allow the appeal by reducing the damages awarded to the plaintiff by £11,500, being the amount awarded by the trial judge for the "lost chance of recovery," together with the amount of any interest on that sum which is included in the award.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Ackner. For the reasons they give, I too would allow the appeal.

Appeal allowed.

*Order of Court of Appeal set aside
save as to costs.*

*Order of Simon Brown J. of 15
March 1985 varied to extent that
sum awarded to plaintiff reduced
by £11,500 and amount of any
interest on that sum included in
award.*

*Further consideration of report of
Appellate Committee adjourned sine
die.*

*Solicitors: Hempons; Stephens & Scown, St. Austell for Lloyd
Howorth & Partners, Maidenhead.*

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A

[COURT OF APPEAL]

FITZGERALD v. LANE AND ANOTHER

1986 Dec. 1, 2, 3, 4, 5; Slade and Nourse L.JJ. and Sir Edward Eveleigh

1987 Feb. 23;

B

March 6

Negligence—Foreseeability of risk—Causation—Plaintiff crossing road when traffic lights in traffic's favour—Collision with first defendant's and second defendant's cars—Plaintiff rendered tetraplegic—Evidence inconclusive as to cause of tetraplegia—Both collisions capable of causing tetraplegia—Plaintiff's failure to prove that collision with second defendant's car caused or materially contributed to tetraplegia—Whether second defendant liable

C

Damages—Personal injuries—Apportionment—Plaintiff injured by two independent tortfeasors—Plaintiff equally to blame for injuries—Calculation of apportionment—Law Reform (Contributory Negligence) Act 1945 (8 & 9 Geo. 6, c. 28), s. 1(1)

D

The plaintiff was crossing a pelican crossing showing green in the traffic's favour when he was struck by a car driven by the first defendant. He was thrown up on the bonnet and into contact with the windscreen which shattered and propelled onto the road where he was struck by another car driven by the second defendant. The plaintiff sustained multiple injuries and in particular a fracture dislocation of the cervical spine which resulted in tetraplegia. The plaintiff brought an action in negligence against both defendants. At the trial expert medical evidence established four possible causes of the tetraplegia, namely, the initial impact with the first defendant's car, impact with the windscreen, impact with the ground and impact with the second defendant's car. The judge concluded that although it was probable that the first impact did not cause the spinal injury there was an equal probability that each of the three subsequent impacts could have been the cause, and that, therefore, each of the defendants must bear the responsibility for the plaintiff's tetraplegia. The judge held that all three parties had been negligent and that since it was impossible to say that one of the parties was more or less to blame than the other the responsibility should be borne equally by all three. On that basis he ordered judgment to be entered against both defendants for two thirds of the plaintiff's damages which he assessed at a total of £596,553.67. The judge included in the damages awarded the sums of £20,580 and £24,500 being respectively the costs of alterations to the plaintiff's parents house and the costs of alterations to the house which the plaintiff intended to purchase. The defendants had contended that the plaintiff was not entitled to both sums.

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On appeal by both defendants:—

Held, (1) dismissing the appeal on causation, that although the plaintiff had failed to prove affirmatively on a balance of probabilities that the second defendant had caused or materially contributed to his tetraplegia, nevertheless, since it had been proved that the second defendant owed a duty of care to the plaintiff and that his negligent driving had created a risk of injury capable of causing tetraplegia the second defendant was equally liable with the first defendant for the plaintiff's injury (post, pp. 260A–D, 262E–H, 272A–H).

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McGhee v. National Coal Board [1973] 1 W.L.R. 1, H.L.(Sc.) and *Wilsher v. Essex Area Health Authority* [1987] 2 W.L.R. 425, C.A. applied.

(2) Dismissing the appeal on quantum, that since the defendants had denied liability the plaintiff was not in a position to decide firmly whether or not he would purchase a house; that it would be unreasonable to expect the plaintiff to live in discomfort in his parents' house pending the decision at the trial, and that, in the circumstances, the plaintiff was entitled to the costs of alterations to both houses (post, pp. 260E-H, 262H, 274B-E).

(3) Allowing the appeal on apportionment, that since the evidence indicated that each of the three parties was equally to blame for the plaintiff's injuries judgment should be entered for the plaintiff against each defendant for 50 per cent. of the plaintiff's claim and an order for contribution between both defendants on a fifty-fifty basis (post, pp. 256C-F, 257B-C, 262H, 275E-276A).

The Mirafleres and The Abadesa [1967] 1 A.C. 826, 846, H.L.(E.) applied.

Decision of Sir Douglas Frank Q.C. sitting as a deputy judge of the Queen's Bench Division affirmed on causation and quantum.

The following cases are referred to in the judgments:

Baker v. Willoughby [1970] A.C. 467; [1970] 2 W.L.R. 50; [1969] 3 All E.R. 1528, H.L.(E.)

Bonnington Castings Ltd. v. Wardlaw [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615, H.L.(Sc.)

Davies v. Taylor [1974] A.C. 207; [1972] 3 W.L.R. 801; [1972] 3 All E.R. 836, H.L.(E.)

McGhee v. National Coal Board [1973] 1 W.L.R. 1; [1972] 3 All E.R. 1008, H.L.(Sc.)

Mirafleres, The and The Abadesa [1967] 1 A.C. 826; [1967] 2 W.L.R. 806; [1967] 1 All E.R. 672, H.L.(E.)

Performance Cars Ltd. v. Abraham [1962] 1 Q.B. 33; [1961] 3 W.L.R. 749; [1961] 3 All E.R. 413, C.A.

Thompson v. Smiths Shiprepairers (North Shields) Ltd. [1984] Q.B. 405; [1984] 2 W.L.R. 522; [1984] I.C.R. 236; [1984] 1 All E.R. 881

Wilsher v. Essex Area Health Authority [1987] 2 W.L.R. 425; [1986] 3 All E.R. 801, C.A.

The following additional cases were cited in argument:

Davies v. Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291; [1949] 1 All E.R. 620, C.A.

Hotson v. East Berkshire Health Authority [1987] 2 W.L.R. 287; [1987] 1 All E.R. 210, C.A.

Mallett v. McMonagle [1970] A.C. 166; [1969] 2 W.L.R. 767; [1969] 2 All E.R. 178, H.L.(N.I.)

Macgregor, The [1943] A.C. 197; [1943] 1 All E.R. 33, H.L.(E.)

Stapley v. Gypsum Mines Ltd. [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478, H.L.(E.)

Worsfold v. Howe [1980] 1 W.L.R. 1175; [1980] 1 All E.R. 1028, C.A.

APPEAL from Sir Douglas Frank Q.C. sitting as a deputy judge of the Queen's Bench Division.

By writ dated 5 September 1984 the plaintiff, Simon Peter Fitzgerald, claimed damages from the first defendant, Vernon Lane, and the second defendant, Prafulbhai Jayantibhai Patel, for personal injuries and

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A consequential loss arising out of the defendants' negligent driving on 21 March 1983. By his defence dated 9 October 1984 the first defendant denied negligence. By his defence dated 2 October 1984 the second defendant also denied negligence.

B On 9 July 1986 the judge held that all three parties had been negligent and that since it was impossible to say that one of the parties was more to blame than the other the responsibility should be borne equally by all three. On the basis of that finding he ordered judgment to be entered against both defendants for two thirds of the plaintiff's damages which he assessed at a total of £596,553.67.

By notices of appeal dated 24 July 1986 the defendants appealed on the grounds of causation, the judge's findings of negligence, quantum and apportionment.

C Second defendant's notice of appeal.

(A) Causation

D (1) The judge erred in finding that the plaintiff's injuries were caused by the collision between the plaintiff and the second defendant's motor car. (2) The judge having found that the probabilities as to the cause of the plaintiff's tetraplegia were equal between three of the possible scenarios namely (a) impact between the plaintiff's head and the windscreen of the first defendant's motor car (b) the plaintiff striking the road surface when thrown from the first defendant's car after impact therewith and (c) the second defendant's motor car striking the plaintiff, he should have found that the plaintiff had failed to prove causation against the second defendant. There was no dispute that in whichever scenario the plaintiff had been rendered tetraplegic the impact with the first defendant's motor car was in law causative thereof. (3) The judge failed to advise himself of the evidence that the plaintiff showed no signs of voluntary movement after the first impact. That made it probable that the plaintiff had been rendered tetraplegic by the first impact (by whatever mechanism) or that his head had struck the windscreen of the first defendant's car so hard as to render him unconscious (and probably breaking his neck at the same time—scenario (b) above) or both. The judge ought to have inferred that the impact with the second defendant's car was not a probable cause and/or was an improbable explanation of the tetraplegia. (4) The judge having reminded himself of the particular (and peculiar) position in which the plaintiff's body would have had to be if the impact with the second defendant's motor car were to break the plaintiff's neck failed to remind himself that the evidence was that his body was not in such position when struck. (5) The judge was in error in inferring that the plaintiff's impact with the second defendant's motor car was violent. He drew that inference from the extent of the damage to the second defendant's car and in particular to the bumper and number plate when there was no such evidence, and from the distance the plaintiff's body travelled after the impact when the judge's earlier finding of fact had been that the impact took place where the plaintiff's body was found i.e. his body did not travel any distance after impact nor did the second defendant's car run over the same. (6) The judge erred in advising himself that the principle as set out in *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 was applicable to the facts of the present case and that it obliged him to hold the second defendant liable.

(B) Negligence of the second defendant

(7) The judge erred in his finding that the second defendant was driving too fast. That finding was in conflict with his earlier finding of fact that the second defendant was driving at 25 miles per hour and with the evidence that he was driving at 15 to 20 miles per hour. (8) The judge erred in finding that additionally or alternatively the second defendant was not keeping a proper look out. This finding was in conflict with the judge's earlier finding of fact that the second defendant had seen the plaintiff leave the pavement although that finding was in turn incompatible with the judge's further finding that the second defendant was talking to his passenger at the time and had his attention distracted. The latter finding was based on the evidence of Mrs. Milne who as the judge found was 100 yards away from the crossing (and even more from the second defendant's car) and who admitted that she was in the nearside of the south bound traffic and did not see the second defendant's car until impact. (9) If the judge inferred that had the plaintiff not been struck by the first defendant's car but had proceeded across the crossing he would have been struck by the second defendant's motor car (on which hypotheses the judge appears to have found the second defendant to have been negligent) he was in error in inferring the same. The braking in fact applied by the second defendant brought his car to a halt before it reached the point at which the collision hypothesised by the judge would have occurred. (10) The judge erred in holding that the second defendant should have stopped sooner and or applied his brakes harder than he did. The judge ought to have directed himself that he was under no duty to the plaintiff to do so unless (which was not suggested) he ought to have foreseen that the plaintiff would be hurled towards him at 30 miles per hour by the force of impact with the first defendant's motor car.

(C) Apportionment

(11) The judge erred in finding that the plaintiff, the first defendant and the second defendant should bear equal responsibility for the plaintiff's injuries. (12) The judge having found that the plaintiff was hurrying across the pedestrian crossing when the lights were red against him and green in favour of vehicular traffic ought to have found that his negligence was the precipitating, predominant and most blameworthy cause of his injuries. (13) The judge erred in failing to hold that any fault on the part of the second defendant (if causative of the plaintiff's injuries at all) was less than the fault of the first defendant and far less than the fault of the plaintiff.

(D) Quantum

(14) The judge found that the plaintiff was entitled to recover £20,580 as the cost of the conversion of his parents' house (which had just been carried out), and £24,500 as the immediate cost of converting another house. It is submitted that the judge ought (a) to have found it reasonable for the plaintiff to wait for the cheaper option of an estate development during which a bungalow could be purchased and modifications incorporated (b) to have made allowance for accelerated receipt (c) to have made some allowance for the value of the work done to the plaintiff's parents' house or (d) to have disallowed wholly or in part one of the sets of costs of conversion.

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A *The first defendant's notice of appeal*(A) *Negligence of the first defendant*

(1) The judge erred in his finding that the first defendant was driving too fast. The judge found as a fact that the first defendant was driving at 30 miles per hour. Such a finding of fact was erroneously based upon the hypothetical evidence of a consulting engineer in preference to the eye-witness evidence. (2) The judge erred in his finding that the first defendant probably could have seen the plaintiff before and after he entered the crossing. Such finding of fact was erroneously based upon a false comparison of the positions and views of the pelican crossing of the first defendant and another witness.

(B) *Apportionment*

(3) The judge erred in finding that the plaintiff, the first defendant and the second defendant should bear equal responsibility for the plaintiff's injuries. (4) The judge erred in failing to give any reasoned judgment evaluating the degree of blame to be apportioned to each of the parties causative of the plaintiff's injuries. (5) The judge having found that the plaintiff was walking fast across the pelican crossing when the lights were red against him and green in favour of traffic, ought to have found that his negligence was the primary and most blameworthy cause of his injuries. (6) The judge having found as fact that the second defendant (i) was travelling at 25 miles per hour when he saw the plaintiff leaving the pavement (ii) on his own admission he could have stopped earlier (iii) probably was talking to his passenger at the time and thereby had his attention distracted ought to have found that the second defendant was more to blame for causing the plaintiff's injuries than the first defendant was.

(C) *Quantum*

(7) The judge having found as fact that the plaintiff had expended £20,580.00 to convert his parents' house to his needs and that £24,500.00 would be the immediate cost of converting another house to his needs, ought to have found that (a) the plaintiff could reasonably stay at his parents' converted house until the cheaper option of a purpose-built bungalow upon an estate development became available to him (b) an allowance ought to be made for accelerated receipt (c) an allowance ought to be made for the element of betterment to the plaintiff's parents' house occasioned by the conversion (d) the plaintiff did not reasonably need to convert two properties to his needs or should at least give credit for such part of the benefit of the conversion of his parents' house as would become "unused" by virtue of his move to another converted house. Such credit ought to be given in the proportion of the amount of time (and use) he occupied his parents' converted house in relation to his maximum life expectancy of 30 years.

The facts are stated in the judgment of Sir Edward Eveleigh.

Dermod O'Brien Q.C. and *Henry de Lotbiniere* for the second defendant.

William Gage Q.C. and *Simon S. Brown* for the first defendant.

Robin Stewart Q.C. and *Kieran May* for the plaintiff.

Cur. adv. vult.

6 March. The following judgments were handed down.

SIR EDWARD EVILLIGH. The carriageway of Esher High Street is 30 feet wide. It runs approximately north and south. On the afternoon of 21 March 1983 the traffic was busy. There were two lanes of traffic moving south. The nearside lane had been travelling slowly and a car had stopped just before the studs of a pelican crossing. There was a line of traffic behind it and there were other stationary vehicles facing south in a line beginning at the other side of the crossing. A second line of traffic moving south was travelling fairly freely with the lights of the pelican crossing showing green in its favour. The plaintiff, a young man of 22 years of age and 6 feet tall, walked briskly on to the crossing and crossed the road close to the studs on the north side. When he reached the centre of the road he was struck by the offside front corner of a Morris 1100 driven by the first defendant from north to south. He was thrown up on to the bonnet and into contact with the windscreen which shattered and then he was propelled forward and on to the offside of the road where he was struck by a Ford Cortina driven by the second defendant in the opposite direction. The plaintiff sustained multiple injuries and in particular injury to the neck which resulted in partial tetraplegia.

Sir Douglas Frank Q.C., sitting as a deputy judge of the Queen's Bench Division, found that all three parties had been negligent. He assessed the total award of damages at the sum of £596,553.67. He held that both drivers were responsible for the plaintiff's tetraplegia. He then said:

"As to the apportionment of the liability, on the facts I have recited I find that it is impossible to say that one of the parties is more or less to blame than the other and hold that the responsibility should be borne equally by all three."

On the basis of that finding he ordered judgment to be entered for the plaintiff against both defendants for two-thirds of the plaintiff's damages.

Both defendants now appeal. Each says that the judge was wrong in holding him to have been negligent. Alternatively, each says that the other and the plaintiff should have been ordered to bear a greater share of the responsibility. The second defendant further contends that the judge was wrong in awarding a sum of money in respect of the expense of conversions to the house of the plaintiff's parents as well as a sum for him to carry out conversions on a house which he wishes to buy.

The first defendant's evidence is well summarised in the judgment:

"He was driving a Morris 1100 in the offside lane which was clear of traffic whereas the nearside lane was filled with traffic bumper-to-tail. He said that his speed approaching the crossing was 15 to 20 miles per hour, that he drove over the crossing and afterwards saw a blur of a person in a running stance looking straight ahead. The plaintiff impacted himself on the nearside of the wheel arch and then smashed the windscreen. He said that he immediately braked and stopped 20 to 30 feet from the crossing. He was certain that the collision did not take place on the crossing but some 20 feet beyond it. On the contrary, approaching the crossing he took a precautionary glimpse to the left and saw cars on the crossing. He had not seen the plaintiff before the blur appeared because the cars on the nearside lane blocked his view."

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A The judge concluded that the first defendant's car was travelling at about 30 miles per hour. In my opinion, this conclusion was supported by the evidence. There is no doubt that the collision occurred on the crossing and that the point of contact with the first defendant's car was the offside headlamp and wing, which had been damaged. A Mr. Greenaway, following behind the first defendant, saw the plaintiff walking briskly across the nearside pavement towards the crossing, although he did not see him on the crossing. The evidence of the first defendant, which was clearly wrong as to the point of impact with his car and the position of the plaintiff in the road, is a strong indication that he knew little or nothing about it until the moment of impact, or the smallest fraction of a second before, and yet the plaintiff had almost reached the centre of the road. The judge was fully entitled to conclude that the first defendant was negligent. He was not keeping a proper look-out and, in my opinion, was travelling at an excessive speed, bearing in mind the situation that existed on his nearside.

C At first sight, I thought that to find the second defendant negligent was requiring a much too heavy standard of skill and care from him. If the collision between the second defendant's car and the plaintiff occurred at the distance from the crossing where the plaintiff's body was found, the time between the first and second collision with the vehicles would be less than a second. However, the evidence in the case, and particularly that of the second defendant himself, provides us with further material in which to assess his conduct.

D The second defendant said that he saw the plaintiff on the pavement and saw him rush across the road. At one point in his evidence he said that he braked gently when the plaintiff started to cross, but he had also said that he braked when he saw the plaintiff bounce from the other car and made no reference to having slowed down before that. When cross-examined, he said that he could have stopped before he did. The judge came to the conclusion that the second defendant was on a collision course immediately the plaintiff left the pavement and yet the defendant carried on as though nothing unusual had happened, and then, when the plaintiff was struck by the first defendant's car, the second defendant did not brake sufficiently, or as effectively as he would have been able to do had he so controlled his car beforehand as to be ready to cope with an emergency. This, I think, is the effect of the judge's findings.

E There were a number of answers given in evidence by the second defendant which would entitle the judge to come to this conclusion. He saw the witness and clearly he did not accept the statement which he made at one point in his evidence, namely that he braked gently when he saw the plaintiff leave the pavement and braked "immediately" when he saw the collision with the first defendant's car. He did not accept the second defendant's evidence that he stopped one yard short of the crossing. The evidence of Mrs. Milne gave the overall impression that the second defendant could have stopped sooner than he did. The blow to the plaintiff must have been severe because not only was his body turned round in the road, but the bumper bar was dented and the number plate and valance damaged.

G H I confess that I have had difficulty in seeing where the second defendant was to blame, particularly as his claim that he braked gently when he first saw the plaintiff leave the pavement is, to some extent, supported by the evidence of Mrs. Milne when she says that he was travelling slowly. However, the judge heard all the witnesses and I am

not prepared to substitute my own assessment of the manner in which the second defendant was driving for that carefully arrived at by the judge. That being so, I do not think that his decision should be reversed.

The plaintiff does not challenge the finding that he was guilty of contributory negligence. The judge dealt with the question of contributory negligence and contribution together. I repeat what he said:

"As to the apportionment of the liability, on the facts I have recited I find that it is impossible to say that one of the parties is more or less to blame than the other and hold that the responsibility should be borne equally by all three."

After assessing the damages, he said, "In view of my findings, one third of the amount of the award will be paid by each of the defendants." He then accepted the submission of counsel for the plaintiff that the order to give effect to his findings would be that judgment should be entered for the plaintiff against both defendants for two thirds of the plaintiff's claim.

The judge's finding indicates that he thought that each of the three parties was equally at fault. That being so, the correct form of judgment should be "judgment for the plaintiff for 50 per cent. of his claim against each defendant." There would then follow an order for contribution between the two defendants on a fifty-fifty basis. Subsection (1) of section 1 of the Law Reform (Contributory Negligence) Act 1945 reads:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: . . ."

In applying this subsection, I have always understood that the court should consider the position between the plaintiff and each defendant separately. In *The Mafiores and The Abadesa* [1967] 1 A.C. 826 Lord Pearce said, at p. 846:

"To get a fair apportionment it is necessary to weigh the fault of each negligent party against that of each of the others. It is, or may be, quite misleading to substitute for a measurement of the individual fault of each contributor to the accident a measurement of the fault of one against the joint fault of the rest."

The case was concerned with apportionment under section 1 of the Maritime Conventions Act 1911, but the observation of Lord Pearce, which I have quoted, related to the hypothetical facts of a factory accident case which he had postulated. Later, referring specifically to the Law Reform (Contributory Negligence) Act 1945, section 1, he said, at p. 846:

"Its intention was to allow a plaintiff, though negligent, to recover damages reduced to such an extent as the court thinks just and equitable, having regard to his share in the responsibility for the damage (section 1(1)). But that share can only be estimated by weighing his fault against that of the defendant or, if there are two defendants, against that of each defendant. It is true that

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A apportionment as between the defendants comes theoretically at a later stage (under the Law Reform (Married Women and Tortfeasors) Act 1935). But as a matter of practice the whole matter is decided at one time and the court weighs up the fault of *each* in assessing liability as between plaintiff and defendants themselves. And I see nothing in the Act of 1945 to show that it intends the court to treat the joint defendants as a unit whose joint blameworthiness could only, one presumes, be the aggregate blameworthiness of its differing components.”

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C Let us assume that the first defendant had suffered injury from the flying glass of his windscreen and that he had counterclaimed against the plaintiff for damages. Would he, too, have been entitled to two-thirds of his damages against the plaintiff? The illogicality of two parties equally to blame being found liable for two-thirds of each others damages is too obvious. I would allow the appeal of each of the defendants in relation to the apportionment and order judgment for the plaintiff against each defendant for 50 per cent. of the plaintiff's claim and order contribution between the defendants on a fifty-fifty basis.

D I now deal with the question of causation. The tetraplegia resulted from a fracture dislocation of the cervical spine of a type most commonly caused by forward flexion of the head. Both doctors were examined with a view to establishing which of four stages of the accident was responsible for such a movement of the head. The doctors agreed that there were four possibilities, namely the initial impact, impact with the windscreen, impact with the ground and the impact with the second defendant's car. Evidence was given by Dr. Pallis on behalf of the plaintiff and by Dr. Hopkins on behalf of the second defendant. We have been taken through their evidence very carefully. Counsel for the first defendant sought to establish that the probability was that the final collision caused or contributed to the tetraplegia. Indeed, it was established that, if the head had been in contact with the bumper of the Cortina, which was denied, and if the body was closer to the ground, there could have been

E imparted a forward flexion to cause the injury. When Dr. Hopkins was asked his assessment of the probability of each of the four possibilities, he said that he placed 30 per cent. on each of the first three and only 10 per cent. on the last. However, he seemed to think that the last impact was less severe than the damage to the car would indicate, and the judge did not accept his assessment. At one point Dr. Pallis was persuaded to agree that the cause was the totality of the injuries, in the

F sense that they had a cumulative effect. However, when asked to consider the matter again, he said:

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“my conclusions were that the tetraplegia could have been caused by either collision or that both collisions could materially have contributed to the damage.”

H The judge carefully considered the medical evidence. He said:

“I am in no doubt that the impact of the plaintiff with the Cortina was violent. That seems an inescapable conclusion from the two facts, namely, the extent of the damage to the second defendant's car and, in particular, to the bumper and number plate and the distance the plaintiff's body travelled after the impact. My conclusion is that although I am satisfied that it is probable that the first collision did not cause the spinal injury there is an equal probability

of the three subsequent impacts having been the cause, and, therefore, each of the defendants must bear the responsibility. The principle to be applied is not in doubt and was stated succinctly by Lord Wilberforce in *McGhee v. National Coal Board* [1973] 1 W.L.R. 1, 6 in these words: 'First, it is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause.'

I think that the judge was saying that each of the three possibilities was equally probable and that he was unable to distinguish between them. After very careful consideration, I cannot treat him as meaning that all three combined to produce the injury by a cumulative effect.

I have considered whether it is possible for me to reach my own conclusion as to the probable cause of the injury, but I have concluded that I cannot. There are answers given by the doctors which, taken in isolation, might entitle one to reach a certain conclusion, but to do so would be to ignore the overall effect of the evidence. The judge expresses no preference for the evidence of either doctor, save that he clearly rejects Dr. Hopkins's assessment of the probabilities which I have referred to above. The reference to *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 indicates to my mind that the judge was finding it impossible to distinguish between the three causes. It is also established on the evidence that the injury might have been caused by each of the impacts, with the last impact exacerbating the injury already suffered by the neck.

The plaintiff and the first defendant relied upon *McGhee's* case. The facts of that case were very different from the facts in this case. That case was concerned with the failure of an employer to alleviate a condition which was already a potential source of dermatitis. We are concerned to determine whether the impact with the second defendant's car caused or contributed to the tetraplegia by inflicting the causative blow to an uninjured neck, or by increasing the harmful consequences to an already injured neck. In *McGhee's* case [1973] 1 W.L.R. 1 Lord Salmon said, at pp. 12-13:

"In the circumstances of the present case, the possibility of a distinction existing between (a) having materially increased the risk of contracting the disease, and (b) having materially contributed to causing the disease may no doubt be a fruitful source of interesting academic discussions between students of philosophy. Such a distinction is, however, far too unreal to be recognised by the common law."

I appreciate that these words and similar expressions of opinion are more easily applied in considering the development of a disease than in relation to injuries sustained in a road accident which might be the result of one single blow. However, the principle enunciated in *McGhee's* case has been taken a step further in *Wilsher v. Essex Area Health Authority* [1987] 2 W.L.R. 425. In that case the plaintiff had been born prematurely, suffering from various illnesses, including oxygen deficiency. The plaintiff was negligently given excess oxygen in treatment designed to remedy the condition. He claimed damages for an incurable condition of the retina, resulting in near blindness, which, it was alleged, was caused or contributed to by the excess oxygen. However, excess oxygen

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A was merely one of several different factors, any one of which could have caused or contributed to the eye condition. Medical evidence was unable to single out the responsible factor. The majority of the Court of Appeal held that the defendants were liable. Mustill L.J. said, at pp. 459–460:

B “There is, however, one problem which must be tackled. I had at one time believed that the present case is on all fours with the *McGhee* case [1973] 1 W.L.R. 1 and that any apparent difference between the two simply stemmed from the way in which the problem happened to be expressed. I am now persuaded that this is not so, and that the two situations really are different. In the *McGhee* case there was only one risk operating, namely that contact of a sweaty skin with brick dust would lead to dermatitis. The fact that such contact did cause the injury was not in dispute. Just as in *Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613 the defenders’ fault lay in not taking proper steps to reduce that single risk. The uncertainty was whether the fault had tipped the scale. In the present case there is a greater uncertainty. Instead of a single risk factor known to have caused the injury there is a list of factors, which cannot be fully enumerated in the current state of medical science, any one of which might have caused the injury. What the defendants did was not to enhance the risk that the known factor would lead to injury, but to add to the list of factors which might do so. I acknowledge that this is much further from the facts of *Bonnington Castings Ltd. v. Wardlaw*, which was the springboard for the *McGhee* case than were the facts of the *McGhee* case itself. The question is whether this makes a crucial difference. The root of the problem lies in the fact that, for reasons of policy, the House of Lords mitigated the rigour of the rule that the plaintiff must prove that the breach caused the loss, in the interests of achieving a result which was considered to be just. Given that this was a decision based on policy, rather than a chain of direct reasoning, the difficulty is to know whether a similar approach can properly be adopted in the different circumstances of the present case. After much hesitation I have come to the conclusion that it can. Reading all the speeches together, the principle applied by the House of Lords seems to me to amount to this. If it is an established fact that conduct of a particular kind creates a risk that injury will be caused to another or increases an existing risk that injury will ensue; and if the two parties stand in such a relationship that the one party owes a duty not to conduct himself in that way; and if the party does conduct himself in that way; and if the other party does suffer injury of the kind to which the risk related; then the first party is taken to have caused the injury by his breach of duty, even though the existence and extent of the contribution made by the breach cannot be ascertained. If this is the right analysis, it seems to me that the shape taken by the enhancement of the risk ought not to be of crucial significance. In the *McGhee* case [1973] 1 W.L.R. 1, the conduct of the employers made it more likely that the pursuer would contract dermatitis, and he did contract dermatitis. Here, the conduct of those for whom the defendants are liable made it more likely that Martin would contract RLF, and he did contract RLF. If considerations of justice demanded that the pursuer succeed in the

one case, I can see no reason why the plaintiff should not succeed in the other.”

In the present case, when the plaintiff was struck by the second defendant's car, his neck might already have been injured to an unknown degree, or it might not have been previously injured. In the latter case the impact with the second defendant's car clearly caused the tetraplegia. If the neck was already injured, then on the evidence in the case as to the manner in which the plaintiff's body came into contact with that car, further damage to some degree must have been inflicted. The bumper was dented in the middle and the number plate and valance below it were broken. There was clearly a risk in that kind of collision that the plaintiff's head would be struck, or forced forward, in a manner which could result in tetraplegia.

No injury to the back of the plaintiff's head was recorded at the hospital. The evidence shows that an injury could have been overlooked. It is also possible, as I read the evidence, for the back and shoulders to have taken the initial impact and for the head to have been forced forward against the resistance of a body which was in contact with the road. In my opinion, therefore, the case is covered by the decision in *Wilsher v. Essex Area Health Authority* [1987] 2 W.L.R. 425 and the second defendant is liable to the plaintiff.

I can deal briefly with the contention that the defendants should not pay for the alterations to the house of the plaintiff's parents as well as to the house he intends to buy. The council undertook to pay for the alterations to the house. There was some delay in doing this and the plaintiff was indeed able to manage when he came out of hospital with temporary alterations. The plaintiff eventually decided that he could not live with his parents because the strain upon them and him was too great. He has not been criticised for taking this attitude but it is said that he should not in effect get the money twice. In my opinion, the plaintiff was in no position to decide firmly that he would buy a house because the defendants denied liability, and there was no offer of an advance to assist him in buying a house. Therefore, the question which has to be determined is whether he ought to have put up with makeshift alterations until he knew whether or not he would be able to purchase a house. In all the circumstances of this case I cannot say that it was unreasonable for the plaintiff to go ahead with the permanent alterations which were carried out to the parents' house. They were designed to add to his comfort and indeed have done so. If, on his behalf, it had been said that he had put up with inadequate accommodation after leaving hospital and he had suffered discomfort and inconvenience as a result, it may well have been suggested that he should have taken advantage of the council's offer to improve his conditions. I think it will be unusual for the costs of alterations to two houses to be allowed, and certainly would not wish to encourage plaintiffs to think otherwise. On the facts of this case, however, I cannot say that expense has been incurred unreasonably.

NOURSE L.J. I agree. I express some views of my own on the issue of causation as against the second defendant. The judge stated his finding on causation in these words:

“My conclusion is that although I am satisfied that it is probable that the first collision did not cause the spinal injury there is an

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A equal probability of the three subsequent impacts having been the cause, and, therefore, each of the defendants must bear the responsibility."

B Reading these words against his immediately preceding consideration of the evidence of Dr. Pallis and Dr. Hopkins, I think it is clear that the judge meant that there was an equal possibility of each of the three subsequent impacts having been either the sole cause of, or a material contributor to, the plaintiff's tetraplegia. I will add that, once he had excluded the first impact and rejected Dr. Hopkins' view that the fourth impact was intrinsically less probable than the others, it is difficult to see to what more precise conclusion the evidence could have led him.

C It follows from the judge's finding that the plaintiff has failed to prove, on the balance of probabilities, that the second defendant caused or materially contributed to the tetraplegia. The question is whether the judge was correct in holding that the second defendant is nevertheless liable under an application of the decision of the House of Lords in *McGhee v. National Coal Board* [1973] 1 W.L.R. 1. If we had had to decide this case without their assistance, I would have found that question just as difficult as did the members of this court in *Wilsher v. Essex Area Health Authority* [1987] 2 W.L.R. 425. But I think that the majority have now shown us that the decision in the *McGhee* case established a principle whose application is wide enough to bridge the evidential gap in this case as comprehensively as it did in the other two. The decision of the majority now binds this court.

D The principle was stated by Mustill L.J. at pp. 459-460: see ante, p. 259F-H.

E The submissions of Mr. O'Brien, for the second defendant, were to the following effect. He said that, if the plaintiff was to recover against the second defendant, he had to prove that the collision with the latter's car occurred before he had suffered, or fully suffered, the injury or injuries which caused his tetraplegia. If he could not prove that, he could not prove that the second defendant had caused or contributed to the condition. This was a question of historic fact which the judge's finding had answered against the plaintiff. It could not be resolved by an application of the *McGhee* principle, which was confined to cases where the evidential gap was the product of an imperfect state of medical knowledge.

F I do not think that these submissions are correct. I think that they would emaciate the *McGhee* principle to an extent not countenanced by the decision in *Wilsher's* case, perhaps reducing it to no principle at all. Their validity rests largely on the proposition that the *McGhee* principle can apply to this case only if it is shown that the plaintiff had not suffered, or fully suffered, the injury or injuries which caused his tetraplegia before the fourth impact occurred. The correctness of that proposition must be tested by a consideration of the *Wilsher* case, in order to see whether any of the other possible causes of the plaintiff's retrolental fibroplasia had materialised before the catheter had first been negligently inserted in one of his veins. If none of them had, there might be good support for the proposition, because it could then be said that the comparable question of historic fact had never arisen in that case. However, it is admittedly difficult to discern from the judgments what the true position was. And it must be said that some at least of the conditions referred to by Sir Nicolas Browne-Wilkinson V.-C. [1987] 2

W.L.R. 425, 466 are conditions which would have been caused by the plaintiff's extreme prematurity and would presumably have existed from the moment of his birth. This factual obscurity is unfavourable to the proposition, because it suggests that the order in which the various possible causes occurred or materialised was not regarded as being a matter of any importance. Accordingly, I think that *Wilsher's* case must be approached on the footing that there were several other possible causes of the plaintiff's disability, any one or more of which could have occurred or materialised before the negligent act.

In these circumstances, the proposition on which Mr. O'Brien's submissions were largely built is not made out. Nor do I think that there is anything in the submission that the *McGhee* principle is confined to cases where the evidential gap is the product of an imperfect state of medical knowledge in a general sense. It is true that both *McGhee* and *Wilsher* were cases of that kind, but to confine the principle to them alone would raise distinctions which could not be allowed in the application of one which is said to have been adopted in the interests of justice. The distinction sought to be made in the present case is a good example. There is no satisfactory distinction between a case where the evidential gap is the product of an imperfect state of medical knowledge in a general sense and one where it is the product of the inability of each of two medical witnesses to say which of four impacts was more likely than any of the other three to have caused the plaintiff's tetraplegia.

An examination of these niceties has been brought upon us by the ingenuity of Mr. O'Brien's submissions. Having done my best to dispose of them, I gladly return to the principle as it was clearly and simply stated by Mustill L.J., bearing in mind that the majority in *Wilsher's* case treated *McGhee's* case as being a case where there were two separate possible causes of the plaintiff's dermatitis, namely exposure to brick dust and the absence of adequate washing facilities; see *per Glidewell L.J.*, at p. 463H.

Does the principle apply to the state of affairs which is found to have existed in the present case? I think that it does. It is an established fact that the negligent driving of the second defendant and his collision with the plaintiff, to whom he owed a duty of care, created a risk that injury of a kind which can cause tetraplegia would be caused to the plaintiff. The plaintiff did suffer an injury or injuries which caused tetraplegia. The collision with the second defendant's car was one of three possible causes of the condition. In *McGhee's* case there were two, in *Wilsher's* case about five. It is not suggested that any distinction is to be made solely because there are two defendants in this case. It does not matter whether the risk was created before or after the third impact had occurred, nor whether the fourth impact in fact caused or contributed to the plaintiff's condition. A benevolent principle smiles on these factual uncertainties and melts them all away.

For these reasons I think that the judge's decision on the question of causation was correct. On all other questions I agree with the judgments of Sir Edward Eveleigh and Slade L.J. and have nothing which I wish to add.

SLADE L.J. The facts of this case have been summarised in the judgment of Sir Edward Eveleigh and I will only repeat them to the extent necessary to explain my conclusions in my own words. The

A difficulties which face this court in attempting to unravel the facts in
relation to this sad accident, which involved a pedestrian and two cars
and happened in the space of a few seconds nearly four years ago, are
formidable. We can never be certain that we have discovered the whole
truth. The best we can do is to proceed on what we consider to be the
balance of probabilities.

B Five principal issues arise, to which I will refer under the headings
shown below.

(1) *The liability of the first defendant*

C Two particular findings of fact made by the judge have been
challenged by Mr. Gage on behalf of the first defendant, namely the
findings that the first defendant (i) at the time of the accident was
travelling at about 30 miles per hour; (ii) he probably could have seen
the plaintiff before and after he entered the crossing if he had kept a
proper look-out.

D The first defendant's own evidence was that he was approaching the
crossing at a speed of 15 to 20 miles per hour, but, as the judge
commented, his faulty recollection of the locus of the collision and the
point of impact (to which matters I will revert) threw doubt on the
reliability of his recollection of other matters. Mr. Gregory, a manager
of a nearby shop who saw the accident, whose statement was admitted
under the Civil Evidence Act 1968, estimated the traffic to have been
moving at around 10 to 20 miles per hour. On the other hand, Mr.
E Greenaway, who had been driving behind the first defendant in the
same lane, separated from his car only by one other car (a Mercedes),
gave oral evidence that he and the two cars in front of him were
travelling at about 25 to 30 miles per hour. In addition to this, a
consulting engineer, Mr. E. T. Page, with long experience of investigating
road accidents, gave some technical evidence based primarily on the
unchallenged hypothesis that the glass from a broken windscreen, and a
pedestrian such as the plaintiff, must have left the first defendant's
F vehicle at the speed of that vehicle. By applying that hypothesis to
various points at which the plaintiff could have entered the crossing, he
expressed various alternative deductions in evidence as to the speed of
the first defendant's car. Another eye witness, Mr. Evans, who was
sitting in his stationary car in the lane nearest to the point where the
plaintiff started to cross the road, identified this point in the course of
his oral evidence. This point accorded with Mr. Page's deduction of a
G speed of 30 miles per hour. Quite apart from the plaintiff's point of
entry to the road, Mr. Page gave evidence in general terms that, while a
speed of more than 30 miles per hour on impact would have tended to
lift a pedestrian's body on to the roof, a speed in excess of 20 miles per
hour would have been required, to result in the body breaking the
windscreen, as occurred in the present case. I think that the evidence of
H Mr. Greenaway, Mr. Page and Mr. Evans, taken in conjunction, justified
a finding that the first defendant was travelling at about 30 miles per
hour. Furthermore, I agree with the judge's finding that a reasonable
motorist, on approaching the crossing at that particular time, would
have been travelling at a speed much slower than 30 miles per hour. The
conclusion that he was driving too fast is, I think, reinforced by various
other factors, to which I will refer below.

Mr. Gage, however, has rightly stressed that any sensible assessment
must involve an appreciation of the first defendant's position. It is now

common ground that the plaintiff entered the pelican crossing while the lights were red against him. Though the first defendant, according to his own evidence, did not realise it until he was "two or three cars distances" away, the lights were green in his favour and, it was submitted, he was entitled to expect that pedestrians would not cross against the lights, particularly at a hurried pace. Furthermore, according to the first defendant's evidence, his vision was obscured by cars in the inside lane.

On the other hand, the first defendant, who was aware of the nature of the road was also aware that he was overtaking a line of stationary or slow moving traffic which was in the inside lane. Mr. Evans' car was actually stationary; he had deliberately left a gap between his own car and the car in front. The first defendant, according to his own evidence, did not even notice Mr. Evans' stationary car. It was an inherently perilous situation. The whole of the crossing appears to have been clear of vehicular traffic. This by itself should have suggested the possibility that a pedestrian would emerge from the gap. The presence of pelican crossing signs made this possibility more likely. The first defendant himself said he "took a precautionary glance left at the pedestrian crossing *when he was on it.*" Unfortunately, if he did look to the left, he did not do so until it was too late. Apart from the sight of a blur, he never saw the plaintiff at all. Though the first defendant's own evidence was that the accident occurred some 20 feet south of the crossing, the judge was satisfied that the collision occurred on the crossing and this finding is not now challenged. Furthermore, significantly, though his evidence was that the plaintiff collided with the nearside of his car, the judge was left in no doubt that the collision occurred on the front offside. This latter finding, which again is not now challenged, suggests that the plaintiff must have been nearing the centre of the road when the vehicle struck him. Mr. Greenaway, who presumably would have had a less good view than the plaintiff, said he saw the plaintiff leave the pavement and foresaw the accident. In contrast, the fair inference appears to be that, even though the plaintiff had nearly reached the centre of the road at the moment of impact, the first defendant knew nothing of his presence until immediately before that moment. It is, I think, significant that there is no evidence that he swerved in the smallest degree in an attempt to avoid the plaintiff.

On this evidence, I think the judge was entitled to find that the first defendant was not only driving too fast, but was not keeping a proper look out for pedestrians. On this basis, it is not disputed that there is a sufficient causative link between his negligence and the plaintiff's tetraplegia. Accordingly, I do not think the finding of liability against the first defendant can be disturbed.

(2) *The liability of the second defendant*

The judge found as facts that the second defendant

"(i) was travelling at about 25 miles per hour when he saw the plaintiff leave the pavement; (ii) on his own admission he could have stopped earlier; (iii) he probably was talking to his passenger at the time and thereby had his attention distracted."

The second defendant's evidence was that he was approaching the pedestrian crossing at a speed of 15 to 20 miles per hour. Mrs. Milne, to whose evidence I will refer further below, also estimated that he was

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A travelling at about 15 to 20 miles per hour. However, the second defendant's passenger, Mr. A. K. Patel, put the speed at 25 miles per hour. All the evidence suggested that the impact between his car and the plaintiff was a violent one. Though the finding was challenged on this appeal, in my opinion the judge was entitled to find that the speed was 25 miles per hour.

B I now refer to parts of the second defendant's own evidence. As he progressed northwards towards the traffic lights, which were green, he first saw the plaintiff *on the pavement* and then saw him moving fast off the pavement. This important piece of evidence was given on at least four separate occasions during the course of his examination-in-chief, it was quite plain that the plaintiff was going to cross the road, even though the lights were green for traffic. As regards the time when he
C first started braking, he appeared at one point early in his evidence to have suggested that he began to brake when he saw the plaintiff rushing on the pavement and to have braked more strongly when he bounced on the windscreen. However, the clear effect of his later evidence was that he *first* braked when the plaintiff bounced on the windscreen of his car and not before that time. At one point he admitted in terms that this was the first time when he braked and even then he only braked gently.
D He explained to the judge that, until the impact occurred, he did not think that the plaintiff was coming towards him. He accepted in terms that he could have stopped sooner than he did. He also accepted he had been talking on and off with his passenger, Mr. A. K. Patel, and that he might have been talking with him just a moment before the accident occurred. Mrs. Milne, whose car was about the fourth in line of the
E vehicles travelling southwards, waiting to pass through the traffic lights, saw the incident. She described in evidence how she saw what she thought was a bundle of clothes or a satchel being thrown across the road and then realised it was a body. Referring to the driver of the Cortina, she said:

F "I watched and prayed that he would stop and I noticed the white Cortina, the driver, was turning his head towards the passenger that he had in the front seat."

Under cross-examination she insisted: "I just say, I had time to think about 'Please stop, please stop.'"

G The judge referred to this evidence of Mrs. Milne in his judgment and, though he did not say so explicitly, clearly accepted it. In my judgment, the evidence of the second defendant, Mrs. Milne and Mr. A. K. Patel sufficed to support the three findings of fact in relation to the second defendant referred to above.

H Mr. O'Brien, on behalf of the second defendant, stressed the difficulties of the split second decision which the second defendant had to make when he was faced with a body that had become a projectile hurtling towards him at about 30 miles per hour. However, the judge commented: "I do not think the second defendant did have only a split second before he saw the plaintiff." I agree. The inferences which, on the balance of probabilities, I would draw from the second defendant's own evidence, coupled with that of Mrs. Milne, is that (i) the second defendant saw the plaintiff hurrying towards the pavement and realised that he was intending to cross the road, even though the lights were green; (ii) he should have at once realised that, if he did not brake immediately, there was a grave risk that his own car would collide with

the plaintiff as he attempted to cross the road (whether or not the first defendant's car hit the plaintiff first); (iii) he should have braked hard at once; (iv) he did not brake at once because he was driving too fast and had his attention distracted by talking to his passenger; (v) for the same reason he reacted inadequately, by braking only gently, even after he had seen the plaintiff hit the windscreen of the first defendant's car.

In my judgment, making proper allowances for the difficult situation in which the second defendant found himself, the evidence was amply sufficient to justify the conclusion that (subject, of course, to the plaintiff's own contributory negligence) the second defendant was in breach of his duty of care to the plaintiff and that the second collision was in fact attributable to the second defendant driving too fast and/or not keeping a proper look-out. No one can be sure that, if the second defendant had begun to brake as soon as he saw the plaintiff hurrying towards the crossing (as I think he should have done), he would altogether have avoided colliding with him. It is, however, certain that the impact, if it had occurred at all, would have been much less violent than in fact it was. Subject to the question of causation, the judge was, in my opinion, entitled to find that liability on the part of the second defendant was established. Causation, however, raises formidable problems, to which I shall now turn.

(3) *Causation*

The first defendant does not dispute that, if, contrary to his submission, negligence against him is proved, such negligence must in law be treated as having been a cause of the plaintiff's tetraplegia. However, he does not admit that the impact of his car on the plaintiff directly physically caused the tetraplegia. Both he and the plaintiff seek to assert that, as the judge held, the second defendant must on a causative basis also be held responsible for this injury.

The judge heard medical evidence from two consultant neurologists, Dr. Pallis and Dr. Hopkins, called respectively on behalf of the plaintiff and the second defendant. As to the tetraplegia, Dr. Pallis began his evidence by stating his ultimate conclusion, which was that "the tetraplegia could have been caused by either collision or both collisions could materially have contributed to the damage." He was asked in examination-in-chief whether he could "exclude either car as playing a part in the causing of the tetraplegia" and he said he could not. He mentioned four possible causes or "scenarios" of the tetraplegia, namely (1) a whiplash effect due to the initial impact of the Morris car on the plaintiff; (2) the impact between the plaintiff and the windscreen of the Morris; (3) the plaintiff's head hitting the ground at some time between the impact of the Morris and the impact of the Cortina; (4) the impact between the Cortina and the plaintiff. He considered scenario (1) the least likely of the four possibilities because he thought it unlikely that the plaintiff's head could have been flexed forward by the impact of the Morris car on his legs. He "could not exclude" scenario (2). He thought scenario (3) "unlikely but not impossible. He likewise considered scenario (4) a possibility, for reasons explained by him in some detail.

In re-examination Dr. Pallis reaffirmed his conclusions that scenario (4) was "quite a plausible scenario" and that the tetraplegia could have been caused by either collision or that both collisions could materially have contributed to the damage.

A Dr. Hopkins accepted the four scenarios put forward by Dr. Pallis as representing the potential possibilities, though he gave much higher credit to scenario (1) than Dr. Pallis had done, because he thought that, if the plaintiff's head was slightly turned to the right at the last moment before the first impact, his head might have remained in the same place and have been forced to flex forward. As to scenario (4), he agreed that, if the Cortina had struck the plaintiff with the plaintiff's head and
B body in precisely the right position, a relatively small force could have caused tetraplegia; but he inferred from the evidence which he had heard that the Cortina came to a halt almost immediately, and therefore concluded that scenario (4) was much less probable than the other three scenarios. In re-examination he expressed a view in terms of probabilities, placing 30 per cent. on each of the first three scenarios and 10 per cent.
C on the last. However, in cross-examination, he had accepted that each of the four scenarios was a possible cause of the tetraplegia and that neither collision could be excluded on a balance of probabilities from being a material cause of the plaintiff's injury.

The judge dismissed scenario (1) as a probable cause of the injury on the grounds that:

D "There is no evidence at all that the plaintiff had turned to the right, but, on the contrary, the evidence is that he was walking straight ahead."

However, having heard the evidence of Dr. Pallis and Dr. Hopkins and summarised it, he expressed his ultimate conclusion as to causation thus:

E "My conclusion is that although I am satisfied that it is probable that the first collision did not cause the spinal injury there is an equal probability of the three subsequent impacts having been the cause, and, therefore, each of the defendants must bear the responsibility."

F Though there has been some debate as to the meaning of this important passage in the course of argument, I do not read it as meaning that, on the balance of probabilities, all three subsequent impacts combined to produce the injury by a cumulative effect; I read it as meaning that it is equally probable that any one of them did so. In reaching his conclusion, the judge applied, or purported to apply, the principle stated by Lord Wilberforce in *McGhee v. National Coal Board* [1973] 1 W.L.R. 1, 6, to which I will revert:

G "First, it is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause."

H Mr. O'Brien submitted that, misapplying the *McGhee* principle, the judge had asked himself the wrong question. He had asked himself whether any of the four scenarios could, on the balance of probabilities, be *excluded* as a cause or the cause of the tetraplegia. Instead, he should have asked himself whether it had been proved on the balance of probabilities that, having regard to the impact of the plaintiff with the first defendant's car which had already occurred, the second collision thereafter caused or materially contributed to the plaintiff's tetraplegia.

Having regard to the form of the pleadings and the argument at the trial, it would in my opinion have been the judge's duty, if he thought

he properly could, to make a finding of fact as to whether or not, on the balance of probabilities, (a) at the moment of impact with the Cortina, the plaintiff had already been rendered tetraplegic by the impact with the Morris; or (b) he had already been rendered partially tetraplegic at that moment but the impact with the Cortina aggravated the complaint; or (c) he was not rendered tetraplegic by the impact with the Morris.

It has not been suggested that the *McGhee* principle would have absolved the judge from making any such finding merely because it was difficult. Having regard to his other findings, a finding in the form (a) would inevitably have left the first defendant solely liable for having caused the tetraplegia and would have absolved the second defendant from responsibility for this injury: *Performance Cars Ltd. v. Abraham* [1962] 1 Q.B. 33. As Lord Reid pointed out in *Baker v. Willoughby* [1970] A.C. 467, 493, that case exemplifies "the general rule that a wrongdoer must take the plaintiff (or his property) as he finds him: that may be to his advantage or disadvantage." A finding in the form (b) would have left the second defendant liable to the extent that he had made the tetraplegia worse and the first defendant liable for the balance: compare *Thompson v. Smiths Shiprepairers (North Shields) Ltd.* [1984] Q.B. 405. A finding in the form (c) would, at least *prima facie*, have led to the conclusion that the second defendant's negligence was the sole immediate physical cause of the tetraplegia.

In the course of argument on the facts, we have been invited to hold that the judge could and should properly have made one or other of these findings. However, having carefully studied the evidence, I, for my part, am not prepared to say that the judge erred in declining or omitting to find that any one of the four impacts was more likely than the others to have been the cause of the tetraplegia. I accept that the evidentiary material available to him regarding the relevant events, which took place over the space of a few seconds, would not have sufficed to enable him to make any such finding with any conviction as to its correctness, and correspondingly does not suffice to enable this court to do so. However, I think he did go wrong in saying that there was no evidence that the plaintiff had turned to the right. The plaintiff himself gave repeated evidence to the effect that he had turned to the right immediately before the impact with the first defendant's car. While, in my opinion, this makes no difference in the ultimate result, I would therefore express my conclusion as to the effect of the evidence on causation slightly differently from the judge by saying that, on the evidence, it is equally probable that any one or more of the four impacts may have been the cause of the tetraplegia and that the available evidence does not permit a precise attribution of the cause on the balance of probabilities. On the basis of the principle established by *Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613, it would have sufficed for the plaintiff to prove that the second defendant's negligence had materially contributed to his tetraplegia, even if it was not the sole cause. But, subject to the *McGhee* principle, I do not think the evidence suffices to show that.

Against this background, Mr. O'Brien has submitted that the plaintiff has simply failed to prove his case against the second defendant in as much as he has failed to show that, on the balance of probabilities, the second defendant's fault, as opposed to the first defendant's fault, either caused or materially contributed to the plaintiff's tetraplegia. The

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A plaintiff, as he pointed out, may already have been tetraplegic when struck by the second defendant's car.

In *McGhee's* case the respondents were found to have been at fault by failing to provide showers for the appellant for use after his work on brick kilns. They attempted to escape liability for his dermatitis by submitting that it had not been shown on the balance of probabilities that their fault had caused or materially contributed to his dermatitis, because it had not been shown on the balance of probabilities that he would not have contracted dermatitis if adequate washing facilities had been provided. As Lord Wilberforce put it [1973] 1 W.L.R. 1, 6:

C "But the question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary."

D The House of Lords answered this question in the negative by deciding that, notwithstanding this evidentiary gap, a finding in the court below that the respondents' breach of duty had materially increased the risk of injury to the appellant, amounted for practical purposes to a finding that such breach had materially contributed to his injury. Their respective rationes decidendi, slightly differently expressed, are to be found set out in the passages cited by Mustill L.J. in *Wilsher v. Essex Area Health Authority* [1987] 2 W.L.R. 425 at pp. 455 to 458, but are comprehensively summarised by him in a passage which I will cite below. Meantime, however, it is to be observed that in *McGhee* there was only one relevant risk operating, namely that contact of the employee's skin with brick dust would cause dermatitis; there was no doubt at all that such contact had in fact caused the injury.

E The *Wilsher* decision first came to our notice after the first hearing of these appeals had been concluded and we thought it necessary to invite further argument in the light of it. In that case the infant plaintiff was suffering from a condition of near blindness ("RLF"). While in hospital, through mistakes made by members of the hospital's staff, he had been given excess oxygen in two separate episodes. He sought to recover damages from the hospital authority on the grounds that the excess oxygen in his bloodstream had caused the RLF. The evidence showed that excess oxygen could cause or contribute to RLF: see [1987] 2 W.L.R. 425, 459, 463). It also showed, however, that there are a number of other disabilities or diseases from which premature babies, such as the plaintiff in that case, are liable to suffer and which singly or in combination can or may cause RLF. The medical evidence did not go so far as establishing on the balance of probabilities that the two episodes involving the administration of excess oxygen had caused or contributed to the RLF. It did, however, show that they had added new factors to the existing list of factors which had subjected the plaintiff to the risk of RLF.

H Mustill L.J., who delivered the leading judgment, pointed out that, in one respect, the facts of *Wilsher's* case were different from those of *McGhee's* case, at p. 459:

"Instead of a single risk factor known to have caused the injury, there is a list of factors which cannot be fully enumerated in the current state of medical science any one of which might have caused the injury. What the defendants did was not to enhance the risk

that the known factors would lead to injury but to add to the factors which might do so.”

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However, Mustill L.J. considered that this made no crucial difference, saying, at pp. 459–460:

“The root of the problem lies in the fact that, for reasons of policy, their Lordships’ House mitigated the rigour of the rule that the plaintiff must prove that the breach caused the loss, in the interests of achieving a result which was considered to be just. Given that this was a decision based on policy, rather than a chain of direct reasoning, the difficulty is to know whether a similar approach can properly be adopted in the different circumstances of the present case. After much hesitation I have come to the conclusion that it can. Reading all the speeches together, the principle applied by the House seems to me to amount to this. If it is an established fact that conduct of a particular kind creates a risk that injury will be caused to another or increases an existing risk that injury will ensue; and if the two parties stand in such a relationship that the one party owes a duty not to conduct himself in that way; and if the [one] party does conduct himself in that way; and if the other party does suffer injury of the kind to which the risk related; then the first party is taken to have caused the injury by his breach of duty, even though the existence and extent of the contribution made by the breach cannot be ascertained. If this is the right analysis, it seems to me that the shape taken by the enhancement of the risk ought not to be of crucial significance. In the *McGhee* case [1973] 1 W.L.R. 1, the conduct of the employers made it more likely that the pursuer would contract dermatitis, and he did contract dermatitis. Here, the conduct of those for whom the defendants are liable made it more likely that Martin would contract RLF, and he did contract RLF. If considerations of justice demanded that the pursuer succeed in the one case, I can see no reason why the plaintiff should not succeed in the other.”

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Though Sir Nicolas Browne-Wilkinson V.-C. dissented on this point, Glidewell L.J. agreed with Mustill L.J. that the *McGhee* principle applied, on similar grounds.

Mr. O’Brien, in his forceful and able argument, has submitted that, while the *McGhee* principle could have been successfully invoked by the plaintiff against the first defendant, if it had been necessary to do so, it has no application to his claim against the second defendant. I hope and think his essential submissions can be fairly summarised as follows. In both *McGhee’s case* [1973] 1 W.L.R. 1 and *Wilsher’s case* [1987] 2 W.L.R. 425 the court was concerned with hypothetical questions. In *McGhee’s case* the question was: “Would the employee not have contracted dermatitis if the employers had provided proper washing facilities?” In *Wilsher* the question was: “Would the plaintiff not have contacted RLF but for the administration of excess oxygen?” In both those cases medical science had not advanced sufficiently to enable those hypothetical questions to be answered. Where medical science is insufficiently advanced to enable the plaintiff to establish the causal link between the proved increase of risk (such as was proved in both those

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A cases) and the development of the condition of injury within the area of that risk, *McGhee's* case can be applied to bridge the evidential gap.

B In the present case, however, Mr. O'Brien submitted, the relevant question for the court is not a hypothetical one, but a straightforward question of historical fact: "Was the plaintiff rendered tetraplegic by the second collision or had he already been so rendered by the first collision?" As Lord Reid said in *Davies v. Taylor* [1974] A.C. 207, 212–213:

C "When the question is whether a certain thing is or is not true—whether a certain event did or did not happen—then the court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen. . . . You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can."

D In Mr. O'Brien's submission (and this I think is common ground) the *McGhee* principle does not absolve a judge from the duty of making a decision on a pure question of historical fact, if a decision is possible. There is no presumption of law that the plaintiff was not already tetraplegic at the moment of the second collision. In the present case, it was submitted, if the judge, having heard the evidence, was not able to say on the balance of probabilities that the second collision caused or materially contributed to the tetraplegia, he should have dismissed the claim of the plaintiff against the second defendant insofar as it was based on that tetraplegia; there is no evidential gap except in the sense that there always is in any case where a plaintiff fails to prove a past fact, on the balance of probabilities.

F I initially found these submissions persuasive. We are, I think, entitled and indeed perhaps bound to follow Mustill L.J.'s statement of the *McGhee* principle [1987] 2 W.L.R. 425, 459–460 as authoritative. That statement (rightly in my respectful opinion) is prefaced with the words:

G "If it is an established fact that conduct of a particular kind creates a risk that injury will be caused to another or increases an existing risk that injury will ensue . . ."

H In *McGhee's* case [1973] 1 W.L.R. 1 it was an established fact (established by the evidence on the balance of probabilities) that the employer's failure to provide washing facilities increased an existing risk that the employee would suffer dermatitis. In *Wilsher's* case it was an established fact (again established by the evidence on the balance of probabilities) that the two administrations of oxygen both created a risk that the plaintiff would suffer RLF and increased the existing risk that he would suffer from it. In the present case, I was particularly impressed by Mr. O'Brien's submission that the second defendant's conduct could only be said to have created a risk that the plaintiff would suffer tetraplegia or to have increased an existing risk that such injury would ensue, if it were presumed that he did not already suffer from it at the

moment of the second collision; and that there was no justification for any such presumption. I was doubtful whether the *McGhee* principle could have any application to a case where a plaintiff was injured on successive occasions by two tortfeasors, not acting in concert so as to render the second tortfeasor liable for damage which he could not positively, on the balance of probabilities, be shown to have caused.

In the end, however, on the particular facts of the present case, I have come to the conclusion that the *McGhee* principle was rightly applied for these short reasons. Mr. O'Brien's submissions focused attention on the moment of impact between the plaintiff and the second defendant's car. In my judgment, however, attention should be focused on the moment when the second defendant's negligent course of conduct began, that is to say (if my assessment of the facts is right) when he first saw the plaintiff on the pavement hurrying towards the crossing and failed to brake immediately. At that moment of time the plaintiff was a fit and able man. If this is the right way to look at the matter, applying the *McGhee* principle as explained by Mustill L.J., I have no difficulty in holding that the second defendant, by failing to brake when he should have done, created a risk that physical injury involving tetraplegia would be caused to the plaintiff or increased the existing risk that such injury would ensue. I can thus see no material distinction in the facts of the present case from those of *McGhee* or of *Wilsher*.

Broad considerations of justice may be potentially misleading guides where questions of causation arise. Nevertheless, I would add that, if considerations of broad justice demanded that the respective plaintiffs should succeed against the respective defendants in both *McGhee's* case [1973] 1 W.L.R. 1 and *Wilsher's* case [1987] 2 W.L.R. 425, I find it hard to see why the plaintiff in the present case should fail in his claim against the negligent second defendant merely because (through no lack of diligence in assembling the relevant evidence) he cannot positively prove that his collision with the second defendant's car (as opposed to the first defendant's car) caused or materially contributed to his tetraplegia. A conclusion to this effect would seem to me unjust to the first defendant, bearing in mind that it would leave him saddled with paying the entire bill of damages due to the plaintiff, while on the judge's and my own view of the facts the second defendant was no less culpable than the first defendant. It could also cause potential injustice to the plaintiff, in particular if the first defendant were to prove incapable of paying the full amount of the damages recoverable. In my view of the facts, both defendants, by their negligent conduct, began to expose the plaintiff to risk of physical injury more or less simultaneously. In my judgment, the mere fact that the first defendant happened to collide with the plaintiff a few seconds before the second defendant does not entitle the second defendant to avoid liability for the injury that ensued on the grounds that the plaintiff has not adduced sufficient evidence to prove his case against him. Nor, in my opinion, is the present case in its essentials distinguishable from *McGhee's* case and *Wilsher's* case merely because the evidential gap in this case is not solely due to an insufficient advance in medical science.

(4) *Housing alterations*

The plaintiff came out of hospital in May 1984. He then returned to his parents' house, where he occupied a bed-sitting room. This

A accommodation, however, was not entirely appropriate for the plaintiff's
disability. Certain works of alteration were proposed. The matter was
sent out to tender in July 1985 and in September 1985 the works were
begun. They were not completed at the date of trial; they were not in
fact finished until July 1986. They were carried out under the auspices of
the Surrey County Council, who paid the cost amounting to £20,580.
B The council, by virtue of the Health and Social Services and Social
Security Adjudications Act 1983, have to charge for these works and
requested that this item be included in the plaintiff's claim. While the
second defendant's counsel reserved the right to argue against it in a
higher court, the defendants' counsel at the trial accepted in principle
that the claim, if reasonable, would have been a valid one, but resisted
C it on the grounds that it was unreasonable. As I understand the position,
it was not suggested that the works of alteration would have been
inappropriate or that they would have represented unreasonable
expenditure if the plaintiff had intended to occupy the room on a
permanent or semi-permanent basis. The unreasonableness was said to
arise because it was the plaintiff's stated intention, if possible, to move
to a home of his own in one or two years' time and the additional cost
D of providing such a home was the subject of a separate head of claim.

An expert, Mr. Spencely, gave evidence as to the plaintiff's housing
needs. In the course of his evidence he discussed various options open
to the plaintiff. The first was to purchase a bungalow that met the
necessary criteria and to adapt it. The second was to negotiate with a
developer of a bungalow before it was built. The third was to purchase a
plot of land and build a purpose-designed bungalow. The cheapest
E option, in his view, was the second, the probable cost of negotiating
alterations being between £3,000 and £12,000; the difficulty about this
course was in finding a developer who was proposing to build a suitable
bungalow in the right place at the right time. Mr. Spencely's evidence
was that the probable cost of adapting a three-bedroomed bungalow for
F a tetraplegic would be about £24,500.

In the event, the judge included in the amount of damages awarded
both this sum of £24,500 and the sum of £20,580. Both defendants say
he erred in awarding the full amount of both these sums. Mr. Gage
submitted that the plaintiff did not reasonably need to convert two
properties to his needs and should not have been allowed the cost of
two conversions. As his primary submission Mr. O'Brien, on behalf of
G the second defendant, submitted that the judge ought to have found it
reasonable for the plaintiff to wait for the cheaper option of an estate
development during which a bungalow could be purchased and
modifications incorporated. On this basis his primary submission was
that the proper award in this context would have been £20,580, plus a
sum between £3,000 and £12,000. Alternatively, he submitted that, at
H the very least, the judge ought to have made some discount for
accelerated receipt of the sum of £24,500. He pointed out that at the
trial the plaintiff had given evidence to the effect that he wished to
move to his own home within a year.

It was clearly the duty of the plaintiff, like any other plaintiff, to
take reasonable steps to mitigate his damage. Correspondingly, he would
not have been entitled to debit the defendants with expenditure incurred

by him in connection with his housing arrangements which was unnecessary or unreasonable. Ordinarily, I would accept, a plaintiff could not expect to be allowed the cost of alterations to two houses. On the special facts of the present case, however, I do not think that it can be said that the plaintiff has failed to take reasonable steps to mitigate his damage or that he has incurred expenditure which was either unnecessary or unreasonable.

As to the £24,500, it was a readily foreseeable consequence of the defendants' negligence and the plaintiff's resulting injuries that, as soon as he would be in a position to do so, this young man would wish to purchase a house where he could lead an independent life and pay for it to be adapted to his special needs. The submission that some discount should be allowed for accelerated payment of this sum does not attract me. By the time when the expenditure has to be incurred, the disadvantageous effects of inflation on its amount are likely to counter-balance any advantages of accelerated payment.

As to the sum of £20,580, I think it might well have been said that the expenditure on the room in the plaintiff's parents' house was unnecessary or unreasonable if liability on the part of the defendants had already been admitted. However, as Mr. Stewart rightly stressed on his behalf, it had not. The plaintiff did not know whether he was going to recover anything in the action or whether in the foreseeable future he was going to be in a position to buy a house of his own. It might have been several years or more before this was possible. It was clearly sensible for him to take advantage of the room offered to him by his parents on being discharged from hospital. And I cannot see that, in all the circumstances, in the absence of any admission of liability by the defendants or any offer by them of an advance of money towards house purchase, it was unreasonable for him to arrange for the doing of the work required to make that room tolerably comfortable, having regard to his needs. I do not think he could reasonably have been expected to continue to live in discomfort in that room pending the decision at the trial. No evidence was called in an attempt to demonstrate what the plaintiff should reasonably have done instead of what in fact he did do. The defendants' notices of appeal raise in the alternative a submission that the judge should have made some allowance for the element of betterment to the plaintiff's parents' house, but this point has not been pursued.

I do not think that this ground of appeal has been established.

(5) *Contributory negligence, apportionment and contribution*

At the trial the plaintiff's counsel conceded that he was guilty of contributory negligence. In these circumstances, the judge, having decided issues (1), (2) and (3) above in favour of the plaintiff, had two further decisions to make, apart from those relating to the quantum of damage. First, he had to decide the extent to which the damage recoverable should be reduced by reason of the plaintiff's own fault under section 1(1) of the Law Reform (Contributory Negligence) Act 1945. Secondly, he had to decide how great a contribution in respect of the damage each defendant should recover from the other under section 1(1) of the Civil Liability (Contribution) Act 1978. The judge dealt very

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A briefly with the questions of contributory negligence and contribution
together in the passages cited or referred to by Sir Edward Eveleigh in
his judgment. As Sir Edward Eveleigh has said, the judge's finding
indicated that he considered each of the three parties to be equally at
fault. Section 1(1) of the Act of 1945 requires the damages recoverable
to be reduced "to such extent as the court thinks just and equitable,
B having regard to the claimant's share in the responsibility for the
damage." Counsel on behalf of each of the respective defendants has
submitted in effect that on any footing the plaintiff's share in the
responsibility for the damages was, on the facts, greater than that of his
client and the judge should have applied the subsection accordingly.

C I have considerable sympathy with this submission. There can be no
doubt that the plaintiff was, to a significant extent, the creator of his
own great misfortune. It was he who set in motion the whole train of
events, by carelessly and unnecessarily hurrying into a busy road at a
pelican crossing at a time when the lights were red for pedestrians and
green for traffic, and when a line of more or less stationary traffic in the
D nearside lane increased the risk of injury from traffic approaching from
the offside lane. In contrast, each of the defendants, as a result of the
plaintiff's negligence, found himself confronted by a quite unexpected
emergency. If hearing the case at the trial, I might well have held that
the plaintiff's share in the responsibility for his injuries must be regarded
as larger than that of either of the defendants. However, this court is
always slow to interfere with the decision of a judge of first instance on
a question of apportionment such as this and, subject to what is said
below, I see no sufficient grounds to interfere with the decision of the
E judge in this context.

Nevertheless, I do not think that the form of order actually made by
the judge gave effect to his clear conclusion that the plaintiff's
responsibility for the injury was no less (though no greater) than that of
either of the defendants. If only one of the defendants had appeared
before him, this conclusion must, more or less inevitably, have led to a
F ruling that the damages recoverable by the plaintiff against that defendant
should be reduced by 50 per cent. (not $33\frac{1}{3}$ per cent.) under section 1(1)
of the Act of 1945. I can see no possible grounds in principle or logic
why the amount of the reduction should be less, merely because two
defendants were parties to the action instead of one. One the issue of
contributory negligence, the judge, with respect to him, was, in my
opinion, led into error by considering the share of the responsibility of
G the plaintiff for his injury vis-à-vis the defendants *conjunctively* instead
of individually; "that share can only be estimated by weighing his fault
... against that of *each* defendant": see *The Miraflores and The*
Abadesa [1967] 1 A.C. 826, *per* Lord Pearce at p. 846. (The emphasis is
mine.) If the judge had taken the latter course, it seems clear that he
would have regarded the responsibility of the plaintiff vis-à-vis each
H defendant as being 50 per cent.

Section 2(1) of the Act of 1978 requires that, as between the two
defendants, the amounts of their respective contributions "shall be such
as may be found by the court to be just and equitable having regard to
the extent of that person's responsibility for the damage in question." I
see no sufficient grounds for differing from the judge's conclusion that
the responsibility of each of the two defendants for that part of the
injury for which the plaintiff was not responsible was equal.

I therefore agree that the appeal of each of the defendants should be allowed on the limited issue of apportionment, and that the judge's order should be varied by giving judgment for the plaintiff against each defendant for 50 per cent. (instead of two-thirds) of the plaintiff's claim and by ordering contribution between the defendants on a fifty-fifty basis.

*Appeal of each defendant allowed on
the limited issue of apportionment.
Plaintiff to have judgment against
each defendant for 50 per cent. of
his claim, the contribution to be on
a fifty/fifty basis.
Leave to all parties to appeal.*

Solicitors: Joynson-Hicks; Barlow Lyde & Gilbert; Underwood & Co.

M. F.

3 W.L.R.

A

[QUEEN'S BENCH DIVISION]

REGINA v. INSPECTOR OF TAXES, READING,
Ex parte FULFORD-DOBSON

1987 Feb. 23, 24, 25, 26

McNeill J.

B

Revenue—Capital gains tax—Tax avoidance—Extra-statutory concession—Arrangement for transfer of farm to taxpayer—Taxpayer taking up residence abroad—Sale of farm—Taxpayer's claim to concession for non-residents to charge to capital gains tax—Whether concession intra vires—Whether concession available where arrangement made for purpose of reducing statutory liability to tax

C

In 1980, the taxpayer's wife decided to sell a farm she had inherited in 1977 and, on 18 August 1980, the taxpayer entered into an agreement whereby he would work and reside in Germany. For the purpose of taking advantage of the extra-statutory concession D2, which granted substantial relief to charge to capital gains tax on a disposal made after a taxpayer ceased to be ordinarily resident in the United Kingdom, the wife by deed of gift transferred the farm to the taxpayer on 29 August. On 13 September the taxpayer left the United Kingdom for Germany and on 17 September the farm was sold at auction. The taxpayer invested the proceeds of sale outside the United Kingdom. The inspector assessed the taxpayer to the full amount of tax in reliance on the "rubric," set out at the beginning of the booklet "Extra-Statutory Concessions in Operation at 8 August 1980," that concessions therein set out, which included concession D2, would not be applied where there was an attempt to use them for tax avoidance purposes. Correspondence followed but the inspector made the assessment for the full amount of tax.

D

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On the taxpayer's application for judicial review:—

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Held, dismissing the application, (1) that, since extra-statutory concession D2 had been published in the booklet, there was nothing secretive about the concession that prevented it from being evenly applied and, since its provisions fell well within the concept of good management and of administrative common sense, it was *intra vires*; that there was nothing improper in limiting the terms of the concession by a separate provision and, since the rubric itself was not discriminatory and could be applied generally to all who came within its terms, all the concessions in the booklet were limited by the terms of the rubric so that they could only be applied in circumstances where there had been no attempt to use a concession for the purpose of avoiding tax (post, pp. 286E–H, 290G–H).

G

Vestey v. Inland Revenue Commissioners (Nos. 1 and 2) [1980] A.C. 1148, H.L.(E.) distinguished.

Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617, H.L.(E.) considered.

H

(2) That the transfer of the farm from the wife to the husband was a transaction that lacked any element of bounty and it had been made for the sole purpose of taking advantage of concession D2 in circumstances where the taxpayer had neither suffered a reduction in income nor incurred expenditure that would qualify for a reduction in liability for tax; that the arrangement whereby the taxpayer left the United Kingdom after the farm had been transferred to him but before its sale was an arrangement made solely for the purpose of diminishing

Reg. v. Inspector of Taxes, Ex p. Fulford-Dobson (Q.B.D.)**[1987]**

the amount of tax chargeable on the profits of sale and, therefore, it was an arrangement for tax avoidance within the meaning of the rubric and, accordingly, the provisions of concession D2 did not apply to the profits on the sale of the farms (post, pp. 289D—290A).

Inland Revenue Commissioners v. Duke of Westminster [1936] A.C. 1, H.L.(E.); *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300, H.L.(E.) and *Commissioner of Inland Revenue v. Challenge Corporation Ltd.* [1987] A.C. 155, P.C. considered.

(3) That, although the taxpayer had no right of appeal against the revenue's decision that the extra-statutory concession was not applicable, the taxpayer had been given the opportunity to make submissions before the assessment was made; and that, therefore, there were no grounds on which the assessment could be criticised and the full amount of tax chargeable on the transaction was payable (post, p. 290E-G).

The following cases are referred to in the judgment:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Chief Constable of the North Wales Police v. Evans [1982] 1 W.L.R. 1155; [1982] 3 All E.R. 141, H.L.(E.)

Commissioner of Inland Revenue v. Challenge Corporation Ltd. [1987] A.C. 155; [1987] 2 W.L.R. 24, P.C.

Congreve v. Inland Revenue Commissioners [1948] 1 All E.R. 948, H.L.(E.)

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1985] I.C.R. 14; [1984] 3 All E.R. 935, H.L.(E.)

Furniss v. Dawson [1984] A.C. 474; [1984] 2 W.L.R. 226; [1984] 1 All E.R. 530, H.L.(E.)

H.T.V. Ltd. v. Price Commission [1976] I.C.R. 170, C.A.

Inland Revenue Commissioners v. Burmah Oil Co. Ltd. (1981) 54 T.C. 200, H.L.(Sc.)

Inland Revenue Commissioners v. Duke of Westminster [1936] A.C. 1, H.L.(E.)

Ramsay (W.T.) Ltd. v. Inland Revenue Commissioners [1982] A.C. 300; [1981] 2 W.L.R. 449; [1981] 1 All E.R. 865, H.L.(E.)

Reg. v. Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 Q.B. 864; [1967] 3 W.L.R. 348; [1967] 2 All E.R. 770, D.C.

Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.)

Reg. v. Inland Revenue Commissioners, Ex parte Preston [1985] A.C. 835; [1985] 2 W.L.R. 836; [1985] 2 All E.R. 327, H.L.(E.)

Vestey v. Inland Revenue Commissioners [1979] Ch. 177; [1978] 2 W.L.R. 136; [1977] 3 All E.R. 1073; [1980] A.C. 1148; [1979] 3 W.L.R. 915; [1979] 3 All E.R. 976, H.L.(E.)

Vestey v. Inland Revenue Commissioners (No. 2) [1979] Ch. 198; [1978] 3 W.L.R. 693; [1979] 2 All E.R. 225; [1980] A.C. 1148; [1979] 3 W.L.R. 915; [1979] 3 All E.R. 976, H.L.(E.)

The following additional cases were cited in argument:

Chinn v. Hochstrasser [1981] A.C. 533; [1981] 2 W.L.R. 14; [1981] 1 All E.R. 189, H.L.(E.)

Reg. v. Inspector of Taxes, Ex parte Lansing Bagnall Ltd. [1986] S.T.C. 453, C.A.

Reg. v. Secretary of State for the Environment, Ex parte Nottinghamshire County Council [1986] A.C. 240; [1986] 2 W.L.R. 1; [1986] 1 All E.R. 199, H.L.(E.)

3 W.L.R. Reg. v. Inspector of Taxes, Ex p. Fulford-Dobson (Q.B.D.)

A APPLICATION for judicial review.

B The wife of the taxpayer, Roger Fulford-Dobson, transferred to him a farm she owned just before he left the United Kingdom to work and reside in Germany. The farm was sold by auction a few days after he had taken up residence in Germany and he sought to take advantage of extra-statutory concession D2 published in the booklet, "Extra-Statutory Concessions in Operation at 8 August 1980" (I.R.1 (1980)), to reduce the amount of capital gains tax chargeable on the profit of the sale. The Inspector of Taxes for Reading District 5 refused to grant the concession and by letter dated 19 October 1984 to the taxpayer's accountants, he conveyed the decision that extra-statutory concession D2 would not be applied on the disposal by the taxpayer of the farm.

C The taxpayer applied for judicial review and the remedy of an order of certiorari to quash the assessment to capital gains tax dated 20 December 1983. He also sought a declaration that (a) in the operation of the system of extra-statutory concessions the Board of Inland Revenue were not entitled to discriminate between taxpayers who brought themselves within the terms of the relief; (b) every taxpayer was entitled to avail himself of all lawful means to minimise the burden of tax on himself and to enter into any legally effective transaction for that purpose; (c) unless specifically authorised by statute the board might not impeach such transactions on the grounds of their motive; and (d) the term "tax avoidance" was not applicable to lawful tax planning effected by transactions which were not fictitious or artificial.

E The grounds on which relief was sought were that (1) the system of extra-statutory concessions existed outside the legal framework of taxation authorised by Parliament and could only be controlled through the exercise of judicial review; (2) the decision of the board was in breach of natural justice because it was arrived at from information derived by inquisitorial processes which gave the taxpayer no opportunity to put his case to the board and the board was acting as judge in its own cause; (3) the arbitrary operation of the extra-statutory concessions system by the revenue discriminated unfairly between taxpayers and constituted an abuse of power; (4) it was in the public interest that clear guidelines should be laid down to control quasi-judicial powers exercised without statutory authority by the revenue; and (5) the delay in making the application was due to the necessity to consider alternative courses of action and taking legal advice thereon and the taxpayer's illness, and consequent matrimonial upheaval.

G The taxpayer died on 26 April 1986 and, by leave of the court, the executors of his will were substituted as applicants to the proceedings.

The facts are stated in the judgment.

Ian Ferrier for the applicant executors.

Alan Moses for the Crown.

H McNEILL J. On 9 July 1985, Mr. Roger Fulford-Dobson was given leave to apply for judicial review by way of certiorari to quash an assessment upon him to capital gains tax dated 20 December 1983 and for associated declaratory relief.

On 26 April 1986, Mr. Fulford-Dobson died. Prior to the hearing of the application I gave leave ex parte for the executors appointed in his will to be substituted as applicants, in the interests of the estate. The

assessment was in the sum of £59,000 upon chargeable gains of £200,000. No issue arises before me as to figures. A

The real meat in the application, however, lies behind the assessment. What is really challenged is the refusal of the Board of Inland Revenue to extend to Mr. Fulford-Dobson an extra-statutory concession. If it had been extended to him, he would have been chargeable only on a much smaller sum, with tax payable of £3,885. The extra-statutory concession in point is D2 which is set out in the booklet, Extra-Statutory Concessions in Operation at 8 August 1980 (I.R.1 (1980)), the relevant part of which reads: B

“When a person leaves the United Kingdom and is treated on his departure as not resident and not ordinarily resident in the United Kingdom he is not charged to capital gains tax on gains accruing to him from disposals made after the date of his departure.” C

The statutory provision to which this concession relates is section 2 of the Capital Gains Tax Act 1979 which reads:

“(1) Subject to any exceptions provided by this Act,”—and I interpolate that that is not relevant here—“a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom . . .” D

By section 155(1) “year of assessment” in relation to capital gains tax means “a year beginning on 6 April and ending on 5 April in the following calendar year . . .”

In the event which happened, which I shall have to describe later in detail, it is common ground between the parties (a) that until 13 September 1980 Mr. Fulford-Dobson was resident and ordinarily resident in the United Kingdom, that is to say, within the year of assessment 1980–81; and (b) that from 13 September 1980 he was not resident or ordinarily resident in the United Kingdom. Accordingly, the assessment, if not quashed, is not open to the appeal procedure provided by the tax legislation. E

Concession D2, as I have said, is to be found in the booklet “Extra-Statutory Concessions in Operation at 8 August 1980.” Inside the front cover of the booklet the following appears: F

“The concessions described within are of general application, but it must be borne in mind that in a particular case there may be special circumstances which will require to be taken into account in considering the application of the concession. A concession will not be given in any case where an attempt is made to use it for tax avoidance.” G

It is the latter sentence which is central to the argument. The passage itself has for convenience during the hearing been called the “rubric” and I adopt that word. H

The assessment was made because the board concluded that what was done was to attempt to use the concession for tax avoidance. The applicants contend that what was done was legitimate tax planning. Before I turn to the facts and the law, two other matters can be got out of the way. First, so far as declaratory relief is concerned, Mr. Ferrier for the applicants concedes that he is not entitled to (a), (b) and (c) which are in essence so worded as to invite the court to determine

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A matters which are not factually established and in a sense to give
"academic" decisions, and further that (d) is decided one way or the
other by the decision on certiorari. Secondly, Mr. Ferrier made it plain
that he mounted no challenge to the decision of the board on what in
now accepted legal shorthand are called "*Wednesbury* principles: Lord
Diplock's irrationality:" see *Associated Provincial Picture Houses Ltd. v.*
B *Wednesbury Corporation* [1948] 1 K.B. 223 and *Council of Civil Service*
Unions v. Minister for the Civil Service [1985] A.C. 374, 410.

C The facts are short and simple. Mr. Fulford-Dobson was married. He
had been in the Merchant Navy, but early in 1980 he was without
employment. In 1977 his wife had inherited a property called "Hardings
Farm." During 1980 she was considering the sale of the property. A
letter from accountants acting, it appears, for both Mr. and Mrs.
Fulford-Dobson, dated 7 December 1983 to H.M. Inspector of Taxes
makes it clear that the proposed sale had generated "a vast amount of
correspondence," and involved considerable organisation, in relation, for
example, to contracts of employment of farm workers, obtaining vacant
possession of farm cottages, termination of grazing rights, investigation
of rights of way and the like.

D During the same period in 1980, Mr. Fulford-Dobson was negotiating
employment with a German firm of publishers at Herrsching. His
contract of employment was concluded and signed on 18 August 1980.
He was thereby required to work and reside in Herrsching and to
commence work on Monday 15 September 1980. On 29 August 1980,
that is, 11 days after the contract of employment, Mrs. Fulford-Dobson
transferred Hardings Farm to her husband by deed of gift. On 13
E September he left for Germany. On 17 September Hardings Farm was
sold by auction.

In his affidavit of 21 May 1985, Mr. Fulford-Dobson was wholly
frank. He said:

F "The purpose of the gift by my wife to me was to avail ourselves of
concession D2 and to provide me with funds which I could invest
outside the United Kingdom during my employment abroad without
liability to United Kingdom tax."

A similar statement appears in the accountant's letter to the inspector
of taxes of 23 May 1984, three paragraphs of which I must read:

G "There were two reasons for the transfer of Hardings Farm by Mrs.
Fulford-Dobson to her husband. The first and most important was
that it was realised that Mr. Fulford-Dobson would not be liable to
U.K. income tax on foreign source income during his period of non-
residence. Investing the proceeds abroad thus presented them, in
common with other non-residents, with the opportunity to add to
their wealth bases taking advantage of the high rates of interest
payable worldwide at that time. The other reason was to ensure
H that, when the sale took place, it would be outside the scope of
capital gains tax by virtue of Mr. Fulford-Dobson's foreign
employment and the fact that he would be not resident and not
ordinarily resident for U.K. tax purposes.

"As your papers will show, until 15 September 1980 Mr. Fulford-
Dobson had been unemployed for some time. However the family's
finances were such that he had been under pressure to obtain
gainful employment and negotiations for his German employment

commenced early in 1980 (see enclosed copy of employer's letter dated 20 August 1980).

"It was whilst negotiations for his overseas employment were being concluded that the opportunity for avoiding capital gains tax on the sale of Hardings Farm was recognised. Naturally, following the principles laid down in the *Duke of Westminster* case [1936] A.C. 1 our clients transferred ownership of the farm to Mr. Fulford-Dobson on 29 August 1980."

The inspector's response was by letter dated 19 October 1984. The major part of that letter reads:

"Your client's contention is that no gain is chargeable for the year ended 5 April 1981 (other than the small agreed gain of £3,885) since at the date of disposal of Hardings Farm he had left the United Kingdom. You will of course be aware of the fact that to 29 August 1980 Mrs. Fulford-Dobson owned the farm and on that date she gifted it to her husband. It is accepted by yourself in your letter of 23 May 1984 that one of the two reasons for the transfer of Hardings Farm from Mrs. Fulford-Dobson to her husband was 'to ensure that when the sale took place it would be outside the scope of capital gains tax by virtue of Mr. Fulford-Dobson's foreign employment and the fact that he would be not resident and not ordinarily resident for U.K. tax purposes.' Of course, your contention that Mr. Fulford-Dobson would be outside the scope of U.K. capital gains tax is based on the applicability of extra-statutory concession D2 operated by the Board of Inland Revenue. The application of all extra-statutory concessions is subject to the general condition which is printed on the inside cover of the booklet I.R.1 and reads . . ."

The letter then recites the passages which I have already read. It continues:

"I am instructed to inform you that in the particular circumstances of this case and in the light of the transactions which your client and his wife entered into, the Board of Inland Revenue do not consider this condition satisfied. The extra-statutory concession D2 will not be applied with the result that Mr. Fulford-Dobson is chargeable on the gain which accrued on the disposal of Hardings Farm under the terms of section 2 of the Capital Gains Tax Act 1979.

"I would therefore ask for the detailed computations of gain arising on the disposal of the farm and your agreement subject to my acceptance of the figures that the appeal should be determined in that figure. I should mention, perhaps, that if agreement of the gain is not possible, the appeal will have to be listed for hearing by the commissioners and of course, my contentions before the commissioners will be based on the terms of section 2 of the Capital Gains Tax Act 1979, the commissioners not being able to concern themselves with the application of an extra-statutory concession."

The decision so conveyed had been reached by Mr. J. P. B. Bryce, an assistant secretary employed by the Board of Inland Revenue in the Policy Division, and dealing with taxes on capital gains. At paragraphs 6 to 9 of his affidavit, he deposes:

"6. In October 1984 I was required to decide whether or not the applicant should benefit from the extra-statutory concession D2

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A referred to in his affidavit. There was before me at this stage the
applicant's tax file and also the tax file of Mrs. Fulford-Dobson. In
addition there was before me the correspondence making up the
bundle referred to as MTC1 in Mr. Cooper's affidavit, save for
the correspondence between the accountants and the National
Westminster Bank. 7. All extra-statutory concessions, including
extra-statutory concession D2, have to be construed in accordance
B with the warning published on the inside of the extra-statutory
concession booklet. . . ." Again, I have read the passage which has
been called the "rubric." The affidavit continues: "Accordingly it is
made clear to anyone who seeks to take advantage of a concession
that it will not be available where an attempt is made to use it for
tax avoidance. 8. After the protective assessment had been raised
C further correspondence took place between the accountants and the
revenue. . . . (See MTC1.) On 19 April 1984 the inspector
specifically asked for the reasons for the gift by Mrs. Fulford-
Dobson. The reasons were given in a letter written on behalf of the
applicant dated 23 May 1984." That is the letter which I have just
read. "I formed the view that the letter made it clear that the
reason for the gift was for the purpose of avoiding capital gains tax
D upon the sale of the farm. The gift combined with the use of a
concession was a scheme designed to avoid tax. I also took the view
that the gift coupled with the attempt to use the concession came
within the prohibition set out in the warning notice. As must have
been apparent to the applicant, or at least the accountants, the
concession would not be granted to a taxpayer if an attempt were
made to use it for tax avoidance. 9. The final decision not to grant
E the concession was only made after careful consideration of all the
facts and matters which the applicant's advisers chose to lay before
the revenue in letters passing between them and the revenue.
Furthermore between the receipt of the letter from the accountants
dated 23 May 1984 and the decision of 19 October 1984, discussion
took place between members of Policy and Technical Divisions of
F the Board and the Solicitor to the Board."

That last paragraph which I have read went more to the possibility at
that stage of a *Wednesbury* challenge being directed at the board, but,
as I have said, Mr. Ferrier for the applicants expressly abandons any
such contention.

G I should say for completeness that in paragraph 6 of that affidavit the
deponent made reference to correspondence between the accountants
and the National Westminster Bank Plc. The whole of the correspondence
now exhibited by Mr. Cooper makes it clear that there was
correspondence and the passing of advice between the bank and the
accountants, and that in the course of the letters from the assistant
H manager of the trust and tax services estate planning unit of the bank
there are references to the law, but it is noteworthy that nowhere in the
correspondence, either from the bankers or from the accountants, is
there any reference to the rubric or the condition imposed on the
concessions, including concession D2.

Mr. Ferrier conceded that if the applicants could not bring the case
within the concession the assessment could not be challenged (except to
the extent that as it was a "protective" or "estimated" assessment the
figures might require adjustment). However, he sought to attack the

legal validity of extra-statutory concessions but contended that, if valid, a taxpayer could not be deprived of a concession otherwise appropriate by the words on the inner cover of the booklet. These, he said, were, like the concessions themselves, unauthorised by statute and the inclusion of them was an unlawful assumption of authority by the board. Further, he said, if the words were to be read as part of each concession they were discriminatory in the sense that they did not operate evenhandedly to all taxpayers but only to a selected number of taxpayers. They did not, he said, apply indifferently (using the word used by Walton J. in *Vestey v. Inland Revenue Commissioners (No. 2)* [1979] Ch. 198, 204B, to which I shall return later) to all who fall, or who can bring themselves, within the scope of the concession. A B

His second submission was that if the code, being the whole wording of the booklet, was *intra vires* the board was wrong in law in raising this assessment. The facts did not disclose an attempt to use the concession for “tax avoidance” as those words are properly to be understood in law. Thirdly, he said that the procedure adopted by the board in reaching its decision was unfair and in breach of natural justice. The board was, he argued, guilty of procedural impropriety. C

Mr. Ferrier developed his first submission by reference to the decision of the House of Lords in *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617. That decision in essence turned on the *locus standi* of the federation to challenge the failure to collect tax from the so-called Fleet Street casuals, but their Lordships took the view that the point should not have been decided as a preliminary issue: Lord Diplock, for example, concluded that it has not even been shown that the board did anything *ultra vires* or unlawful. D E

The federation’s case, in part at least, was based on the statutory obligation on the revenue to “collect and cause to be collected every part of the inland revenue:” see section 13 of the Inland Revenue Regulation Act 1890. The complaint was that the revenue by a so-called, but according to Lord Wilberforce inaccurately called, “amnesty” decided not to investigate tax lost in years before 1978–79, and this, it was contended by the federation, was unlawful. The revenue in reply claimed to be making “a special arrangement” for the collection of tax pursuant to the Income Tax (Employments) Regulations 1973 (S.I. 1973 No. 334). Lord Wilberforce regarded what was done as falling within the care and management of the revenue within section 1 of the Taxes Management Act 1970. Lord Diplock, too, regarded it as a managerial function. He said, at p. 637: F G

“I do not doubt, however, and I do not understand any of your Lordships to doubt, that if it were established that the board were proposing to exercise or to refrain from exercising its powers not for reasons of ‘good management’ but for some extraneous or ulterior reason, that action or inaction of the board would be *ultra vires* and would be a proper matter for judicial review if it were brought to the attention of the court by an applicant with ‘a sufficient interest’ in having the board compelled to observe the law.” H

A little later he continued:

“It is enough for me to say that I agree with my noble and learned friend that no court considering this evidence could avoid reaching the conclusion that the board and its inspector were acting solely for

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‘good management’ reasons and in the lawful exercise of the discretion which the statutes confer on them.”

Of their Lordships, only Lord Scarman referred to *Vestey v. Inland Revenue Commissioners* [1980] A.C. 1148, and he only on the question of fairness. It is I think plain that to “dispense” with the obligation and power to collect back tax from 4,000 to 5,000 casuals did not attract the criticism that extra-statutory concessions attracted in the *Vestey* case.

The question of fairness was further considered by their Lordships in *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835. Lord Scarman said, at p. 851g: “My third proposition is that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power.” He referred to *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, and to his own judgment in *H.T.V. Ltd. v. Price Commission* [1976] I.C.R. 170.

Mr. Ferrier recognised the force of some later words of Lord Scarman in *Ex parte Preston* where he said, at p. 852:

“I accept that the court cannot in the absence of special circumstances decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. But circumstances can arise when it would be unjust, because it would be unfair to the taxpayer, even to initiate action under Part XVII of the Act of 1970”—that is to say, the part dealing with tax avoidance.

In *Ex parte Preston* the taxpayer complained that having withdrawn certain claims for relief and paid certain tax on the strength of information from an inspector that he, the inspector, did not intend to raise any further inquiries on his tax affairs, the revenue could not reopen the same matter and request further information, but he failed on the facts to get judicial review of the request. It could only be if there was conduct equivalent to breach of contract or breach of representation that the taxpayer could show abuse or excess of jurisdiction.

Mr. Ferrier said that he relied on the formulation of the remedy by Lord Templeman in *Ex parte Preston*, at p. 862c, and that there were here special circumstances which enabled the court to interfere. He reminded me of Lord Templeman’s words, at p. 864e: “the commissioners themselves must bear in mind that their primary duty is to collect, not to forgive, taxes.”

Mr. Ferrier relied strongly on the passages in the *Vestey* cases critical of extra-statutory concessions: see the much quoted words of Walton J. in *Vestey v. Inland Revenue Commissioners (No. 2)* [1979] Ch. 198, 203–204. Walton J.’s criticism in *Vestey v. Inland Revenue Commissioners* [1979] Ch. 177, 197, received the approval of Lord Wilberforce in *Vestey v. Inland Revenue Commissioners (Nos. 1 and 2)* [1980] A.C. 1148, 1173: and see Lord Edmund-Davies, at pp. 1194 et seq., and he expressed the view that it was high time to consider the basis of the claim by the executive to make extra-statutory concessions.

It is not difficult to understand their Lordships’ concern in that case. The discretion said to be exercisable there was to assess each of the resident beneficiaries of an overseas discretionary trust on the basis that each was the recipient of the whole of the appointed sums. Secondly, that was said to be consistent with the earlier decision of the House of

Lords in *Congreve v. Inland Revenue Commissioners* [1948] 1 All E.R. 948, which, to reach the result which their Lordships' desired, had to be overruled. A

It is, however, to be noted that although extra-statutory concessions were criticised, Walton J. appears to have accepted that if there was some published code of concessions which applied indifferently to all who fall or can bring themselves within its scope the position might be different. There was no such code in *Vestey's* case. Lord Edmund-Davies [1980] A.C. 1148, 1194 cited this passage of Walton J. with apparent approval. Lord Wilberforce, at p. 1173A, appears to have accepted, as in the Fleet Street casuals case, that the revenue could act with "administrative common sense." B

Despite the strong words of their Lordships, extra-statutory concessions have persisted. Parliament has not sought to legislate to provide for concessions, despite the words of Scott L.J. in *Absalom v. Talbot* [1943] 1 All E.R. 589, 598, cited by Lord Edmund-Davies in *Vestey's* case [1980] A.C. 1148, 1195: C

"The fact that such extra-legal concessions have to be made to avoid unjust hardships is conclusive that there is something wrong with the legislation." D

Mr. Ferrier argued that the existence of concession D2 meant that section 2 of the Capital Gains Tax Act 1979 was unworkable. The reality was, he said, that the assessment was made not under the section but under the concession as limited by the rubric. His difficulty was that if he successfully established that the concession itself was unlawful, it is unnecessary to consider the rubric; it falls with the concession. The taxpayer is then left with section 2 and in no way can Mr. Ferrier argue that he would not be caught by that. Nor am I persuaded that the rubric is discriminatory. It is, in terms, of general application to all those who come within its words. This, of course, does not decide what those words mean; that is the next question to be answered. E

So far as the argument based on *Vestey's* case is concerned, I am not prepared to hold that concession D2 is unlawful. I consider it as falling well within the concept of good management or of administrative common sense, as those words were used by their Lordships and already cited by me, and they are within the proper exercise of managerial discretion. F

There is really no additional argument of any substance advanced by Mr. Ferrier to isolate the rubric from the concession to say that the concession is lawful but the rubric unlawful. In my judgment, the rubric is effectively part of each concession. It loses none of its force by being given a special and early place in the booklet: indeed, perhaps, it gains force from that. And, indeed, why should a taxpayer have the advantage of a concession when he is attempting to use it for tax avoidance? That, of course, begs the question, what is "tax avoidance" in this context? G

Mr. Ferrier relied strongly on the decision of the House of Lords in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1. The issue in that case was whether arrangements entered into between the Duke and his servants were covenants providing for payments to those servants or contracts of employment providing for their remuneration. If the former, the payments were deductible for the purposes of surtax: not otherwise. Their Lordships, by a majority, held the documents on their proper construction to be covenants. It was in H

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A that case that Lord Tomlin, at p. 19, delivered the much quoted sentence: "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be." I comment that the words "if he can" are sometimes conveniently forgotten. So, said Mr. Ferrier, tax planning to reduce the incidence of tax is a legitimate exercise. I accept that as a proposition. The question is whether it was on the facts here legitimate.

B Mr. Ferrier invited my attention to the distinction drawn between tax evasion and tax avoidance in *Whiteman and Wheatcroft on Income Tax*, 2nd ed. (1976), para. 1-15. He then took me to a line of authority which, far from giving to the "supposed doctrine" that in revenue cases the court looks at the substance of the matter, ignoring the legal position, the quietus for which Lord Tomlin hoped, made it clear that
C the court will now look at the substance of transactions to see what the reality was. The fact that the motive for a transaction may be to avoid tax does not invalidate the transaction, unless a statute so provides: *per* Lord Wilberforce in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300, 323E. His Lordship there went on to consider the *Duke of Westminster's* case. If a transaction is genuine the court cannot go behind it to look at some supposed underlying substance, but if there is
D a composite transaction it can look to see if there is some underlying purpose. So too in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* (1981) 54 T.C. 200 and *Furniss v. Dawson* [1984] A.C. 474.

E In the former of those cases the principle was formulated by Lord Diplock and adopted expressly by Lord Brightman in the latter. There must be a pre-ordained series of transactions. It may or may not include the achievement of a legitimate commercial object. There must be steps inserted which have no commercial purpose apart from the avoidance of tax. If these conditions exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result after they are disregarded. These cases are far from the present case. This was, says Mr. Ferrier, a genuine gift from wife to husband; a real transaction between living people.

F Finally, he invited my attention to the recent decision of the Privy Council in *Commissioner of Inland Revenue v. Challenge Corporation Ltd.* [1987] A.C. 155. The appeal was from New Zealand where the taxing statute provided that every arrangement, the purpose or effect of which was tax avoidance, was void against the commissioner. "Tax avoidance" was defined in section 99(1) of the New Zealand Income Tax Act 1976 in the following terms:
G

" 'Tax avoidance' includes—(a) Directly or indirectly altering the incidence of any income tax: (b) Directly or indirectly relieving any person from liability to pay income tax: (c) Directly or indirectly avoiding, reducing, or postponing any liability to income tax."

H It is right also that I should read further on in section 99 to make the point clear. Subsection (2) provides:

"Every arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the commissioner for income tax purposes if and to the extent that, directly or indirectly,—(a) Its purpose or effect is tax avoidance; . . ."

I need not read the remainder of the section.

Lord Templeman distinguished tax evasion, tax avoidance, and what was called tax mitigation. He said, at p. 167: A

“Tax evasion also can be dismissed. Evasion occurs when the commissioner is not informed of all the facts relevant to an assessment of tax. Innocent evasion may lead to a re-assessment. Fraudulent evasion may lead to a criminal prosecution as well as re-assessment. In the present case the taxpayer fulfilled its duty to inform the commissioner of all the relevant facts.” B

Nobody suggests here that there is any question of tax evasion. He continued:

“The material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax.” He then quoted the sentence of Lord Tomlin in *Duke of Westminster's* case [1936] A.C. 1, 19, that I have already read. In that case however the distinction between tax mitigation and tax avoidance was neither considered nor applied. Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an ‘arrangement’ but from the reduction of income which he accepts or the expenditure which he incurs. Thus when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant.” C
D
E

Mr. Ferrier seeks to bring himself within that and submits that this was, as I have said, tax planning for the purpose and with the intended effect of mitigating capital gains tax. Lord Templeman continued, at p. 168:

“Section 99 does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.” F

Lord Templeman said, at p. 169: G

“In an arrangement of tax avoidance the financial position of the taxpayer is unaffected (save for the costs of devising and implementing the arrangement) and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering that reduction in income, loss or expenditure which other taxpayers suffer and which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax. In *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1 the Duke avoided tax by reducing his assessable income without reducing his income by the method of substituting an annuity for a wage payable to his gardener. So long as the gardener continued to work, the Duke gained a tax advantage over other taxpayers who paid wages to their working gardeners.” H

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A Mr. Moses submitted for the revenue that the rubric was to be construed as part of the concession, and I have already indicated that I so regard it. As I have said before the rubric is part of each concession and is so to be read. I am reinforced in that view by his submission that if they give a concession the commissioners are entitled to take reasonable steps to prevent the abuse of the concession. They must act fairly and evenhandedly in the administration of the scheme, but there is no abuse or excess of power if they do what they have done here. It is not without significance that neither Mr. Fulford-Dobson in his affidavit, nor the accountants in the correspondence ever suggest unfair treatment or discrimination.

C As to tax avoidance, Mr. Moses submitted, Mr. Fulford-Dobson and the accountants in the passages I have already read from the affidavit and the correspondence make it abundantly clear that the purpose and intent of what was done was to avoid tax. What the Duke of Westminster did was, according to Lord Templeman, tax avoidance. Questions have been raised as to whether that case would now be decided in the same way. Whatever the answer to those questions be, Mrs. Fulford-Dobson is very much, said Mr. Moses, in the position of the Duke. If she had not given Hardings Farm to her husband and the auction had continued while it was still in her name, she would undoubtedly have been chargeable to tax on her gain. The clear inference from the papers was that that was in contemplation until her husband was offered the job in Germany. Then, on advice, things moved quickly. Although Lord Templeman uses the word "arrangement" repeatedly in the course of his speech, the word "arrangement" clearly encompasses both the complicated arrangements described, for example, in *W.T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300 and *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.*, 54 T.C. 200 cases, but also the very simple arrangement here, that is to say, the gift to the husband, the departure of the husband to Germany, and the sale four days afterwards.

F The question, I am bound to say, remains in my mind: did the advisors recognise the significance of the rubric? The trigger to the whole arrangement or operation, misconceived as I am now satisfied it was, was the prospect of saving the capital gains tax on the sale of the farm once the husband was to become non-resident before the date of the auction. That was the tax advantage which could not otherwise be secured. The gift, as Mr. Moses put it, lacked all elements of bounty. It was part of a scheme devised by the accountants and the bankers to avoid tax.

G It seems to be plain as a pikestaff upon the facts that this was tax avoidance as that term is used in the rubric. The taxpayer here, Mr. Fulford-Dobson, suffered no reduction in income, suffered no loss, incurred no expenditure (save his professional advisers' fees and expenses), nothing which, in Lord Templeman's words on the legislation there in point, Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability for tax. I repeat that from the passage I have already read at p. 169 of his judgment.

H I return to Lord Tomlin's much quoted sentence in the *Duke of Westminster's* case [1936] A.C. 1, 19: "Every man is entitled if he can" and again I stress those three words "if he can"—"to order his affairs so as that the tax attaching . . . is less than it otherwise would be." It is plain to me, using the same words, that on the facts here it cannot be done, or, more accurately, that the taxpayer, Mr. Fulford-Dobson,

could not so order his affairs as to attempt to use concession D2 to avoid tax. What was done was done deliberately for the admitted purpose of tax avoidance, but in total disregard of the clear words limiting the availability of the concession.

Finally, I turn to the last submission that was made, that is to say, that there was a procedural impropriety in the way the matter was handled. In the skeleton argument which he very helpfully provided, Mr. Ferrier claimed that the breaches upon which he relied were that no proper hearing was given to the taxpayer; that there was no effective appeal to an independent arbiter; and that there was secrecy surrounding the procedures which resulted in the taxpaying public and their advisers not knowing the attitude which the revenue was likely to take in cases in which the concession was sought to be applied. This, he said, was not conducive to public confidence in the operation of the extra-statutory concession scheme.

Taking those points in turn, I was invited to consider, first of all, the reported decision of *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864. In that case, Mr. Ferrier said, there was a code and it was sufficient if the board followed their code. Here, he said, and this is linked with the later point, there is no code or scheme other than appears from the booklet. To my mind, that of itself does not give any ground for saying that there was procedural impropriety.

I was also invited to consider the decision in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155, where their Lordships, and in particular Lord Brightman, analysed the obligations essentially under two headings. (1) Did the constable there subject to disciplinary proceedings know what the allegation against him was? (2) Did he get an opportunity to answer it? On the facts there it was held that he had not had that opportunity. However, here, first of all it is accepted by Mr. Ferrier that the word "hearing" encompasses consideration of written representations. Here it is perfectly clear from the correspondence that the taxpayer knew perfectly well what was being said against him, and the correspondence makes it abundantly clear that he had every opportunity, and took it through his professional advisers, to answer the charges.

So far as appellate procedures are concerned, the answers are two-fold. One is that on the material here the applicants did not have, and concede that they did not have, access to the normal appellate procedure under the legislation. They have the right to come to this court to seek judicial review, but there is nothing which ought to be written into the code as I see it, and I do not think Mr. Ferrier goes so far as to suggest that there should be some additional appellate procedure available in cases which are not within the statutory code.

Finally, so far as secrecy is concerned, I suppose in the broadest possible sense it might be said that tax advisers would like to know what, on a variety of different sets of facts, the revenue is likely to do in the given set of facts. I did not get any real assistance from the reference over to the value added tax tribunals, but of course against that broad desirability, if that is an appropriate phrase, the other side is that the revenue is dealing in each particular case confidentially with the tax affairs of an individual taxpayer. I cannot find that there is anything contrary to procedural propriety in not issuing a series of judgments or decisions on particular sets of facts, and I reject that as a charge of impropriety.

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McNeill J.

A Mr. Ferrier argued, relying to an extent on the decision already
cited, *H.T.V. Ltd. v. Price Commission* [1976] I.C.R. 170, that if the
administrative body (there the Price Commission) changed the rules or
the practice in mid-stream, or as he graphically put it, moved the goal
posts while the shot was being taken, that can be, and was there
regarded, as an unfair practice and procedurally improper. There is not
B a shred of evidence to suggest here that the case of this taxpayer was
treated in any way inconsistent with the practice of the revenue in
dealing with such cases.

In all the circumstances, on the facts and the law, I decline to give
the relief sought and the application is dismissed.

I have, of course, to consider one other matter and that is this. The
decision here was given on 19 October 1984. The application for judicial
C review was not launched until 21 May 1985. There is an explanation
given, as it has to be given, on form 86A. It reads:

"The delay in making this application is due to the necessity to
consider alternative courses of action and take legal advice thereon
and the applicant's illness, and consequent matrimonial upheaval."

D That matter is amplified in Mr. Fulford-Dobson's affidavit at
paragraphs 11, 12 and 13. Paragraph 11 reads:

"In October 1984"—that is the month of the decision—"I was
temporarily estranged from my wife and suffering from over-
addiction to alcohol. 12. I am informed and I believe that on 28
January 1985 my wife and her solicitor were advised by counsel that
E an appeal to the commissioners against the decision of the board
would be unsuccessful in view of the terms of section 2 of the
Capital Gains Tax Act 1979 that 'a person shall be chargeable to
capital gains tax in respect of chargeable gains accruing to him in a
year of assessment during any part of which he is resident in the
United Kingdom' but that decision was subject to judicial review by
this Honourable Court."

F I should add that the point then apparently considered by Mrs. Fulford-
Dobson, the solicitor and counsel had been plainly put to the accountants
in a letter of 21 November 1983 from the inspector of taxes. It is a little
surprising that over 12 months elapsed before Mrs. Fulford-Dobson,
who in many respects and in reality seems to be the prime mover behind
this arrangement, sought that advice. In paragraph 13 Mr. Fulford-
Dobson says:

"I completed residential treatment for my alcoholic addiction and
re-united with my wife at the end of April 1985. However before
documentation could be sent to me the matrimonial situation
deteriorated and I am now temporarily residing away from the
matrimonial home until our difficulties can be sorted out."

H That affidavit, as I have said, is dated 21 May 1985.

I have had some hesitation over this question because the rules are
perfectly clear that proceedings must be brought promptly or within
three months of the decision and this application is seven months after
the decision. There is power in the court to extend time. It may perhaps
be academic in view of the decision I have reached on the facts and the
law. I am inclined to the view, but reluctantly, that in the absence of
any real investigation of the reasons for the delay that I cannot in

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discretion refuse relief on the ground of delay alone. I think there are matters on both sides. I do not think the point was taken before the judge who granted leave and I do not think it would be right now on that ground alone to refuse relief, although I express my disquiet at the time which it took to get these proceedings launched. A

Application dismissed with costs. B

Solicitors: Wilkinson & Durham, Kingston-upon-Thames; Solicitor of Inland Revenue.

[Reported by MISS GERALDINE FAINER, Barrister-at-Law.]

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3 W.L.R.

A

[HOUSE OF LORDS]

CREST HOMES PLC. RESPONDENTS

AND

B MARKS AND OTHERS APPELLANTS

CREST HOMES PLC. RESPONDENTS

AND

MARKS AND OTHERS APPELLANTS

C [CONJOINED APPEALS]

1987 June 2, 3, 4;
July 9Lord Keith of Kinkel, Lord Templeman,
Lord Griffiths, Lord Mackay of Clashfern
and Lord Oliver of Aylmerton

D

Practice—Discovery—Use of documents—Action for infringement of copyright—Documents discovered and affidavits sworn pursuant to Anton Piller order—Implied undertaking not to use documents or affidavits for other purposes—Whether applicable to contempt proceedings in separate action—Application for leave to use documents and affidavits in contempt proceedings—Whether leave to be granted—Supreme Court Act 1981 (c. 54), s. 72¹

E

In 1984, the plaintiff company and a subsidiary commenced an action against the first and second defendants alleging, inter alia, breach of copyright and obtained an *Anton Piller* order in respect of copies and originals of the plaintiffs' documents relating to 60 of their house designs. That order having been executed, it appeared to the plaintiffs that only two of their designs had been copied by the defendants and that the defendants had retained no other documents relating to those designs. In 1985, the plaintiffs, suspecting that another of their designs, not covered by the 1984 order, had been substantially copied by the defendants, commenced another action and obtained an *Anton Piller* order in that action in respect of 105 of their house designs, including all those covered by the 1984 order. On execution of the 1985 order, a number of allegedly infringing drawings were discovered, many of which the plaintiffs claimed should have been disclosed pursuant to the 1984 order or were evidence of breaches of undertakings given in that action. The plaintiffs applied to the court for leave to use the documents obtained on the execution of the 1985 order and the affidavits sworn by the defendants in purported compliance therewith for the purpose of, inter alia, considering and, if so advised, taking proceedings for contempt of court in respect of the 1984 order. The judge refused the application. The Court of Appeal allowed an appeal by the plaintiffs.

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On appeal by the first, second and fourth defendants:—

Held, dismissing the appeal, that the implied undertaking on discovery in an action not to use the discovered material for any purpose other than the proper conduct of that action was given to the court and could, in appropriate circumstances, be released or modified by the court, though the importance as a matter of

¹ Supreme Court Act 1981, s. 72: see post, pp. 299F—300D.

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general policy of preserving its integrity was to be emphasised; that no injustice would be done to the defendants if the documents in question were made available for use in the 1984 action for the purposes of proceedings for contempt; and that, accordingly, in the very special circumstances of the case, including the circumstance that it was purely adventitious that there were two actions and that in substance they were a single set of proceedings, the plaintiffs should be released from their implied undertaking (post, pp. 295F–H, 297H–298D, 301H, 303D, 304A, F–G).

A. J. Bekhor & Co. Ltd. v. Bilton [1981] Q.B. 923, C.A. considered.

Per curiam. (i) The proper policing and enforcement of observance of orders made and undertakings given to the court in an action are as much an integral part of the action as any other step taken by a plaintiff in the proper prosecution of his claim. Proceedings for contempt of court are in no way “collateral” to the action in which they are launched (post, pp. 295F–H, 304C–E).

(ii) Section 72 of the Supreme Court Act 1981 has only a peripheral significance in the solution of the present problem. Subsection (4) was probably inserted out of an abundance of caution in order to forestall any possible argument that subsection (3) afforded any protection in cases of contempt of court or perjury whether or not they could be brought under the umbrella of “related offences” (post, pp. 295F–H, 299c, 300H).

Decision of the Court of Appeal [1987] 3 W.L.R. 48 affirmed.

The following cases are referred to in the opinion of Lord Oliver of Aylmerton:

Alterskye v. Scott [1948] 1 All E.R. 469

Anton Piller KG v. Manufacturing Processes Ltd. [1976] Ch. 55; [1976] 2 W.L.R. 162; [1976] 1 All E.R. 779, C.A.

Bekhor (A.J.) & Co. Ltd. v. Bilton [1981] Q.B. 923; [1981] 2 W.L.R. 601; [1981] 2 All E.R. 565, C.A.

Comet Products U.K. Ltd. v. Hawkex Plastics Ltd. [1971] 2 Q.B. 67; [1971] 2 W.L.R. 361; [1971] 1 All E.R. 1141, C.A.

Halcon International Inc. v. Shell Transport and Trading Co. Ltd. [1979] R.P.C. 97, C.A.

Home Office v. Harman [1983] 1 A.C. 280; [1982] 2 W.L.R. 338; [1982] 1 All E.R. 532, H.L.(E.)

Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1975] 2 Lloyd's Rep. 509, C.A.

Rank Film Distributors Ltd. v. Video Information Centre [1982] A.C. 380; [1981] 2 W.L.R. 668; [1981] 2 All E.R. 76, H.L.(E.)

Riddick v. Thames Board Mills Ltd. [1977] Q.B. 881; [1977] 3 W.L.R. 63; [1977] 3 All E.R. 677, C.A.

Sybron Corporation v. Barclays Bank Plc. [1985] Ch. 299; [1984] 3 W.L.R. 1055

The following additional cases were cited in argument:

C.B.S. Songs Ltd. v. Amstrad Consumer Electronics Plc. (unreported), 6 February 1986; Court of Appeal (Civil Division) Transcript No. 117 of 1986, C.A.

Goddard v. Nationwide Building Society [1986] 3 W.L.R. 734; [1986] 3 All E.R. 264, C.A.

Helliwell v. Piggott-Sims [1980] F.S.R. 356, C.A.

Reg. v. Coote (1873) L.R. 4 P.C. 599, P.C.

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A *Universal City Studios Inc. v. Hubbard* [1984] Ch. 225; [1984] 2 W.L.R. 492; [1984] 1 All E.R. 661, C.A.

APPEALS from the Court of Appeal.

B These were conjoined appeals by the first defendant, David Terrence Marks, and the second and fourth defendants, Wiseoak Homes Ltd. and Wiseoak Residential Ltd., by leave of the House of Lords from the judgment of the Court of Appeal (May, Croom-Johnson and Nourse L.JJ.) [1987] 3 W.L.R. 48 given on 20 February 1987 allowing an appeal by the plaintiffs, Crest Homes Plc., from a decision of Whitford J. Whitford J. had refused the plaintiffs' application for leave to use documents obtained on the execution of an *Anton Piller* order made in an action brought by them in [1985 against the first, second and fourth] C [defendants and the third] defendant, Barry J. Best, and affidavits sworn by the defendants in purported compliance therewith in the general conduct of an action brought by them in 1984 against the first and second defendants and others and for the purpose of considering and, if so advised, taking proceedings for contempt of court in respect of an *Anton Piller* order made in the 1984 action.

D The Court of Appeal refused the defendants leave to appeal from their decision, but on 19 March 1987 the Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Ackner) allowed petitions by the first, second and fourth defendants for leave.

The facts are set out in the opinion of Lord Oliver of Aylmerton.

E *Andrew Morritt Q.C.* and *Geoffrey Hobbs* for the second and fourth defendants.

Paul Dickens for the first defendant.

Roger Henderson Q.C., *Christopher Floyd* and *Richard Arnold* for the plaintiffs.

Their Lordships took time for consideration.

F 9 July. LORD KEITH OF KINKEL. My Lords, I have had the opportunity of reading in draft the speech to be delivered by my noble and learned friend Lord Oliver of Aylmerton. I agree with it, and for the reasons he gives would dismiss the appeal.

G LORD TEMPLEMAN. My Lords, for the reasons to be given by my noble and learned friend Lord Oliver of Aylmerton I would dismiss this appeal.

H LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech to be given by my noble and learned friend Lord Oliver of Aylmerton. I agree with it, and for the reasons he gives I too would dismiss this appeal.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Oliver of Aylmerton and for the reasons he gives I too would dismiss this appeal.

LORD OLIVER OF AYLMEYTON. My Lords, the respondents, Crest

Homes Ltd. ("Crest"), are a company carrying on, either themselves or through subsidiary companies, a business of developing and selling land for residential purposes. In the course of that business they have evolved a substantial number of designs and plans of different types of dwelling house and it is not in dispute that they are the owners of the copyright in those designs and plans. On 23 November 1984 Crest, together with its subsidiary company Crest Homes (Westerham) Ltd. ("Westerham"), obtained from Scott J. ex parte an order in the *Anton Piller* form (*Anton Piller KG v. Manufacturing Processes Ltd.* [1976] Ch. 55) against the first and second appellants. The first appellant was an employee of Crest and a director of Westerham but had handed in his resignation and left to join the second appellant, a company incorporated in the previous August, as its managing director. The basis of the ex parte application was an allegation that Crest had discovered that a planning application had been made by the second appellant using drawings relating to two of Crest's house designs known as "Carrington" and "Linslade." The order, which followed the usual *Anton Piller* form, incorporated an undertaking by the plaintiffs to issue and serve a writ and notice of motion and that was done on 26 November 1984. The defendants were the first two appellants and another individual not a party to this appeal. Subsequently further parties were added by amendment. The writ claimed appropriate injunctions restraining infringement of Crest's copyright in the drawings relating to their house designs and misuse of confidential information, an inquiry as to damages and delivery up of infringing material. I will refer to the action thus constituted as "the 1984 action." The order of Scott J. ("the 1984 order") restrained the defendants in the action from parting with possession otherwise than to the plaintiffs' solicitors of an extensive range of documents including "any documents of the plaintiffs or either of them relating to any of their house designs listed on page 2 of exhibit JMC 11" to the affidavit sworn in support of the application and it obliged the first appellant to permit entry to his house for the purpose of searching for, inspecting and removing such documents. The exhibit referred to contained particulars of 60 of Crest's house designs including the Carrington and Linslade designs which had formed the basis of the application. That order was duly executed at the first appellant's house and a number of documents were inspected and removed into the custody of Crest's solicitors. On the first inter partes hearing of the motion before Vinelott J. on 4 December 1984 the matter was adjourned to a date to be fixed on an undertaking substantially in accordance with the injunction granted by Scott J. On 11 December 1984 the first appellant swore an affidavit in which he accepted that the second appellant had made use of drawings relating to the Carrington and Linslade houses and swore that he had no relevant documents in his possession other than those which had been found as a result of the search of his premises on the execution of the order, which documents had been listed in an exhibit to an affidavit of Crest's solicitor. He had previously, pursuant to the order, sworn an affidavit on 30 November 1984 denying that he was in possession of any of the documents or information required by the order. The action thereafter proceeded on the footing that only the Carrington and Linslade designs had been copied and that the first appellant was not in possession of any further documents relating to Crest's designs. On the adjourned hearing of the motion on 17 April 1985 a further undertaking in the terms of the

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A previous undertaking with certain modifications was given and the motion stood to trial.

As already mentioned, the 1984 order and the undertakings which replaced it related to 60 specified Crest designs. They did not include the design of a house type known as "Versailles." In October 1985, however, Crest discovered that the second appellants were advertising a house which appeared to them to be similar to the Versailles house and, after inspecting the second appellant's planning applications, they concluded that the design was substantially copied from their Versailles design. The relief claimed in the 1984 action was sufficiently wide to cover a claim in respect of such copying and it would, no doubt, have been open to Crest to apply in that action for a further interlocutory injunction specifically to restrain copying of the Versailles design and any other Crest designs not already embraced in the existing undertakings. It seems, however, that they took the view that any infringement in relation to the Versailles design would probably have taken place after the commencement of the 1984 action and would thus constitute a fresh cause of action. They accordingly, on 25 November 1985, commenced a second action against the first and second appellants claiming substantially the same relief as that claimed in the 1984 action and at the same time they obtained and executed a fresh *Anton Piller* order ("the 1985 order") directed to conducting a search at the second appellant's business premises for documents which included the designs listed in an exhibit to the affidavit in support of the application. This exhibit listed some 105 designs and included (although, it might then have been thought, unnecessarily) the 60 already the subject matter of the existing undertaking. That order was duly executed. No objection was made to the search and numerous drawings were discovered which Crest allege infringe their copyright and which include drawings which Crest allege are copies of designs of some of the 60 types of dwellings specifically made the subject matter of the 1984 order. Crest concluded, therefore, that the existing undertakings had been broken and that the first and second appellants were in breach of the 1984 order. In an affidavit sworn on 17 December 1985 the first appellant admitted that all these documents had been in his possession at the time of the 1984 order but deposed that a representative of Crest's solicitors had consented to his retaining them.

In the light of this history, and if Crest are right in believing that the documents disclosed as a result of the execution of the 1985 order show numerous (and, it must be assumed, deliberate) breaches of the order and undertakings made or given in the 1984 action—and it must be emphasised that this is very much at issue—it is not altogether surprising that they now wish to seek to enforce the order and undertakings by proceedings in the 1984 action for contempt of court. The problem with which they are confronted, however, is that a substantial part of the material which they would require to make use of in prosecuting such an application consists of the documents taken into the possession of their solicitors and the affidavits sworn by or on behalf of the appellants pursuant to the 1985 order.

The purpose of an *Anton Piller* order is, primarily, the preservation of evidence which might otherwise be removed, destroyed or concealed but it operates, of course, also as an order for discovery in advance of pleadings. It is clearly established and has recently been affirmed in this House that a solicitor who, in the course of discovery in an action,

obtains possession of copies of documents belonging to his client's adversary gives an implied undertaking to the court not to use that material nor to allow it to be used for any purpose other than the proper conduct of that action on behalf of his client: see *Home Office v. Harman* [1983] 1 A.C. 280. It must not be used for any "collateral or ulterior" purpose, to use the words of Jenkins J. in *Alterskye v. Scott* [1948] 1 All E.R. 469, approved and adopted by Lord Diplock in *Harman's* case, at p. 302. Thus, for instance, to use a document obtained on discovery in one action as the foundation for a claim in a different and wholly unrelated proceeding would be a clear breach of the implied undertaking: see *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881. It has recently been held by Scott J. in *Sybron Corporation v. Barclays Bank Plc.* [1985] Ch. 299—and this must, in my judgment, clearly be right—that the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it be embodied in a copy or stored in the mind. But the implied undertaking is one which is given to the court ordering discovery and it is clear and is not disputed by the appellants that it can, in appropriate circumstances, be released or modified by the court.

On 24 January 1986, therefore, Crest served notice of motion in the 1985 action on, inter alios, the first and second appellants seeking, so far as might be necessary, orders for the release of the implied undertaking given on the obtaining of the 1985 order to the extent necessary to enable them (a) to use the documents removed into their solicitor's custody pursuant to that order for the conduct of the 1984 action and (b) to use those documents

"for the purpose of considering, and if so advised, preparing, commencing and conducting proceedings in connection with breaches of orders made against and undertakings given by"

the first and second appellants in the 1984 action. I say "inter alios" because after the execution of the 1985 order two further defendants were added in the 1985 action, that is to say a Mr. Best, who is not concerned in this appeal, and the third appellant, Wiseoak Residential Ltd., a company which, it appears, is also concerned in the development to which some of the drawings relate.

The motion was heard on 28 February 1986 by Whitford J. who refused the orders sought. In relation to the use of the documents in the general conduct of the 1984 action his ground for refusing an order was that, in so far as they were relevant to that action, they would in any event have to be disclosed on discovery and any deficiency in discovery in that action could be pursued at that stage. That, however, is no longer a live issue, for it was subsequently agreed by the parties at the hearing in the Court of Appeal that, without prejudice to the position as regards proceedings for contempt, no objection would be taken to the use of the documents in the general conduct of the 1984 action. That was obviously sensible because, prior to the hearing of the appeal, the master had given directions that the actions should be listed consecutively and come on for hearing at the same time. As regards the question of the use of the documents for the purposes of proceedings for contempt, Whitford J. rejected Crest's claim on the ground that it was premature until contempt proceedings had been instituted by an appropriate notice of motion. From this decision Crest appealed to the Court of Appeal

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A which allowed the appeal and made an order on 20 February 1987 that Crest be at liberty to use the documents removed under the 1985 order and three specified affidavits sworn in the 1985 action pursuant to the *Anton Piller* order for the purposes specified in the notice of motion. That order was subsequently stayed pending the hearing of a petition for leave to appeal to your Lordships' House, which leave was subsequently granted on 19 March 1987.

B In the Court of Appeal the leading judgment was given by Nourse L.J. who, after reviewing the arguments for and against releasing Crest's solicitors from the implied undertaking, was prepared to assume that the arguments against such release ought to prevail were it not for the provisions of section 72 of the Supreme Court Act 1981 which, in his view, was the determinative factor in pointing to the conclusion that the
C appeal should be allowed. My Lords, I have, speaking for myself, found some difficulty in following the reasoning of the Court of Appeal in this respect. I cannot, for my part, regard section 72 as having anything but a peripheral significance in the solution of the problem with which your Lordships are faced. It is a section which was passed in order to meet the difficulty caused by the fact that the *Anton Piller* order is most frequently made in cases concerned with the infringement of intellectual
D property rights. The circumstances in which such infringements take place very frequently involve the commission of a criminal offence or subject the defendant to statutory penalties. They may involve a criminal conspiracy. Where they do, apart from the section, this enables the defendant to claim that the privilege against self-incrimination entitles him to have any order for discovery or production set aside, a claim
E which was upheld in this House in *Rank Film Distributors Ltd. v. Video Information Centre* [1982] A.C. 380. In order to meet that situation the section deprives the defendant, in proceedings to which it relates, of his right to a claim to be excused from answering questions or complying with an order of the court on the grounds that the answers or compliance might expose him to proceedings of a penal nature and, as a quid pro quo, safeguards his position by providing that no statement made or
F answer given shall be admissible as evidence in such proceedings. The section, however, expressly excludes from the proceedings in which such statements are to be inadmissible proceedings for perjury or contempt of court. The side-note to the section is "Withdrawal of privilege against incrimination of self or spouse in certain proceedings" and section 72 is, so far as material, in the following terms:

G "(1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person . . . to proceedings for a related offence or for the recovery of a related penalty—(a) from answering any question put to that person in the first-mentioned proceedings; or (b) from complying with any order made in those proceedings. (2) Subsection
H (1) applies to the following civil proceedings in the High Court, namely—(a) proceedings for infringement of rights pertaining to any intellectual property or for passing off; (b) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off; and (c) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off. (3) Subject to subsection (4), no statement or admission made by a person—(a) in answering a question put to him in any

proceedings to which subsection (1) applies; or (b) in complying with any order made in any such proceedings, shall, in proceedings for any related offence or for the recovery of any related penalty, be admissible in evidence against that person . . . (4) Nothing in subsection (3) shall render any statement or admission made by a person as there mentioned inadmissible in evidence against that person in proceedings for perjury or contempt of court.”

Subsection (5) contains a number of definitions. For present purposes I need only to refer to the definition of “related offence” which is in these terms:

“ ‘related offence,’ in relation to any proceedings to which subsection (1) applies, means—(a) in the case of proceedings within subsection (2)(a) or (b)—(i) any offence committed by or in the course of the infringement or passing off to which those proceedings relate; or (ii) any offence not within sub-paragraph (i) committed in connection with that infringement or passing off, being an offence involving fraud or dishonesty; (b) in the case of proceedings within subsection (2)(c), any offence revealed by the facts on which the plaintiff relies in those proceedings; . . . ”

My Lords, I confess that I have found the section far from easy to construe. This much is clear, that the privilege against self-incrimination is withdrawn only so far as the answer or compliance with the order would expose the defendant to proceedings for a “related offence”—I leave aside penalties which must, I think, clearly refer to statutory penalties and have no relevance in the context of the instant case. Secondly, to be a related offence, the offence must be one which is committed by the very act of infringement complained of or one committed in the course of carrying out that infringement or it must be an offence involving fraud or dishonesty which is committed in connection with the infringement complained of or an offence revealed by the facts on which the plaintiff relies in the proceedings. The difficulty arises in relation to subsection (4). “Offence” hardly seems an appropriate word to describe a civil contempt but the assumption seems to be that the perjury or contempt referred to must be a related offence, for otherwise subsection (3) could not in any event have affected the admissibility of the statement or admission. At the same time, it is not easy to envisage how a contempt of court could be committed in carrying out the very infringement of which complaint is made in the proceedings save where, as is alleged here, the proceedings relate to an infringement constituting a breach of an order in some other proceedings—a circumstance which must be so rare that it can hardly have been in the draftsman’s contemplation. Equally it is not easy to see how it can be “revealed by” the facts on which the plaintiff relies in the proceedings, although one can readily see that the contempt itself, when committed, may be a fact which the plaintiff will seek to rely upon at the trial in support of his claim for quia timet relief. The probability is, as it seems to me, that the subsection was inserted out of an abundance of caution in order to forestall any possible argument that subsection (3) afforded any protection in cases of contempt of court or perjury whether or not they could be brought under the umbrella of “related offences.” But whether that is so or not, in so far as the contempt or perjury is a related offence subsection (1) clearly destroys any claim to privilege on the ground of

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A self-incrimination. Equally clearly the admissibility in evidence in proceedings for contempt of statements or admissions remains unaffected by the section. Moreover while subsection (1) destroys any claim to privilege in relation to compliance with the order, whether by making statements or answering questions or by permitting entry, search and removal, subsection (3) is confined to the admissibility of a "statement or admission" and confers no protection in relation to the admissibility in evidence of documents or material removed into custody under the order. Having said that, however, I have not for my part been able to attach to the section the critical importance which appears to have been attached to it by the Court of Appeal as a factor to be taken into account in determining whether the undertaking should be released to the extent sought by Crest. In so far as a possible contempt of court in the 1984 action is an offence related to the infringements complained of in the 1985 action the section effectively precluded any objection being taken to the 1985 order on the ground of possible self-incrimination. Beyond that it did no more than preserve the admissibility in evidence of statements and admissions which, once made, would in any event have been admissible. At highest it can be said only to demonstrate an intention on the part of the legislature that the quid pro quo for the removal of the privilege which might otherwise have prevented the evidence being given should not extend to proceedings for contempt. For my part, therefore, I derive little assistance from this section.

Was, then, the Court of Appeal right in reversing the decision of Whitford J. and making the order of 20 February 1987? The refusal of the leave sought at first instance on the ground of prematurity cannot, I think, have been right for it involved the consequence that no use could be made of the documents without a prior notice of motion in a case where, if Crest were right, no notice of motion could have been prepared without using the documents. Mr. Morritt, however, on behalf of the corporate appellants, has rightly drawn attention to the importance, stressed in *Home Office v. Harman* [1983] 1 A.C. 280, of preserving the implied undertaking. It should not be relaxed, it is said, as a matter of public policy, for otherwise litigants may be deterred from making full and frank disclosure. Additionally it is submitted that in substance Crest's application is one for discovery in aid of a contemplated motion for contempt which ought not to be permitted and reference is made to the decision of the Court of Appeal in *A. J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923. If, it is said, Crest had applied in the 1984 action for discovery of documents in aid of a motion for contempt, the application would have been refused because the court will not order a defendant to discover documents for the purpose of incriminating him. It would not, therefore, it is argued, be right to produce by a relaxation of the undertaking in the 1985 action a result which could not have been produced by an application in the action in which the alleged contempt occurred.

My Lords, I would not wish anything said in your Lordships' House to be thought to detract from the integrity of the implied undertaking given to the court on behalf of a party obtaining an order for discovery. Nevertheless, in the very special circumstances of this case, I find myself unimpressed by the arguments adduced on behalf of the appellants. So far as concerns the effect of a relaxation of the undertaking upon the performance of the obligation to make full and frank disclosure, there are two points. In the first place, that obligation can be of little

relevance in relation to the seizure of documents and materials under an *Anton Piller* order, the whole purpose of which is to gain possession of material evidence without giving the defendant the opportunity of considering whether or not he shall make any disclosure at all. Indeed the justification for the application is the likelihood that, short of immediate and unheralded intervention, relevant material is likely to be spirited away or destroyed. Secondly, so far as concerns free and frank disclosure under the compulsion of that part of the order which requires the defendant to swear an affidavit, the point may have some general validity but in a case where, if Crest are right, the absence of free and frank disclosure on a previous occasion is manifest, an appeal to it has a somewhat hollow ring.

As regards the suggestion that to release the undertaking now would, in effect, be to deprive the appellants of an opportunity which they would otherwise have had, had the application been made in the 1984 action, to resist disclosure and production of the material sought on the ground that discovery was being required in aid of contempt proceedings and would thus involve self-incrimination, this is, in my judgment, misconceived. The 1985 order, if it had been applied for in the 1984 action, could perfectly properly have been made in that action. It is true that in *A. J. Bekhor & Co. Ltd. v. Bilton* the Court of Appeal held that an order for discovery in aid of a *Mareva* injunction (*Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509) ought not to be made for the purpose, not of discovering the whereabouts of assets, but of ascertaining whether there had been past breaches of the injunction. But that is a long way removed from the instant case, where the application was directed simply to the preservation of evidence in relation to infringing material not covered by the existing undertakings and it is purely adventitious that it happens (assuming always that Crest are right in what they allege) incidentally to have uncovered evidence of breaches of those undertakings. On the execution of the 1985 order the appellants were advised of their right to seek legal advice before compliance and they availed themselves of it. If, of course, the contempt alleged by Crest was a "related offence," they had no privilege to plead; but if they took the view that any breaches of the undertakings which might have been exposed were not "related offences," it was open to them, if they wished, to seek to discharge the order or to take an objection on the ground of self-incrimination when they came to swear affidavits in compliance with the order. They did not do so and there is no question but that the evidence of which Crest now seek to make use was perfectly properly obtained. It is clearly established that although a contemnor is not a compellable witness in proceedings against him for contempt, if he gives evidence he can be cross-examined upon it in relation to the contempt alleged: *Comet Products U.K. Ltd. v. Hawtex Plastics Ltd.* [1971] 2 Q.B. 67. I cannot, therefore, for my part, agree that, simply because the application which produced the evidence was made in the 1985 action, the release of the undertaking which is now sought will deprive the appellants of some protection which would have been available to them if it had been made in the action in which it is now sought to move for contempt. The material which, it is claimed, has been uncovered would clearly have been discoverable on general discovery in that action so far as it related to the 60 house types covered by the 1984 order, although it may well be

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- A that an application for discovery of that material specifically for the purpose of supporting a motion for contempt would have been unsuccessful. Thus much, if not all, of the material covered by the implied undertaking in the 1985 action would in any event have had to have been made available in the 1984 action although possibly at a later stage. It is said that on general discovery in the 1984 action the appellants would, so far as they were able to demonstrate that any contempt committed was not a "related offence," have been able to resist disclosure by pleading the privilege against self-incrimination. That may be right, although if it is it produces the extraordinary result that a defendant, by putting himself in contempt of court, can successfully resist discovery of relevant documents at any stage of the proceedings. Thus logically a defendant who, in response to an order for verification of his list of documents by affidavit, makes inadequate discovery can thereafter resist any application for discovery of particular documents on the ground that to comply would demonstrate that he had been in breach of the earlier order and thus in contempt. I cannot think that that can be right, but it is unnecessary to decide the point since such an objection, if open at all, would have been equally open on the execution of the 1985 order and was not taken. I can, therefore, in the circumstances of this case, discern no injustice to the appellants if the documents are made available for use in the 1984 action. Should the point arise for decision it may be necessary in relation to the production of relevant documents essential to the conduct of proceedings—I say nothing about interrogatories—to reconsider the extent of the privilege against self-incrimination where it is prayed in aid solely on the ground of liability to a motion for civil contempt in those proceedings.

- E My Lords, although I have, for my part, found the appellants' arguments less than convincing, they can and do fairly say that it is not for them to advance reasons why the implied undertaking should not be released but rather for the respondents to demonstrate cogent and persuasive reasons why it should be released. To that I now turn. Mr. Henderson, on behalf of the respondents, whilst accepting the importance, as a matter of general policy, of preserving the integrity of undertakings given to the court as the price of discovery, submits that there is an equally important countervailing consideration of public policy that orders of the court should be obeyed. I accept that, but if what was in issue here was the revelation of a civil contempt in some wholly unrelated proceeding I would not for my part consider that the importance of ensuring obedience to the court's orders outweighed that of ensuring the continued observance of an undertaking given to the court by the party obtaining discovery. Your Lordships have been referred to a number of reported cases in which application has been made for the use of documents obtained under *Anton Piller* orders or on general discovery for the purpose of proceedings other than those in which the order was made. Examples were *Halcon International Inc. v. Shell Transport and Trading Co. Ltd.* [1979] R.P.C. 97 and *Sybron Corporation v. Barclays Bank Plc.* [1985] Ch. 299. I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery.

As Nourse L.J. observed in the course of his judgment in the instant case, each case must turn on its own individual facts. In the instant case [1987] 3 W.L.R. 48, 58, the determinative point to my mind is that it is purely adventitious that there happened to be two actions. That has been brought about partly by purely technical considerations and partly, as Crest allege, by the appellants' failure to make full and frank disclosure under the 1984 order, and the fact that the parties to the two actions are not identical is quite immaterial. The cause of action is the same in each and the first and second appellants are defendants in both. The remaining defendants could equally well have been joined as defendants in a single set of proceedings. Thus it is a pure technicality that the 1985 order happens to have been made in proceedings other than those in which Crest seek to move to enforce the undertakings. It has been submitted that proceedings for contempt of court are always to be regarded, for the purpose of the implied undertaking on discovery, as "collateral" to the action in which they are launched, so that even if the 1985 order had been made in the 1984 action it would still have been necessary to seek the leave of the court to use the material thus discovered for the purposes of the motion for contempt in that action. My Lords, I find myself quite unable to accept that submission. The proper policing and enforcement or observance of orders made and undertakings given to the court in an action are, in my judgment, as much an integral part of the action as any other step taken by a plaintiff in the proper prosecution of his claim. The normal procedure where the contempt complained of is that of a party to the action is to apply for committal by motion in that action as an incidental step in the action. There is, in my judgment, nothing "collateral" or "alien" about enforcement of the court's order in the action in which discovery is obtained and I do not entertain any doubt at all that documents disclosed on discovery in the action can perfectly properly be used for the purpose of taking such a step without in any way infringing the implied undertaking and without the necessity of obtaining the prior leave of the court.

The evidence in the instant case discloses that there is, to put it no higher, at least a serious question to be investigated as to whether there has not been a deliberate contempt by flouting the court's orders and breaking undertakings freely given to the court in the 1984 action. In substance the 1984 action and the 1985 action are a single set of proceedings—a circumstance emphasised by the order that the two should be heard together—and the fact that, because, for reasons good or bad, Crest's claim has been prosecuted by the issue of two writs instead of one, the court's leave is required for the use of the documents obtained under the 1985 order is the merest technicality. To accede to Crest's application will, in these circumstances, cause no injustice to the appellants nor will it detract from the solemnity and importance of the implied undertaking. Although, therefore, I have not felt able to agree fully with the reasoning of the Court of Appeal so far as it was based upon section 72 of the Act of 1981, I have been left in no doubt that the conclusion at which that court arrived was correct. I would accordingly dismiss the appeal.

Appeals dismissed with costs.

Solicitors: Jaques & Lewis; Stoffel & Co.; Lovell White & King.

M. G.

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A

[COURT OF APPEAL]

HARRIS v. SHEFFIELD UNITED FOOTBALL CLUB LTD.

1987 Feb. 16, 17, 18;
March 19

Kerr, Neill and Balcombe L.JJ.

B

Police—Duties—Law enforcement—Chief constable providing officers to attend inside ground at football matches—Whether “special police services” provided “at the request of” football club—Whether police authority entitled to charge for attendances—Police Act 1964 (c. 48), s. 15(1)

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Football matches took place at premises in Sheffield belonging to the defendants, a club. Until 1970 the club had made special arrangements for the attendance of police officers at matches for which payments had been made. Thereafter the police had continued to attend at matches both inside and outside the ground but the club formed the view that the chief constable was obliged to arrange for police attendance in order to fulfil his duty to maintain law and order and to protect life and property. Accordingly they refused to make any payments to the police authority. The plaintiff, acting on behalf of the police authority for the district in which the football ground was situated issued a writ against the club claiming £51,669 for the services of police officers inside their ground between August 1982 and November 1983 on the ground that the attendances constituted “special police services” within the meaning of section 15(1) of the Police Act 1964¹ and for which the police authority were entitled to make a charge. The club in their defence denied any liability claiming that the attendances did not constitute “special police services” as the chief constable in arranging for officers to attend inside the ground was doing no more than carrying out his duties. Further the club denied that they had since December 1983 “requested” police services at the ground for the purposes of section 15(1) of the Act and they sought by way of counterclaim a declaration that they were not liable to make any payments for police services unless they requested attendance by officers to fulfill roles other than police duty. Boreham J. found as a fact that at some matches at the club’s ground violence was almost certain unless the police attended in substantial numbers but he concluded that the attendances inside the club’s ground did not constitute “special police services” within the meaning of the statutory provisions and that the services had at all material times been “requested” by the club. He gave judgment in favour of the police authority.

On appeal by the club:—

Held, dismissing the appeal, (1) that in deciding what constituted “special police services” for the purpose of section 15(1) of the Police Act 1964 it was necessary to look at all the circumstances of the individual case; that the court should bear in mind that in exercising his discretion to carry out his public duty to keep the peace and enforce the law a chief constable was entitled to have regard to the resources available to him and the cost of providing them; and that it was relevant to consider whether the services were required on private premises, the nature of the occasion and when they were required; that, accordingly, in the circumstances, the provision of police officers to attend regularly at the club’s football ground throughout the season to guard against the possibility of violence constituted the provision of “special police services” for which a charge

¹ Police Act 1964, s. 15(1): see post, p. 308F.

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could properly be made (post, pp. 315G—317c, 319D—F, 320A—B, D—E).

Glasbrook Brothers Ltd. v. Glamorgan County Council [1925] A.C. 270, H.L.(E.) considered.

(2) That in order for the football matches to take place it was necessary that police officers attended inside the ground to enable the club to meet its responsibilities to the public and that it followed that in such circumstances a request for their attendance by the club was to be implied (post, pp. 317c—F, 320c—D, D—E).

Per Balcombe L.J. Cases involving the policing of political events where public disorder is threatened are not in pari materia and the dismissal of the present appeal does not pose any threat to the political freedoms which the citizen of this country enjoys (post, p. 320c).

Decision of Boreham J. affirmed.

The following cases are referred to in the judgments:

China Navigation Co. Ltd. v. Attorney-General [1932] 2 K.B. 197, C.A.

Glamorgan Coal Co. Ltd. v. Glamorganshire Standing Joint Committee [1916] 2 K.B. 206; 114 L.T. 717, C.A.

Glasbrook Brothers Ltd. v. Glamorgan County Council [1924] 1 K.B. 879, C.A.; [1925] A.C. 270, H.L.(E.)

Reg. v. Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board [1982] Q.B. 458; [1981] 3 W.L.R. 967; [1981] 3 All E.R. 826, C.A.

Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn [1968] 2 Q.B. 118; [1968] 2 W.L.R. 893; [1968] 1 All E.R. 763, C.A.

Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 3) [1973] Q.B. 241; [1973] 2 W.L.R. 43; [1973] 1 All E.R. 324, C.A.

Reg. v. Oxford, Ex parte Levey, *The Times*, 1 November 1986, C.A.

Wathen v. Sandys (1811) 2 Camp. 640

The following additional cases were cited in argument:

Haynes v. Harwood [1935] 1 K.B. 146, C.A.

Moss v. McLachlan, *The Times*, 29 November 1984, D.C.

Ogwo v. Taylor [1987] 2 W.L.R. 988; [1987] 1 All E.R. 668, C.A.

APPEAL from Boreham J.

By writ dated 12 December 1983 the plaintiff, Mr. John Charles Harris, acting on behalf of the South Yorkshire Police Authority, claimed against the defendants, Sheffield United Football Club Ltd., £51,669 plus interest of £19,810 for police services at the club's football ground at Bramall Lane, Sheffield. By way of counterclaim dated 8 February 1984 the club sought a declaration that they were not liable for such charges. On 26 March 1986 Boreham J. allowed the claim and dismissed the counterclaim holding that the police authority were entitled to make charge for attending inside the club's ground, the attendances constituting "special police services" for the purposes of section 15(1) of the Police Act 1964.

By a notice dated 23 April 1986 the club appealed on the grounds that the judge was wrong in deciding (1) that the court had to view the services of police officers at home fixtures as a whole and not break them down into their constituent parts; (2) that the chief constable could decide which request to carry out; that duty could only be answered if the services were paid for; (3) that the chief constable could take steps to prevent an event if it would be productive of disorder, other than under the provisions of section 10 of the Safety of Sports Grounds Act

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- A 1975; (4) that the chief constable was entitled to say if there was a threat to law and order on private land "my resources in men and money are limited, I cannot afford to provide the service [of police officers] unless [the owners of the land] pay for them;" (5) that the law and order protection given to the club was more extensive than that given to an ordinary citizen; (6) that (a) refusing entry to those who tried to enter the ground without paying and (b) prohibiting spectators encroaching on parts of the ground which their entry fee did not entitle them to enter was outside the duty of the chief constable; (7) that police services at the ground had to be viewed as a whole taking into account services other than the maintenance of law and order, and were not severable, even when since at least January 1984 the club had not requested the chief constable to do other than his duty, as defined by the judge;
- B (8) that if services provided by the chief constable were of a kind which was similar to those which he provided in pursuance of his public duty such services could be special police services; (9) that the club had created a special need for protection; (10) that the protection to which the police at the request of the club were committed in advance each week, was against possible future breaches of the peace; (11) that there was at home fixtures, except in some cases, nearly a possibility of a breach of the peace; (12) that the police were expected and further were requested by the club since at least about January 1984 to do other than their duty, and (13) that after about December 1983 or at all the club had made any request for special police services.

The facts are set out in the judgment of Neill L.J.

- E *John Griffiths Q.C.* and *J. M. D. Chapple* for the club.
David Bentley Q.C. and *W. B. Phillips* for the police authority.

Cur. adv. vult.

19 March. The following judgments were handed down.

- F NEILL L.J. This is an appeal from the order of Boreham J. dated 26 March 1986. It raises a question as to the responsibility for the cost of providing for the attendance of police officers inside the ground of the Sheffield United Football Club at Bramall Lane in Sheffield on the occasions when league or other important football matches are played at the ground. We have been told that the answer to this question is of some general interest both to police authorities and to other leading football clubs.

- G It is the case for the South Yorkshire police authority, within whose area the Bramall Lane ground lies, that the attendance of police officers on these occasions constitutes the provision of "special police services" within the meaning of section 15(1) of the Police Act 1964, and that as the provision of these services has been expressly or impliedly requested
- H by the club, the police authority is entitled to make charges therefor. It is the case for the club on the other hand that as the chief constable of Sheffield has at all material times been of the opinion that the attendance of police officers on these occasions has been necessary for the maintenance of law and order and to protect life and property, the club is not liable to make any payment; the police have been merely carrying out their public duty. It is further argued on behalf of the club that even if it is held that "special police services" were provided at the club's

request before 26 October 1983, after that date the club has made no request for the provision of any police services beyond those which the police are required to provide in pursuance of their duty to the public.

In the action which was instituted by the police authority the sum of £51,699.54 was claimed as the aggregate of charges for the services of police officers at the club's ground on various dates between 14 August 1982 and 13 November 1983. The club disputed liability on the grounds which I have indicated and by way of counterclaim sought a declaration that it was not liable to make any payment to the police authority save where the club requested the attendance of officers to "fulfill roles other than the police duty." Before the judge the counterclaim also included, *inter alia*, a claim to recover certain sums paid to the authority before August 1982, but this matter is no longer pursued and I need say no more about it.

The action was tried by Boreham J. at Sheffield in February 1986 and in a reserved judgment delivered on 26 March 1986 the judge upheld the claim by the police authority and dismissed the counterclaim. The club has appealed to this court.

I shall come a little later to examine the events which have given rise to the present litigation but I think it is convenient to start by setting the case in its historical perspective and by identifying those matters which are common ground. The claim by the police authority is a claim in contract. It is conceded on behalf of the police authority, however, that if the officers attended merely in order to enable the chief constable to carry out his duty to maintain law and order no charge could or can be made to the club because any "agreement" to pay would not be supported by consideration.

It is conceded by the club on the other hand that if the attendance of the officers amounted to the provision of "special police services" then, subject to the subsidiary argument as to whether these services were requested after 26 October 1983, the charges are recoverable in accordance with section 15(1) of the Act of 1964. I turn at once therefore to section 15(1) which provides:

"The chief officer of police of any police force may provide, at the request of any person, special police services at any premises or in any locality in the police area for which the force is maintained, subject to the payment to the police authority of charges on such scales as may be determined by that authority."

The words "special police services" are not defined in the Act, but it is clear that the section provides statutory authority for a long-established practice whereby police officers have been made available to carry out functions at private premises in return for payment to the relevant police authority. The existence of the practice before 1964 has not been challenged, but nevertheless, as the nature of the services provided in this case is at the core of the dispute, it may be helpful to refer to some of the relevant passages in the authorities and documents to which our attention was drawn. It is sufficient to start with the Police Act 1890 (53 & 54 Vict. 27, c. 45). This Act was passed to make provision for, *inter alia*, the pensions and allowances to be paid to police constables in England and Wales. By section 16 it was provided that every police force should have a pension fund, and by section 16(1)(e) it was further provided that there should be carried to that fund

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A “such proportion of any sum received on account of constables whose services have been lent in consideration of payment as the police authority may consider to be a fair contribution to the pension fund in respect of those constables . . .”

B Viscount Cave L.C., referred to this provision in the Act of 1890 in *Glasbrook Brothers Ltd. v. Glamorgan County Council* [1925] A.C. 270, where the legality of the payment for police services was challenged. He said, at p. 280:

C “I find it difficult to believe that if the legislature had considered the practice of lending constables for special duty, which in the year 1890 was of daily occurrence, to be against public policy, it would have provided for the application of payments received in consideration of such lending to pension purposes; and it appears to me that this statutory recognition of the practice in question affords a strong argument in favour of its legality.”

A little earlier in his speech Viscount Cave L.C. referred to the practice of “lending” the services of police constables in these terms, at p. 278:

D “Instances are the lending of constables on the occasions of large gatherings in and outside private premises, as on the occasions of weddings, athletic or boxing contests or race meetings, and the provision of constables at large railway stations.”

E The practice was also noticed without disapproval by Scrutton L.J. in the same case in the Court of Appeal [1924] 1 K.B. 879, where he said, at pp. 890–891:

F “There is no doubt that for many years police authorities have furnished for payment, at the request of individual citizens, policemen to perform duties in the nature of maintaining order or preventing crime. Instances are where valuable property is temporarily and temptingly exposed to mixed assemblies, as at weddings, to guard the presents, or sales or bazaars; or where assemblies are likely to produce disorder, as at races, or football meetings, or to regulate traffic to private festivities, such as dances. It would take very clear authority to persuade me this is illegal.”

G It is also clear from the decision in the *Glasbrook* case that the provision of protection in the context of an industrial dispute may in certain circumstances constitute the provision of special police services for which a charge can be made. Moreover it is to be observed that in *Glamorgan Coal Co. Ltd. v. Glamorganshire Standing Joint Committee* (1916) 114 L.T. 717, 718 (not reported on this point in [1916] 2 K.B. 206) Phillimore L.J. stated in the context of a coal strike in South Wales, where a colliery company had asked for 24 policemen on special duty, that the request meant “that they would have to pay the usual charge for police sent on special request for private protection . . .”

H Further information as to the existence and understanding of the practice is to be found in the report of the Shortt Committee which was set up in June 1923 following the events at the first Cup Final held at Wembley Stadium on 28 April 1923 (the Report of the Departmental Committee on Crowds (1924) (Cmd. 2058)). In their report the committee considered the existing arrangements for the control of crowds in and around sports grounds. In paragraph 20 of the report they

turned to deal with the provision of police for duty inside grounds. The paragraph included these passages:

"At present the number of police to be provided on any particular occasion is settled by consultation between the ground authorities and the Chief Officer of Police, and the former are charged for the services of the police at rates fixed by the police authority. It is evident that the number of police to be supplied cannot be determined by any mathematical formula according to the size of the ground or the number of spectators which it will accommodate; nor is it possible to say with certainty in advance that any particular number of police will or will not be adequate to deal with all emergencies that may arise. The most that can be done is to form an estimate based on previous experience and on the best information that is available. . . . The evidence which we have received indicates that in practice any dispute as to the number of police to be employed at private cost is of the rarest occurrence; . . . It is true that the duty of preserving law and order is one for which the local police authority and the Chief Officer of Police are primarily responsible, and it is arguable that persons who cause the assembling of large crowds in an area under their control may reasonably be expected to pay the whole cost of any police whom the responsible authority consider may be required to ensure the preservation of order in that area.

"We are agreed that the opinion of the chief officer must ultimately prevail and that the management of a ground which disregards his advice must incur heavy responsibility, but we feel that the present system should be allowed to continue, by which the spirit of co-operation between the parties concerned is encouraged. . . . Yet if it should prove that the ground authorities persistently fail to secure provision of an adequate police contingent inside the ground, then there should be no question that the chief constable should have power to require the provision of such additional police as he thinks necessary, subject to proposals set out in the following paragraph."

In the following paragraph the committee suggested that as the employment of the police was not solely for private advantage but also served a useful public purpose the rates to be fixed should be at something less than the full cost of the men concerned.

It is against this background that one comes to examine the facts and the submissions in the instant case. It is accepted on behalf of the club, at any rate for the purpose of the present appeal, that the arrangements which were made between the club and the police authority before the 1939-45 war, and indeed until about 1970, for the attendance of police officers inside the ground at Bramall Lane amounted to arrangements for the provision of special police services. It is further accepted that these arrangements were made at the request of the club and that the police authority was entitled to make a charge for attendance of the police officers; before 1964 the charge could be justified as being in accordance with the decision in *Glasbrook Brothers Ltd. v. Glamorgan County Council* [1925] A.C. 270. Between 1964 and about 1970 the charge could be justified as being made in accordance with section 15(1) of the Police Act 1964. Since about 1970, however, and certainly in the last ten years, the position, it is said, has changed in a fundamental

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A respect. It is true, submitted Mr. Griffiths, that until the end of October
1983, the club continued to request the attendance of police officers at
the ground, or at any rate must be taken to have made such requests,
but in recent years these requests did not give rise to any legal liability
to pay for the attendance, because the chief constable was obliged to
B arrange for the attendance of these officers in any event so that he could
fulfil his duties to maintain law and order and to protect life and
property. Accordingly there was no consideration for any offer or
promise by the club, whether express or implied, to pay for the
attendance.

Placed in the forefront of Mr. Griffiths' argument were statements
of principle on this matter to be found in the speeches in the House
of Lords in *Glasbrook Brothers Ltd. v. Glamorgan County Council*
C [1925] A.C. 270. In that case a question arose as to the right of a
police authority to make a charge for billeting a number of police
officers on colliery premises on the occasion of a strike. The House
ruled by a majority that a charge could be made if the amount of
protection requested by the agent of the colliery owners exceeded
that which the senior police officer reasonably considered to be
necessary in the circumstances. But there are clear statements in the
D speeches to the effect that if the scale of protection was no more than
that which the police thought to be necessary no charge could properly
be made. Viscount Cave L.C. put the matter as follows, at p. 277:

“No doubt there is an absolute and unconditional obligation binding
the police authorities to take all steps which appear to them to be
necessary for keeping the peace, for preventing crime, or for
E protecting property from criminal injury; and the public, who pay
for this protection through the rates and taxes, cannot lawfully be
called upon to make a further payment for that which is their
right.”

Later in his speech he applied this statement of principle to the facts, at
p. 281:

F “If in the judgment of the police authorities, formed reasonably and
in good faith, the garrison was necessary for the protection of life
and property, then they were not entitled to make a charge for it,
for that would be to exact a payment for the performance of a duty
which they clearly owed to the appellants and their servants; but if
they thought the garrison a superfluity and only acceded to [the
G owners' agent's] request with a view to meeting his wishes, then in
my opinion they were entitled to treat the garrison duty as special
duty and to charge for it.”

And Lord Blanesburgh (whose dissent on the facts does not affect the
question of principle) said, at p. 306, that the “absolute duty” of the
police “to afford protection to life and property was only, I think,
H limited by the extent of their available resources and by the urgency of
competing claims upon their services.”

Armed with these statements as to the duty of the police, Mr.
Griffiths directed our attention to the facts and to certain passages in the
evidence. It is common ground that until about 1970 the normal number
of police officers attending a match at Bramall Lane was 20, though a
few more were needed when the ground was full to capacity. In those
days, as the judge recorded in his judgment, the main concern of the

police was to ensure that spectators were able to watch in safety and comfort and that both entry to and egress from the ground was smooth and unobstructed. In addition there were other subsidiary duties such as supervision of the takings at the turnstiles and ensuring that there was no entry on to the pitch. In the 1970's and 1980's, however, the position changed. The crowds have decreased so that instead of gates sometimes in excess of 40,000 the average gate is about 12,000. But at the same time the behaviour of the crowds has deteriorated with the supporters of some clubs being particularly unruly, aggressive and disruptive. As a result (a) the number of officers required for duty inside the ground has increased to a figure varying between about 30 and 80 or more; and (b) the emphasis of the policing has changed so that, although other duties such as crowd management and the enforcement of the club's ground regulations are still carried out, the main function of the police inside the grounds has become the maintenance of law and order.

The club itself has taken steps to deal with the changed situation. The advice of an experienced engineer has been taken and as a result a number of safety measures have been introduced including adequate crush barriers and the careful siting and construction of gangways. In addition high and substantial fencing has been erected around three sides of the ground to contain the standing spectators. The judge drew attention to these measures in his judgment and paid tribute to the fact that as a result Bramall Lane is one of the safest of soccer grounds. Furthermore for some years the club has employed a number of part-time stewards to assist in crowd management, the securing of exits and the enforcement of the club's ground regulations.

Mr. Griffiths accepted that the club itself had a duty to safeguard the safety of those who came to Bramall Lane, either as players or spectators, as well as to the club's own staff. Mr. Griffiths also accepted that while on the club's premises the police officers contributed, as they had done in the past, to crowd management and safety and to the enforcement of the club's ground regulations. But, said Mr. Griffiths, such matters as the enforcement of the club's ground regulations did not provide the main reason for the presence of the police. It was common ground, he emphasised, that the presence of the police was *necessary* to maintain law and order and to protect life and property; indeed it was unthinkable that a league match could take place without the presence of the police and it was quite plain that the chief constable would take such steps as he could to prevent a match taking place if the club declined to request a police presence.

In order to demonstrate the importance which the chief constable himself attached to the presence of the police, Mr. Griffiths drew our attention to passages in the judgment where the judge dealt with the arrangements which were made between the club and the police. The judge referred to the five clubs (including the club and Sheffield Wednesday) within the police authority's area, and continued:

"In July or August of each year the senior police officer responsible for the policing operations meets the chairmen and secretaries of each of the five clubs. Together they review the policing arrangements made during the previous season, discuss problems which have arisen and consider the policing requirements for the forthcoming season. When the season begins the divisional commander in whose area a particular ground is situated discusses with the club the

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A number of uniformed officers required for each home game. Those numbers depend in part on the expected size of the crowd and in part on the number and reputation of the visitors' supporters. . . . At the beginning of each week an operation order is compiled by the police and circulated within the force and to the club. Such an order is before the court. It contains detailed instructions for policing each particular part of the ground, crowd control and for the enforcement of the club's ground regulations. . . . The manpower required for these operations is, as I have indicated, considerable. It cannot be provided by officers who would normally be on duty at the relevant times, without adversely affecting normal policing requirements elsewhere in the authority's area. It is, therefore, provided by extending the shifts of those involved and by calling on officers who would otherwise have been on rest day. This involves the payment of substantial overtime."

A little earlier in his judgment the judge described the steps taken by the police to maintain law and order by keeping the supporters of the rival clubs segregated at all times. He described the operation in these terms:

D "To achieve this the police have mounted a combined operation at all home matches, between the officers on duty outside the ground and those on duty inside. First, the club's supporters are admitted through particular turnstiles to terracing at the end of the ground known as the Kop. Secondly the visiting supporters are met at the railway station or their coach park and escorted to turnstiles at the opposite (Bramall Lane) end of the ground. At the turnstiles they are relieved of alcohol and containers, such as bottles; those already under the influence of alcohol are refused admittance. The remainder are then admitted to the Bramall Lane terraces and there overseen by uniformed officers. Their duty is to prevent or deter provocative, disruptive or violent behaviour. . . . The final phase of the operation comes at the end of the game when the visiting supporters are held on the terraces while the home supporters disperse. They are then escorted by the police officers outside the ground back to the railway station or to their coach parks."

From this description of the police operations it is apparent, submitted Mr. Griffiths, that by providing for the attendance of a substantial number of police officers the chief constable was carrying out his public duty to maintain law and order. The operation was planned as a whole and it was impossible to make a satisfactory distinction between the duties which the officers carried out outside the ground and those which they carried out within it. The nature of their main function was the same—the maintenance of law and order and the protection of life and property. Moreover, it was instructive to observe that the police placed the matches in three categories and that a category B match (which by definition was less likely to lead to violence than a category A match) was defined as being "a match . . . where serious public disorder can be anticipated."

It will be apparent from this summary of the submissions made on behalf of the club that if the words used by Viscount Cave L.C. in the *Glasbrook* case [1924] A.C. 270 were applied as though they were the words of a statute the case for the club would be very strong if not

overwhelming. Thus it is not in dispute that at all material times since about 1970 the chief constable has been of the opinion that the attendance of police officers at Bramall Lane on the occasion of league and cup matches has been *necessary* for the maintenance of law and order and the protection of life and property. In the *Glasbrook* case, however, the House of Lords was considering a very different situation from that before the court in the present case. The question before the House was whether a charge could be made where the precautions taken were more extensive than those which the police authorities considered to be necessary. But the emergency which required the presence, if not of a garrison of police officers, of at least a number of officers to watch the situation with other officers held in reserve, arose in the context of an industrial dispute and not because the colliery company had voluntarily chosen to invite a large number of people to their premises to watch a football match or other spectacle.

I come therefore to the arguments advanced on behalf of the police authority. It was argued on behalf of the police authority that the claim for payment could be justified on a number of grounds. First it was said that in the *Glasbrook* case itself it was recognised both in the Court of Appeal and in the House of Lords that payments were permissible if special arrangements were made for police officers to attend at such events as weddings, race meetings, and sporting contests. At Bramall Lane the police officers were in effect still carrying out the role which they had always carried out of crowd control and the maintenance of law and order, albeit that the task was more demanding than it was 50 or even 20 years ago. Secondly it was pointed out that though the chief constable was under a general duty to enforce the law, the duty did not and could not extend to providing every citizen with complete protection at all times and in all circumstances. Thirdly it was argued that the disposition of the police force was a matter for the chief constable and that provided he acted reasonably the courts would not interfere with his decisions. Finally, it was submitted that in any event the chief constable was entitled, and indeed bound, to take account of the resources, both financial and in terms of manpower, which were available to him. If he decided, acting reasonably, that he could not provide adequate protection without calling on officers who would otherwise be off duty and would therefore have to be paid overtime if they were used, he was entitled to insist, in a situation such as the present, that the protection would have to be provided in the form of "special police services" and not otherwise.

In support of these arguments Mr. Bentley drew our attention to a number of authorities in which consideration has been given to the question as to how far the courts can interfere with the discretion of a chief constable to dispose of his resources as he thinks best. It is sufficient to refer to some of the relevant passages. In *Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118 Lord Denning M.R. said, at p. 136:

"I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone,

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A save of the law itself. No Minister of the Crown can tell him that he
must, or must not, keep observation on this place or that; or that
he must, or must not, prosecute this man or that one. Nor can any
police authority tell him so. The responsibility for law enforcement
lies on him. He is answerable to the law and to the law alone. . . .
B Although the chief officers of police are answerable to the law,
there are many fields in which they have a discretion with which the
law will not interfere. For instance, it is for the Commissioner of
Police of the Metropolis, or the chief constable, as the case may be,
to decide in any particular case whether inquiries should be pursued,
or whether an arrest should be made, or a prosecution brought. It
must be for him to decide on the disposition of his force and the
concentration of his resources on any particular crime or area. No
C court can or should give him direction on such a matter. He can
also make policy decisions and give effect to them, as, for instance,
was often done when prosecutions were not brought for attempted
suicide."

Some years later in *Reg. v. Chief Constable of Devon and Cornwall*,
Ex parte Central Electricity Generating Board [1982] Q.B. 458 Lord
D Denning M.R. repeated part of this judgment, at p. 472, where he
introduced the relevant passage with the words:

"It is of the first importance that the police should decide on their
own responsibility what action should be taken in any particular
situation."

E And to the same effect were the words of Roskill L.J. in *Reg. v.*
Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 3)
[1973] Q.B. 241, where he said, at p. 262:

"It is no part of the duty of this court to presume to tell the
respondent how to conduct the affairs of the Metropolitan Police,
nor how to deploy his all too limited resources at a time of ever-
increasing crime, especially of crimes of violence in London."

F I return to the facts of the present case. I see the force of the
argument that the court must be very slow before it interferes in any
way with a decision of a chief constable about the disposition of his
forces. The question posed in the instant case, however, is not whether
the chief constable ought to have sent officers to Bramall Lane or as to
the number of officers which were necessary; that the presence of
G officers was necessary is not in dispute. The question is whether, having
regard to his general duty to enforce the law, the provision of these
officers can properly be considered as the provision of special police
services for which the police authority was entitled to make a charge. In
answering this question I do not propose to attempt to lay down any
general rules as to what are or are not "special police services," because
H in my judgment it is necessary to look at all the circumstances of the
individual case. I would, however, venture to suggest that the following
matters require to be taken into account (1) Are the police officers
required to attend on private premises or in a public place? Though in
Glasbrook Brothers Ltd. v. Glamorgan County Council [1925] A.C. 270
the fact that the garrison was to be stationed on private premises was
not treated as conclusive, the fact that the police will not as a general
rule have access to private premises suggests that *prima facie* their

presence on private premises would constitute special police services. (2) A
 Has some violence or other emergency already occurred or is it
 immediately imminent? I can at present see no basis for an argument
 that the attendance of police officers to deal with an outbreak of
 violence which has actually occurred or is immediately imminent could
 constitute the provision of special police services, even though officers
 who would otherwise be off duty had to be deployed. (3) What is the
 nature of the event or occasion at which the officers are required to
 attend? It is to be noted that in *Wathen v. Sandys* (1811) 2 Camp. 640, B
 which was referred to in the course of argument in the *Glasbrook* case
 in the Court of Appeal [1924] 1 K.B. 879, 882, the sheriff was not
 entitled to charge the candidates for the provision of constables at the
 polling booth because he was under a duty to procure the peace of the
 county. But a distinction can be drawn between public events such as
 elections which perhaps lie at one end of a spectrum, and private events
 such as weddings which lie at the other end. At various points in the
 middle may lie events such as football matches to which the public are
 invited and which large numbers of the public are likely to attend. It
 may also be relevant to inquire whether the event or occasion forms part
 of a series or whether it is a single occasion or event. Someone who
 stages events which require the regular attendance of police officers will
 be placing an exceptional strain on the resources of the police,
 particularly if the events take place at weekends or on public holidays. D
 (4) Can the provision of the necessary amount of police protection be
 met from the resources available to the chief constable without the
 assistance of officers who would otherwise be engaged either in other
 duties or would be off duty? It was argued on behalf of the club that
 though it was relevant to take account of the total number of men
 available it was not permissible to take into consideration the fact that
 the use of "off-duty" officers might increase the payment of overtime. I
 am unable to accept this argument. The chief constable when deciding
 how to deploy his forces is subject not only to the constraints imposed
 by the number of men available, but also to financial constraints. The
 payment of overtime on particular occasions may mean that on other
 occasions reductions have to be made in the ordinary services provided
 by the police or sacrifices have to be made in the provision of equipment. E

Bearing these considerations in mind I return to the present case.
 The club has responsibilities which are owed not only to its employees
 and the spectators who attend but also to the football authorities to take
 all reasonable steps to ensure that the game takes place in conditions
 which do not occasion danger to any person or property. The attendance
 of the police is necessary to assist the club in the fulfilment of this duty. G
 The matches take place regularly and usually at weekends during about
 eight months of the year. Though the holding of the matches is of some
 public importance because of the widespread support in the local
 community both for the game and the club, the club is not under any
 legal duty to hold the matches. The charges which the police authority
 seek to make, and have made, relate solely to the officers on duty inside
 the ground and not to those in the street or other public places outside. H

There is clear evidence that the chief constable would be unable to
 provide the necessary amount of protection for Bramall Lane and also
 to discharge his other responsibilities without making extensive use of
 officers who would otherwise have been off duty. Substantial sums by
 way of overtime have therefore to be paid. The arrangements for the

A attendance of the officers are made to guard against the possibility, and for some matches the probability, of violence; the officers are not sent to deal with an existing emergency, nor can it be said that any outbreak of violence is immediately imminent.

B In my judgment, looking at all these factors I am driven to the conclusion that the provision of police officers to attend regularly at Bramall Lane throughout the football season does constitute the provision of special police services. Nor in my opinion is it to the point that the club has stated that they do not expect the police to carry out any duties other than to maintain law and order. The resources of the police are finite. In my view if the club wishes on a regular basis to make an exceptional claim on police services to deal with potential violence on its premises, then however well intentioned and public spirited it may be in assembling the crowd at Bramall Lane, the services which it receives are "special police services" within the meaning of section 15(1) of the Police Act 1964.

C The question then remains: are these services "requested" by the club within the meaning of section 15(1)? It was very strongly argued on behalf of the club that after 26 October 1983 the club made no relevant request for such services other than requests made on a without prejudice basis. In my view this part of the club's argument, unlike the argument on the meaning of "special police services," lacks any real substance. If the club is to hold matches at Bramall Lane it is necessary for police officers to attend inside the ground. Their presence is necessary to enable the club to meet its responsibilities to the players, the staff and the spectators as well as to comply with the rules imposed by the football authorities. It is not necessary to examine what steps could be taken, and by whom, to stop a match taking place if the club authorities declined to allow the police to attend. But there is no likelihood that the club authorities, who have acted with a great sense of responsibility throughout, would take such a course. It may be that the request for the police services can only be implied from all the circumstances and that it is made without enthusiasm. But if the police attend in order to enable the match to take place then, in the circumstances existing in this case, I consider that a request is to be implied.

E I would only add this. One can feel considerable sympathy for the club authorities who are faced with falling gates and a grave escalation of costs to meet violence which they deplore and do their best to prevent. One can only hope that some accommodation can be reached perhaps on a national scale to meet a threat to the finances of the club and other clubs in a similar situation. But I am satisfied that as a matter of law the judge reached the right conclusion.

G I would dismiss the appeal.

H BALCOMBE L.J. The principal issue on this appeal is whether police services provided by the South Yorkshire Police Authority at the ground of the Sheffield United Football Club on the occasions of the club's home fixtures are "special police services" within section 15(1) of the Police Act 1964 so that, if these services are provided at the club's request, the police authority may charge for their provision. The judge held that they were special services. The club has appealed.

The club's argument has the attraction of simplicity. It is common ground that it is the duty of all constables, including chief constables, to

enforce the law and in particular to prevent breaches of the peace. In the course of his judgment the judge said: "It is accepted that at some fixtures violence was almost certain if the police were not present in substantial numbers—that was well known to the club and to the police." So, Mr. Griffiths submitted, it follows that by their presence at the club's ground the police were merely fulfilling their primary function of preserving public order: that is part of their ordinary duty and cannot therefore be "special police services." As I said, the argument has the attraction of simplicity; nevertheless in my judgment it is wrong.

The argument depends to a very great extent on the decision of, and the speeches in, the House of Lords in *Glasbrook Brothers Ltd. v. Glamorgan County Council* [1925] A.C. 270. It is therefore necessary to consider carefully what that case decided. On the occasion of a strike a colliery manager applied for police protection for his colliery and insisted that it could only be efficiently protected by billeting a police force on the colliery premises. The police superintendent was prepared to provide what in his opinion was adequate protection by means of a mobile force, but refused to billet police officers at the colliery except on the terms of the manager agreeing to pay for the force so provided at a special rate. The House of Lords held by a majority (Viscount Cave L.C., Viscount Finlay and Lord Shaw of Dumfermline; Lord Carson and Lord Blanesburgh dissenting) that there was nothing illegal in the agreement, nor was it void for want of consideration. It will at once be observed that the facts of the *Glasbrook* case are a very long way from the facts of the present case; in particular there was no suggestion there, as there is here, that the person requiring police protection had, for his own private purposes, organised an occasion which could only take place safely if special security measures were taken, and which it was his own duty to provide. It is against that background of fact that the quotations from the speeches in the *Glasbrook* case on which Mr. Griffiths relies have to be set; in particular the passage from the speech of Viscount Cave L.C., where he said, at p. 277:

"there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace . . . ; and the public, who pay for this protection through the rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right."

However, the House of Lords decided in that case that what the colliery manager wanted by way of policing went beyond what the police were under a public duty to provide; therefore it was a "special" service for which payment could be required. It is the same question which has to be decided, on different facts, in the present case. It is, however, interesting to note that during the course of the *Glasbrook* case there were several references to policing of the kind which is in issue in the present case as being an example of the kind of "special" service for which payment could be required. Thus Viscount Cave L.C. said, at p. 278:

"Instances are the lending of constables on the occasions of large gatherings in and outside private premises, as on the occasions of weddings, athletic or boxing contests or race meetings, and the provision of constables at large railway stations."

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- A In the *Glasbrook* case in the Court of Appeal [1924] 1 K.B. 879 Scrutton L.J. gave examples of services provided by the police for payment at p. 891: "Instances are . . . where assemblies are likely to produce disorder, as at races, or *football meetings* . . ." (my emphasis). Mr. Griffiths attempted to explain away these references by submitting that, whatever may have been the position in the past, today it is a sad fact of life that football hooliganism is virtually certain to provoke disorder, so that the police must attend football matches in exercise of their public duty to keep the peace. I do not find that a convincing explanation, particularly against the background of the Report of the Departmental Committee on Crowds (1924) (Cmd. 2088) ("the Shortt Report") which at paragraph 21 on p. 14 makes clear what was then considered to be the function of the police inside a football or other sports ground:
- C "The presence of the police at a largely attended football match or similar event is in itself desirable as the most effective means of preventing disorder and of dealing with it promptly should it arise. Their employment is, in fact, not solely for private advantage but serves also a useful public purpose."
- D Accordingly I do not accept Mr. Griffiths' submission that the decision in the *Glasbrook* case is determinant of the decision in the present case. The true rule, in my judgment, is as follows. In deciding how to exercise his public duty of enforcing the law, and of keeping the peace, a chief constable has a discretion, which he must exercise even-handedly. Provided he acts within his discretion, the courts will not interfere: see,
- E e.g., *Reg. v. Oxford, Ex parte Levey*, The Times, 1 November 1986. In exercising that discretion a chief constable must clearly have regard to the resources available to him, and I reject as wholly unrealistic Mr. Griffiths' submission that in estimating those resources he must only consider the manpower available, whether from his own force or from another force under section 14 of the Police Act 1964, without regard to the cost of providing those resources, whether by way of payment of
- F overtime to his own men or by payment to the other police authority under section 14(4). As Scrutton L.J. said in the *Glasbrook* case [1924] 1 K.B. 879, 891:
- "Obviously the police authorities cannot be expected to, and cannot, protect every citizen completely against possible, even anticipated, crime. The cost would be prohibitive . . ."
- G See also *China Navigation Co. Ltd. v. Attorney-General* [1932] 2 K.B. 197, per Scrutton L.J. at pp. 212–213. In the present case there was evidence of the very considerable sum which had to be paid by way of overtime for the provision of police within the club's ground, and this was in addition to the considerable cost of policing outside the ground on the occasion of home fixtures. In answering the question whether
- H the provision of police within the club's ground was a special service the judge said:
- "The numbers considered necessary to carry out these services could only be provided by calling on officers who, at the material times, would otherwise have been off duty. The scope and extent of those services and their impact on the chief constable's manpower resources put them beyond what the club, in the circumstances, was entitled to have provided in pursuance of the chief constable's

public duty. He was entitled to provide those services because he was able to do so without depriving other people of police protection. In other words, the services provided were within his powers; they were not within the scope of his public duty. I am satisfied that they were special services as I understand that expression to have been used in the *Glasbrook* case and within the meaning of section 15(1) of the Police Act 1964. It follows that he was entitled to provide them on condition that they were paid for."

In my judgment that is a correct statement of the legal position which cannot be faulted.

In the course of his argument Mr. Griffiths submitted that this appeal raises grave constitutional issues in that the same arguments which were successful before the judge—and in my view rightly so—could be used to support an argument that the policing of political events where there were threats of disorder could be "special services" for which payment could be required. I do not accept that the cases are in *pari materia* and I do not consider that a dismissal of this appeal poses any threat to the political freedoms which the citizen of this country enjoys.

On the other issue which arises on this appeal—whether the club after 26 October 1983 requested police services at its ground—I agree with the judgment of Neill L.J. and do not wish to add anything.

I would dismiss this appeal.

KERR L.J. I agree that this appeal should be dismissed for the reasons stated in the judgments of Neill and Balcombe L.JJ. and there is nothing which I could usefully add.

*Appeal dismissed with costs.
Leave to appeal.*

Solicitors: Clegg & Sons, Sheffield; W. K. Irving, Barnsley.

[Reported by HARRIET DUTTON, Barrister-at-Law]

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A

[COURT OF APPEAL]

REGINA v. O'GRADY

1987 June 2; 11

Lord Lane C.J., Boreham and McCowan JJ.

B

Crime—Self-defence—Homicide—Mistake of fact induced by voluntary intoxication—Whether available for self-defence

C

The appellant, who was intoxicated, killed a man and stated to the police, "If I had not hit him I would be dead myself." He was tried on a count charging murder. The jury were directed that, if the appellant mistakenly believed he was under attack, he was entitled to defend himself but was not entitled to go beyond what was reasonable. He was convicted of manslaughter.

On appeal against conviction, on the question whether the direction should have included the possibility of mistake as to the severity of an attack:—

D

Held, dismissing the appeal, that so far as self-defence was concerned, reliance could not be placed on a mistake of fact induced by voluntary intoxication; and that, accordingly, the appeal failed (post, pp. 324H, 326D).

Reg. v. Majewski [1977] A.C. 443, H.L.(E.) and *Reg. v. Williams (Gladstone)* (1983) 78 Cr.App.R. 276, C.A. considered.

Per curiam. A sober man who mistakenly believes he is in danger of immediate death at the hands of an attacker is entitled to be acquitted of both murder and manslaughter if his reaction in killing his supposed assailant was a reasonable one (post, p. 325A–B).

E

The following cases are referred to in the judgment:

Marshall's Case (1830) 1 Lew. 76.

Palmer v. The Queen [1971] A.C. 814; [1971] 2 W.L.R. 831; [1971] 1 All E.R. 1077, P.C.

Reg. v. Gamlen (1858) 1 F. & F. 90

Reg. v. Lipman [1970] 1 Q.B. 152; [1969] 3 W.L.R. 819; [1969] 3 All E.R. 410, C.A.

F

Reg. v. Majewski [1977] A.C. 443; [1976] 2 W.L.R. 623; [1976] 2 All E.R. 142, H.L.(E.)

Reg. v. Wardrope [1960] Crim.L.R. 770

Reg. v. Williams (Gladstone) (1983) 78 Cr.App.R. 276, C.A.

The following additional cases were cited in argument:

G

Reg. v. Shannon (1980) 71 Cr.App.R. 192, C.A.

Reg. v. Whyte, *The Times*, 16 May 1987, C.A.

Reg. v. Woods (1981) 74 Cr.App.R. 312, C.A.

Rex v. Letenock (1917) 12 Cr.App.R. 221, C.C.A.

APPEAL against conviction.

H

The appellant, Patrick Gerald O'Grady, at the Central Criminal Court, before Judge Underhill Q.C. and a jury was tried on a count charging murder. After a five-day trial he was convicted on 19 September 1986 of manslaughter and was sentenced to seven years' imprisonment. He appealed against conviction on the grounds, inter alia, (a) that, in directing the jury about a mistaken belief as to the severity of an attack, the judge erred in that he ought to have said further that a man who mistakenly believed he was being attacked or who mistakenly believed an attack to be more severe than in fact it was, was entitled to use such

force as was reasonable to defend himself from an attack of the severity of which he believed it to be; (b) that, alternatively, the verdict was unsafe or unsatisfactory because the direction was unclear and ambiguous, in that the jury might have taken it to mean that the appellant was entitled to use only such force as was required by the actual circumstances; (c) that the judge failed to remind the jury that a defendant was not required to judge to a nicety the amount of necessary force and that they should give weight to the view he formed albeit in drink; and (d) that, in all the circumstances, the verdict was unsafe and unsatisfactory. An appeal against sentence does not call for report.

The facts are stated in the judgment.

James Wadsworth Q.C. and *Peter Spink* (assigned by the Registrar of Criminal Appeals) for the appellant.

Michael Worsley Q.C. and *Michael Neligan* for the Crown.

Cur. adv. vult.

11 June. LORD LANE C.J. read the following judgment of the court. On 19 September 1986 at the Central Criminal Court this appellant having been charged with murder was convicted by the jury of manslaughter and was sentenced to seven years' imprisonment. He now appeals against conviction and sentence by leave of the single judge, McCullough J.

The appellant was addicted to drinking large quantities of alcohol, as were the friends and acquaintances with whom he consorted, one of whom was McCloskey, the deceased man. On Thursday, 26 September 1985, the appellant, McCloskey and another man called Brennan spent the day drinking. The appellant had drunk huge quantities of cider (some 8 flagons), and he and Brennan and McCloskey repaired to the appellant's flat.

Early on Friday morning Brennan woke up to see that the appellant was covered in blood. "We"—meaning McCloskey and himself—"had a fight," said the appellant, "and I felt him and he was cold." The appellant went to the police station saying he wished to report a murder. He was medically examined. He had a number of cuts and bruises to the head, hands and legs which were consistent with (a) fighting and (b) grasping broken glass.

A post mortem on McCloskey revealed extensive serious wounds to the face—no less than 20 in number—of varying degrees of severity, as well as injuries to the hands and a fractured rib. The wounds to the hands were probably defence injuries. There was severe bruising to the head, brain, neck and chest. There was a fracture of the spine at the level of the fifth cervical vertebra, probably caused by the head being forced backwards. There was a fractured rib. The blows to the body had been delivered by both sharp and blunt objects. He had bled to death from the wounds inflicted on and around the face.

There was no doubt but that both the appellant and McCloskey were very drunk at the material time. The only evidence of what had led to the injuries of necessity came from the appellant himself. He and McCloskey were friends, there was no animosity between them. After their drinking bout the two fell asleep. The material part of the appellant's account was as follows:

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A "I was awakened by a bang on the head and I jumped up and put my hand to my head and the blood was running down. I am not sure if it was one bang I got or more. I saw Eddie [McCloskey] standing up . . . he had a piece of glass in one hand . . . I made for him to stop him hitting me again. I picked up a piece of glass and I hit him. We were both standing up facing each other . . . We struggled . . . He was getting the better of me, trying to knock me over. I hit him to stop him hitting me again."

B

He went on to describe how the two of them had fought; how he thought that Eddie was getting the better of him, how he thought he had only hit Eddie a few times; how the fight eventually subsided. He described how he had then cooked a chop for Eddie who did not seem to want it. The appellant then sat down and fell asleep. His evidence continued as follows:

C

"Then I woke up and found that Eddie had gone from where he had been. I was scared at that. I was scared he would get out of the flat and go and get men [to help him]. I jumped up with the intention of leaving the place. I went to the toilet on the way to the front door and found Eddie kneeling by the toilet, his hands over the bowl. I called him and he gave no answer. I took hold of him and found he was cold. I moved him on to the floor and I thought to myself: 'He is dead'."

D

The appellant described how he reported Eddie's condition to some friends and then went to Peckham police station. He said, "I did not want to kill him. I wanted him alive, not dead. I had no enmity to him. If I had not hit him I would be dead myself."

E

The judge gave an impeccable direction on the ingredients of murder and upon the way in which intoxication may affect proof of intent to kill or to do serious bodily harm. Likewise impeccable was his direction on provocation, including the correct observation that, when considering whether a reasonable man would have been caused to lose his self-control, questions of drink are irrelevant.

F

Finally he gave the classic direction on self-defence. He made no mention of the possibility that the appellant might by reason of intoxication have been mistaken as to the threat posed to him by McCloskey's action. This was no doubt because no one had taken the point.

G

Counsel for the prosecution towards the close of the judge's directions saw fit to invite the judge to remedy what he plainly regarded as this lacuna in the charge to the jury. Counsel for the appellant wisely held his peace. The judge then gave this further direction:

H

"It might be a view that you might take—I know not—that this defendant thought he was under attack from the other man mistakenly and made a mistake in thinking that he was under attack because of the drink that was in him. If he made such a mistake in drink he would nevertheless be entitled to defend himself even though he mistakenly believed that he was under attack. He would be entitled in those circumstances to defend himself. But if in taking defensive measures, then he went beyond what is reasonable either because of his mind being affected by drink or for any other reason, then the defence of self-defence would not avail him because, as I told you earlier on, you are entitled to defend yourself if it is

necessary to do so, but the defensive measures that you take must be reasonable ones and not go beyond what is reasonable."

The grounds of appeal advanced by Mr. Wadsworth are as follows. (1) Whilst the judge was correct to refer to mistake induced by drink in connection with self defence, he was wrong to limit the reference to mistake as to the existence of an attack; he should have included the possibility of mistake as to the severity of an attack which was the most likely possibility on the facts. (2) By leaving the matter to the jury as he did, the judge in effect divorced the reasonableness of the appellant's reaction from the appellant's state of mind at the time. (3) The judge failed when giving his further direction to the jury to remind them that a defendant is never required to judge to a nicety the amount of force which is necessary and that they should give great weight to the view formed by the appellant at the time, even though that view might have been affected by alcohol.

As to the first two grounds, these require an examination of the law as to intoxication in relation to mistake. Counsel have referred us to a number of authorities. It is not necessary for us to refer to all of these. In three of them the jury were invited to take the defendant's drunkenness into account when deciding whether he genuinely apprehended an assault upon himself. *Reg. v. Giamberini* (1858) 1 F. & F. 90; *Marshall's Case* (1830) 1 Lew. 76; and *Reg. v. Warhup* [1960] Crim L.R. 770. However the reports of these cases leave a great deal to be desired and as far as we can discover there is no case directly in point which is binding upon us.

As McCullough J., when granting leave, pointed out helpfully in his observations for the benefit of the court:

"Given that a man who *mistakenly* believes he is under attack is entitled to use reasonable force to defend himself, it would seem to follow that, if he is under attack and mistakenly believes the attack to be more serious than it is, he is entitled to use reasonable force to defend himself against an attack of the severity he believed it to have. If one allows a mistaken belief induced by drink to bring this principle into operation, an act of gross negligence (viewed objectively) may become lawful even though it results in the death of the innocent victim. The drunken man would be guilty of neither murder nor manslaughter."

How should the jury be invited to approach the problem? One starts with the decision of this court in *Reg. v. Williams (Gladstone)* [1983] 78 Cr. App. R. 276, namely, that where the defendant might have been labouring under a mistake as to the facts he must be judged according to that mistaken view, whether the mistake was reasonable or not. It is then for the jury to decide whether the defendant's reaction to the threat, real or imaginary, was a reasonable one. The court was not in that case considering what the situation might be where the mistake was due to voluntary intoxication by alcohol or some other drug.

We have come to the conclusion that where the jury are satisfied that the defendant was mistaken in his belief that any force or the force which he in fact used was necessary to defend himself and are further satisfied that the mistake was caused by voluntarily induced intoxication, the defence must fail. We do not consider that any distinction should be drawn on this aspect of the matter between offences involving what is

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A called specific intent, such as murder, and offences of so called basic
intent, such as manslaughter. Quite apart from the problem of directing
a jury in a case such as the present where manslaughter is an alternative
verdict to murder, the question of mistake can and ought to be
considered separately from the question of intent. A sober man who
mistakenly believes he is in danger of immediate death at the hands of
B an attacker is entitled to be acquitted of both murder and manslaughter
if his reaction in killing his supposed assailant was a reasonable one.
What his intent may have been seems to us to be irrelevant to the
problem of self-defence or no. Secondly, we respectfully adopt the
reasoning of McCullough J. already set out.

This brings us to the question of public order. There are two
competing interests. On the one hand the interest of the defendant who
C has only acted according to what he believed to be necessary to protect
himself, and on the other hand that of the public in general and the
victim in particular who, probably through no fault of his own, has been
injured or perhaps killed because of the defendant's drunken mistake.
Reason recoils from the conclusion that in such circumstances a
defendant is entitled to leave the Court without a stain on his character.

D We find support for that view in the decision of the House of Lords
in *Reg. v. Majewski* [1977] A.C. 443, and in particular in the speeches of
Lord Simon of Glaisdale and Lord Edmund-Davies. We cite a passage
from the speech of Lord Simon of Glaisdale, at p. 476:

“(1) One of the prime purposes of the criminal law, with its penal
sanctions, is the protection from certain proscribed conduct of
persons who are pursuing their lawful lives. Unprovoked violence
E has, from time immemorial, been a significant part of such proscribed
conduct. To accede to the argument on behalf of the appellant
would leave the citizen legally unprotected from unprovoked
violence where such violence was the consequence of drink or drugs
having obliterated the capacity of the perpetrator to know what he
was doing or what were its consequences. (2) Though the problem
F of violent conduct by intoxicated persons is not new to society, it
has been rendered more acute and menacing by the more widespread
use of hallucinatory drugs. For example, in *Reg. v. Lipman* [1970] 1
Q.B. 152, the accused committed his act of mortal violence under
the hallucination (induced by drugs) that he was wrestling with
serpents. He was convicted of manslaughter. But, on the logic of
the appellant's argument, he was innocent of any crime.”

G Lord Edmund-Davies said, at p. 492:

“The criticism by the academics of the law presently administered in
this country is of a two-fold nature: (1) It is illogical and therefore
inconsistent with legal principle to treat a person who of his own
volition has taken drink or drugs any differently from a man
suffering from some bodily or mental disorder of the kind earlier
H mentioned or whose beverage had, without his connivance, been
'laced' with intoxicants; (2) it is unethical to convict a man of a
crime requiring a guilty state of mind when ex hypothesi, he lacked
it.”

Lord Edmund-Davies then demonstrated the fallacy of those criticisms.

Finally we draw attention to the decision of this court in *Reg. v. Lipman* [1970] 1 Q.B. 152 itself. The defence in that case was put on

the grounds that the defendant, because of the hallucinatory drug which he had taken, had not formed the necessary intent to found a conviction for murder, thus resulting in his conviction for manslaughter. If the appellant's contentions here are correct, Lipman could successfully have escaped conviction altogether by raising the issue that he believed he was defending himself legitimately from an attack by serpents. It is significant that no one seems to have considered that possibility.

The third and final ground of appeal has in effect already disappeared, because if the judge's additional direction was unnecessary, so was any repetition of the passage from the speech of Lord Morris of Borth-y-Gest in *Palmer v. The Queen* [1971] A.C. 814, 832:

"If there has been [an] attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

Indeed those words are scarcely apt to describe the actions of a man labouring under the effect of a drunken mistake. They accordingly add some marginal support to the views which we have expressed.

We have therefore come to the conclusion that a defendant is not entitled to rely, so far as self-defence is concerned, upon a mistake of fact which has been induced by voluntary intoxication.

As already indicated, the judge's addendum to his summing up, which he made at the suggestion of prosecuting counsel, was unnecessary and erred in favour of the appellant.

The appeal against conviction is accordingly dismissed.

[His Lordship stated the considerations relating to the appeal against sentence and continued:] The appeal against sentence is likewise dismissed.

Appeal dismissed.

Solicitors: Crown Prosecution Service, Headquarters.

L. N. W.

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A

[COURT OF APPEAL]

REGINA v. ROBERTSON

REGINA v. GOLDER

B

1987 May 18, 19;
June 11

Lord Lane C.J., Boreham and McCowan JJ.

Crime—Evidence—Conviction as evidence—Commission of offence by another relevant issue at trial of accused—Whether “issue” limited to essential ingredient of offence charged—Whether extending to evidential issue—Whether person having pleaded or been found guilty but not sentenced, “convicted”—“Conviction”—Police and Criminal Evidence Act 1984 (c. 60) ss. 74(1), 78(1)

C

R. was tried on a count of conspiracy with two other men to commit burglaries of a company's warehouses and shops. The two other men pleaded not guilty to conspiracy but guilty to 16 relevant counts of burglary with which R. was not charged, and they were sentenced. At the trial of R., which was delayed for some weeks, the prosecution sought leave which was granted under section 74 of the Police and Criminal Evidence Act 1984,¹ to adduce evidence of the two men's convictions on the 16 counts. R. was convicted.

D

G. was tried on a count of robbery and evidence was admitted of pleas of guilty to the offence by two co-defendants, who had not been sentenced. G. was convicted.

E

On appeal by R. against conviction on the grounds that the judge erred in admitting the evidence in that there was no “issue” within section 74(1), for ex concessis the burglaries had been committed, that section 74 applied only where a defendant had had no part in the offences of which the third party was convicted, and that the evidence should have been excluded as being unfair within section 78(1); and on appeal by G. against conviction on the ground that the evidence was wrongly admitted since the two men had not been “convicted” within section 74(1):—

F

Held, dismissing the appeals, (1) that, in relation to a trial, the term “issue” in section 74(1) was apt to cover not only the restricted meaning of an issue which was an essential ingredient of the offence charged but also the extended meaning of an evidential issue arising during the course of the proceedings; that section 74(1) did not limit “issue” to the restricted meaning and did not apply only to proof of conviction of offences in which the defendant on trial played no part; and that, since R.'s name did not appear in any of the 16 counts to which pleas had been entered, even if the two men had given evidence in accordance with their pleas, counsel for R. would have been unlikely to cross-examine them or, if he did cross-examine, would have been unlikely to achieve anything except disaster for R. so that the admission of the evidence was not unfair within the meaning of section 78(1); that, accordingly, the evidence was correctly admitted and the verdict being neither unsafe nor unsatisfactory, R.'s appeal failed (post, pp. 333H—334A, B, H, 335H—336A).

G

H

¹ Police and Criminal Evidence Act 1984, s. 74(1): see post, p. 331D—E. S. 78(1): see post, pp. 331H—332A.

(2) That whether or not a defendant was sentenced was irrelevant to the issue whether he had committed the offence; so that "convicted" in section 74(1) was to be construed as a finding of guilt or a formal plea of guilty and not as meaning the final disposal of the case; and, accordingly, the convictions G.'s co-defendants being relevant to the charge against G., his appeal failed (post, pp. 337G-H, 338c). A

Dicta of Lord Reid in *S. (An Infant) v. Recorder of Manchester* [1971] A.C. 481, 489, H.L.(E.) applied. B

Per curiam. Section 74 should be sparingly used. Occasionally evidence may be technically admissible but its effect is likely to be so slight that it will be wiser not to adduce it, particularly where there is any danger of contravening section 78. Where the evidence is admitted, the judge should be careful to explain to the jury the effect of the evidence and its limitations (post, p. 335A-B) C

The following cases are referred to in the judgment:

Reg. v. Drew [1985] 1 W.L.R. 914; [1985] 2 All E.R. 1061, C.A.

Reg. v. O'Connor (unreported), 18 November 1986, C.A.

Rex v. Plummer [1902] 2 K.B. 339

S. (An Infant) v. Recorder of Manchester [1971] A.C. 481; [1970] 2 W.L.R. 21; [1969] 3 All E.R. 1230, H.L.(E.) D

The following additional case was cited in argument in Robertson's case:

Reg. v. Gallagher [1974] 1 W.L.R. 1204; [1974] 3 All E.R. 118, C.A.

The following additional case was cited in argument in Golder's case:

Reg. v. Cole [1965] 2 Q.B. 388; [1965] 3 W.L.R. 263; [1965] 2 All E.R. 29, C.C.A. E

APPEALS against conviction.

REG. V. ROBERTSON

The appellant, Malcolm Robertson, on 17 February 1986 in the Crown Court at Snaresbrook before Judge Owen Stable Q.C. and a jury, was convicted after a five-day trial on a count of conspiracy with Barry Poole and Albert William Long, to commit burglary. He was sentenced to three years' imprisonment. He appealed against conviction on the grounds that the judge (1) erred in law in admitting evidence of pleas of guilty by Poole and Long to substantive counts of burglary; (2) unfairly and adversely commented on the appellant's failure to call Poole and Long as witnesses; and (3) wrongly directed the jury that the appellant was alleging that all the police officers were committing perjury, whereas the allegation was that, of the four interviewing officers, two invented evidence and the others were mistaken. F

The facts are stated in the judgment. G

REG. V. GOLDER

The appellant, Martin Golder, on 14 October 1986 in the Crown Court at St. Albans before Judge Hickman and a jury was convicted of robbery and on 17 October 1986 was sentenced for it to four years' imprisonment. On that date he was sentenced also to three years' imprisonment consecutive to the four years but concurrent in respect of each of two counts of burglary in relation to which he had changed his H

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A pleas to guilty on 15 October 1986. He appealed against conviction of robbery on the grounds that the judge erred in law in admitting evidence of pleas of guilty to the robbery, by two co-accused, named respectively Moran and Eley, who had not yet been sentenced for that offence.

The facts are stated in the judgment.

B The appeal of Golder was argued on 18 May 1987. Lord Lane C.J. announced that the appeal was dismissed for reasons to be given later. The appeal of Robertson was argued on 19 May 1987 and judgment was reserved.

R. B. Tansey (assigned by the Registrar of Criminal Appeals) for the appellant Robertson.

C *Philip Turl* (assigned by the Registrar of Criminal Appeals) for the appellant Golder.

Stewart Patterson for the Crown in both appeals.

Cur. adv. vult.

D 11 June. LORD LANE C.J. read the following judgment of the court. These two cases raise similar points upon the construction of certain sections of the Police and Criminal Evidence Act 1984, and we propose therefore as a matter of convenience to deal with them together.

REG. V. ROBERTSON

E On 17 February 1986 in the Crown Court at Snaresbrook before Judge Owen Stable Q.C. and a jury, the appellant, Malcolm Robertson, was convicted of conspiracy to commit burglary. He was sentenced to three years' imprisonment. Now by leave of the single judge he appeals against that conviction.

F The original indictment had contained five counts. Counts 1 and 2 charged the appellant together with Barry James Poole and Albert William Long with conspiring together and with others unknown to commit burglary at premises belonging to Comet Plc. The remaining counts concerned Poole and Long only.

G Before arraignment, and by consent, the indictment was amended by adding counts 6 to 20, each count charging burglary at premises belonging to Comet Plc. in various parts of London and south east England. Eight of these counts charged Poole alone, two charged Long alone and five charged Poole and Long jointly. Poole pleaded not guilty to conspiracy but guilty to all 14 counts of burglary. Long pleaded not guilty to conspiracy but guilty to all nine counts of burglary—six of the counts being joint charges with Poole: a total therefore of 17 burglaries, 16 of them at Comet premises. These pleas were accepted and on 8 H January Poole was sentenced to 2½ years' imprisonment, Long to 2 years' imprisonment.

The trial of the appellant on the two conspiracy counts commenced on 6 January, but, for reasons which do not concern us, the jury were discharged. Prior to his retrial on 11 February, three further counts were added to the indictment charging the appellant with burglary (count 21) and handling a stolen video (counts 22 and 23). During the course of the retrial, and by consent, the indictment was further amended by

consolidating the two conspiracy counts to allege one conspiracy with Poole, Long and others between 1 January 1984 and 20 June 1985. A

The Crown's case was that between January 1984 and 20 June 1985 82 burglaries were committed at premises belonging to Comet in London and south east England. Goods to the value of £245,000 were stolen. This was not in dispute. The pleas of Poole and Long related to 16 of these burglaries and to goods to the value of £44,000. Their last offence was committed at Stevenage on 20 June 1985, when six video recorders to the value of £2,700 were stolen. They were observed by nearby residents, their car number was taken, and they were arrested with the stolen goods within a very short time. B

The appellant was arrested at his home on 25 June. The Crown's case against the appellant was (1) that there was a conspiracy between Poole and Long in the terms of the indictment, namely, "on days between 1 January 1984 and 20 June 1985 to enter showrooms and warehouses belonging to Comet Plc. as trespassers and to steal therein video cassette recorders and television sets." The admissibility of the evidence adduced by the Crown on this aspect of their case is disputed; (2) that the appellant was, for at least part of the time, a member of that conspiracy. C

The Crown relied upon (a) admissions alleged to have been made on three occasions by the appellant: first at his home when arrested, secondly at the police station and thirdly at a formal interview when contemporaneous notes were made of the questions and answers. The appellant was given the opportunity to check and sign the notes. He said he would think about it. He never signed them. In evidence the appellant denied making any admissions. His versions of the first two conversations contained nothing in the nature of an admission. As to the formal interview, he agreed that a note had been made, but not from anything he had said. It was an entire fabrication. Police Constable Bricklow not only asked the questions, he also supplied all the answers. Police Constable Simpson recorded them at his colleague's dictation; (b) evidence of the appellant's association with stolen property and with Poole and Long. On 2 May 1984 Police Constable Smith found a damaged video recorder on the ground beneath a broken window of the appellant's first floor flat. It had been stolen on 30 April 1984 from a Comet warehouse at Chingford. Three officers visited the flat, where they found the appellant and Poole and where they said they saw a video lead hanging from a socket in the television set. The appellant denied that there was such a lead and asserted that the video recorder had no connection with him or his flat. The recorder was the subject of counts 22 and 23. D

The Crown also relied upon an incident on 13 May 1985 when a car driven by Poole stopped when approached by the appellant and Long. According to Police Constable Bricklow, Poole passed to the appellant a paper on which the word "Comet" was printed. The appellant and Long then entered the car which was driven away by the appellant. The appellant did not deny the incident, but disputed any reference to Comet. His case was that his association with Poole and Long was entirely innocent. E

After a five-day trial the appellant was convicted of the conspiracy. The jury were discharged from returning verdicts on counts 21 to 23. The appellant was sentenced to three years' imprisonment. His F

H

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A application for leave to appeal against that sentence was refused by the single judge, and has not been renewed.

B Mr. Tansey on behalf of the appellant submits that the verdict was unsafe and unsatisfactory by reason of, what he submits was, a serious irregularity in the course of the trial, and two more in the course of the summing up. The irregularity in the trial relates to the admissibility of evidence. The Crown sought to prove the existence of the conspiracy between Poole and Long by proving, *inter alia*, that within the relevant period Poole and Long had committed a number of burglaries at different Comet premises and had stolen television sets and video recorders. The inference was that they must have conspired together. To do this the Crown sought the leave of the judge to adduce evidence of the convictions of Poole and Long of 16 relevant counts of burglary. C Their case was that they were entitled to adduce that evidence by virtue of the provisions of section 74(1) of the Police and Criminal Evidence Act 1984. The judge heard argument and ruled in favour of the Crown.

Mr. Tansey challenges that ruling on a number of grounds. To put his submissions into perspective, it is necessary to refer to section 74 and the related sections of the Police and Criminal Evidence Act 1984.

Section 74 provides:

D “(1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom . . . shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence, whether or not any other evidence of his having committed that offence is given. (2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom . . . he shall be taken to have committed that offence unless the contrary is proved. . . .” E

It is unnecessary to refer to subsections (3) and (4). Section 75 provides:

F “(1) Where evidence that a person has been convicted of an offence is admissible by virtue of section 74 above, then without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based—(a) the contents of any document which is admissible as evidence of the conviction; and (b) the contents of the information, complaint, G indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose. (2) Where in any proceedings the contents of any document are admissible in evidence by virtue of subsection (1) above, a copy of that document, or of the material part of it, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in H evidence and shall be taken to be a true copy of that document or part unless the contrary is shown. . . .”

Subsections (3) and (4) are irrelevant for present purposes. Finally section 78 provides:

“(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the

circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.”

Mr. Tansey's criticism of the judge's ruling may be summarised as follows. (1) Section 74 did not apply for the following reasons: (a) there was no issue that many burglaries had been committed at Comet premises within the relevant period, because that fact was conceded by the appellant; (b) the mischief against which the section was directed did not exist or apply here; (c) the section has a restricted application: it only applies where the defendant on trial has played no part in the offences of which the third party has been convicted—for instance on a charge of handling stolen goods. The conviction of the thief of the same goods may properly be given in evidence. (2) Even if the Crown could bring themselves within the ambit of section 74, the evidence should have been excluded in accordance with section 78(1) because of its adverse effect on the fairness of the proceedings.

In support of his submission that section 74 had no application, Mr. Tansey relies on paragraph 218 of the Criminal Law Revision Committee 11th Report (1972) (Cmnd. 4991) for the background of the law as it was. The relevant part reads:

“There is no doubt that the principle of *Hollington v. Hewthorn* [1943] K.B. 587 applies to criminal cases, although there is very little authority. For example, in *Rex v. Turner* (1832) 1 Mood. C.C. 347, 349, ‘many of [the judges] appeared to think’ that in a case of receiving stolen property the conviction of the thief ‘would not have been any evidence of her guilt, which must have been proved by other means.’ This is always taken to be the law. In our opinion it is clearly right that convictions of persons other than the accused should be made admissible in criminal proceedings as evidence of the fact that the person convicted was guilty of the offence charged and that on proof of the conviction that person should be taken to have committed the offence charged unless the contrary is proved. Clause 24 provides accordingly. It seems quite wrong, as well as being inconvenient, that the prosecution should be required to prove again the guilt of the person concerned. The clause will be helpful to the prosecution in various cases where the guilt of the accused depends on another person's having committed an offence. Examples are handling stolen goods, harbouring offenders and the offences under sections 4 and 5 of the Criminal Law Act 1967 of assisting offenders and concealing offences.”

The terms of clause 24 of the committee's draft bill are in all material respects identical to those of section 74.

The matter has already been considered by this court in *Reg. v. O'Connor* (unreported), 18 November 1986. O'Connor was charged with conspiring with a man named Beck to obtain property by deception. He pleaded not guilty and was tried. Beck pleaded guilty and evidence of that plea was admitted at O'Connor's trial. On appeal it was submitted (1) that section 74 did not permit evidence of Beck's plea to be put before the jury, alternatively (2) that even if the strict wording of section 74(1) did render the evidence admissible, then the judge ought,

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A pursuant to section 78, to have excluded it on the ground that it would have such an adverse effect on the fairness of the proceedings. The court held that the disputed evidence ought to have been excluded, but applied the proviso to section 2(1) of the Act of 1968 and dismissed the appeal.

The following is an extract from the judgment in that case:

B “The terms of section 74 clearly were designed, in the judgment of this court, to deal with the situation where it was necessary as a preliminary matter for it to be proved that a person other than the accused had been convicted of an offence. The object, it would seem, of the section is to avoid that matter having to be proved twice where the other person had already pleaded guilty to the offence it was necessary to prove. In effect therefore the object of the section, in our view, was to deal with cases where it was necessary to prove the conviction of another as a condition precedent to the conviction of the defendant of the charge laid against him. The most obvious example would be a case where it is necessary to prove against another that he was guilty of theft before the person before the court could be convicted of handling or harbouring.”

D Mr. Tansey’s case is that this view of the restricted application of section 74(1) is in accordance with the views of the Criminal Law Revision Committee and entirely supports his submission that section 74 had no application to the instant case.

E For the Crown Mr. Patterson contends that the judge’s ruling was correct. His case is that the words of section 74(1) are clear and unambiguous, and should be given their natural meaning; that being so they are wide enough to cover the instant case. Had Parliament intended to restrict the application of the section, they could, and would, have done so in clear terms: for instance, by substituting for the words “where to do so is relevant to any issue in those proceedings” some such expression as “where it is necessary to prove the guilt of another.” Parliament has not chosen to do so.

F The heart of the problem is the correct interpretation of the expression “issue in the proceedings.” Only when that is determined can the court decide what in the particular circumstances is relevant and thus admissible. That is the very question left open in *O’Connor’s* case. There, in the passage already cited, the court gave its view of the primary object of section 74. It expressly left open the limits or scope of the section in the following terms:

G “We find this a difficult point, and, without deciding the full scope of section 74, for the purposes of this case, it is sufficient to say that if it was appropriate within the section to admit the conviction of Beck in the proceedings, we take the view that it would have resulted in a very unfair state of affairs.”

H Despite the assistance of counsel, the difficulty remains.

We think the time has come to attempt to provide some guidance for courts who have the task of applying section 74. The word “issue” in relation to a trial is apt to cover not only an issue which is an essential ingredient in the offence charged, for instance in a handling case the fact that the goods were stolen (that is the restricted meaning), but also less fundamental issues, for instance evidential issues arising during the course of the proceedings (that is the extended meaning). Section 74 by

using the words "any issue in those proceedings" does not seek to limit the word "issue" to the restricted meaning indicated above. Although the Report of the Criminal Law Revision Committee is an indication that the committee may have been regarding the matter at least primarily in the restricted sense, it seems to us that we are not entitled to use that possibility as showing that the words of the section mean other than what they plainly state.

On any view we find no support for Mr. Tansey's submission that the section applies only to proof of conviction of offences in which the defendant on trial played no part. It may well be that the section will be at its most useful in dealing with the type of situation exemplified by the Law Revision Committee, but it is not restricted to that kind of case. Provided that there is an issue before the jury to which the conviction is relevant, the conviction, subject to what we say hereafter, is admissible.

So far as the present case is concerned, there was certainly an issue. Indeed it was probably an issue in the restricted sense, namely, the issue of whether there was a conspiracy between Poole and Long (of which their joint conviction of burglary was the clearest evidence). It was that conspiracy to which the prosecution sought to prove the appellant was a party. It is true that the appellant was prepared to accept that there had been a series of burglaries at Comet's premises during the material times, but that would not preclude the prosecution from relying on section 74 as the words of subsection (1) of that section make clear.

The judge gave his ruling as follows:

"in a conspiracy case where there is only one defendant being tried, but it is alleged that he conspired with two other named persons and others unknown, it is relevant that those named persons committed a number of burglaries which the Crown allege were acts done by those named persons in furtherance of the common design. If the fact of committing those burglaries is relevant, then section 74 . . . facilitates the manner in which their participation in those events may be proved. I think that the evidence of their conviction is relevant to an issue in these proceedings, namely, was there a conspiracy."

That, in our judgment, was a correct approach.

It remains to consider the submissions based on section 78. The complaint here is that by relying on section 74 to prove the convictions of Poole and Long, the prosecution deprived the appellant of the opportunity to cross-examine them. Mr. Tansey points out that this was a prominent feature in the *O'Connor* case already referred to.

The circumstances there however were quite different. *O'Connor* and Beck were jointly indicted in one count with having conspired together and with no one else. It followed that Beck's admission of guilt of that very offence might well lead the jury to infer that *O'Connor* in his turn must have conspired with Beck.

That situation did not exist here. The pleas and consequent convictions of Poole and Long did not on the face of them involve the appellant whose name did not appear in the relevant counts at all. Consequently, even if Poole and Long had given evidence in accordance with their pleas, counsel would have been unlikely to cross-examine them or, if he had, to have achieved anything except disaster for his client.

The judge was, in our view, correct to admit the evidence.

3 W.L.R.

Reg. v. Robertson (C.A.)

A It only remains to add this. Section 74 is a provision which should be sparingly used. There will be occasions where, although the evidence may be technically admissible, its effect is likely to be so slight that it will be wiser not to adduce it. This is particularly so where there is any danger of a contravention of section 78. There is nothing to be gained by adducing evidence of doubtful value at the risk of having the conviction quashed because the admission of that evidence rendered the conviction unsafe or unsatisfactory. Secondly, where the evidence is admitted, the judge should be careful, as Judge Owen Stable was here, to explain to the jury the effect of the evidence and its limitations.

B There are two further grounds of appeal. The first is that the judge commented unfairly on the appellant's failure to call Poole or Long as witnesses.

C Having referred to the appellant's evidence of a conversation that he had with Poole prior to the final interview with the police, the judge continued:

D "you should consider why the police allowed Robertson to see Poole, and why Poole suggested that Robertson should put his hands up—but, members of the jury, you should bear this in mind: that no one knows better than Poole and Long if Robertson was one of their number concerning 'Comet' burglaries. Both had been dealt with, neither would have anything to lose by giving evidence for Robertson. There is no obligation, of course, on Robertson to call either of them, but had he wished you to hear their evidence they could have been compelled to go into the witness box, and you may think it is surprising neither was called on his behalf if the admissions of Robertson are wicked inventions on the part of corrupt policemen."

E That was a reference to the alleged fabrication of the last interview. Mr. Tansey was unhappy about it and, after the jury had retired, invited the judge to retract it. The judge declined.

F It is submitted that the comment was so unfair as to prejudice the appellant's case, particularly as it was linked to the controversial issue of the final interview. It was particularly unfair, it is said, because neither Poole nor Long could assist as to the genuineness of the record of that interview. If, which is doubtful, the judge was entitled to comment, it should have been done with more circumspection.

G In our view the judge was entitled to comment. There is no doubt that the comment was strong. The judge is entitled to make a comment which in appropriate circumstances may be strong. These were appropriate circumstances.

H The appellant's final point is that the judge wrongly directed the jury that the appellant's case was that all the police officers had lied, whereas in fact the appellant was alleging that only those officers, four in number, who gave evidence related to the damaged video recorder and the video lead attached to the television set in the appellant's flat and the meeting at which the Comet paper was produced, were mistaken.

It is unnecessary to go into detail. We have studied the transcripts of the cross-examination of those four officers. It is sufficient to say that the judge and the jury could be forgiven, as all those in this court may be forgiven, for concluding that the suggestion was made that the officers had invented the video and the Comet paper. There is nothing in this point.

For these reasons we conclude that the verdict is neither unsafe nor unsatisfactory. This appeal is dismissed. A

REG. V. GOLDER

On 17 October 1986 in the Crown Court at St. Albans before Judge Hickman and a jury this appellant was convicted of robbery and sentenced to four years' imprisonment. On further counts he was sentenced to three years' imprisonment to run consecutively, thus making a total of seven years' imprisonment. B

We have refused his application for leave to appeal against sentence. We now give reasons for dismissing, as we have done on 17 May last, his appeal against conviction.

On 20 November 1985 Mr. Reece Wilson, an employee at Harper's Garage, St. Albans, was robbed of £40. The prosecution case was that four men carried out the robbery: the appellant; McConnell who was also convicted by the jury; and two other men, Moran and Eley, both of whom pleaded guilty. The evidence was that two of the four men went into the garage armed with a gun and robbed Mr. Wilson whilst the other two, including this appellant, were waiting in a car nearby to drive all four away. C D

The evidence against the appellant consisted primarily of admissions which he was alleged to have made after his arrest which took place on 4 December 1985. At first he prevaricated. However on 5 December, at a further interview, the contents of which were contemporaneously noted, he made a series of admissions. He admitted that he had discussed the possibility of robbing a garage at St. Albans with three other men when they were outside a public house in Hatfield. He said they were all broke and intended to see if they could get some money out of a garage. He further said that some of the three were involved in another robbery at a garage called Grays shortly before the St. Albans robbery. E

So far as the St. Albans robbery was concerned, he said that he stayed in the car, although he was not the driver, and that he did not see the gun until it was brought back by the men who had committed the robbery. He said the gun was a double-barrelled sawn-off shotgun. He knew the men had the gun with them. He said that he was told that they had only got £18 or £20 from the robbery of which they gave him nothing. He said the offence was "a spur of the moment thing" and that the reason for picking on a garage was possibly because of the events on the previous day at Grays Garage as a result of which the other men perhaps felt more confident. F G

During the course of the trial the prosecution requested, and were given leave, to adduce the following evidence, namely, that Moran and Eley inter alios had pleaded guilty to three counts. One of those was relevant only to the case of a co-accused called Puddifoot and need not be considered further. The other two were as follows: the first charged them with having on 19 November 1985 at Hatfield robbed an attendant at Grays Garage of £284; the second with having on the next day, 20 November, robbed Reece Wilson of £40, that is the same offence as that upon which the appellant was being tried. Their pleas of guilty had been duly recorded by the court, but neither man had been sentenced. H

The application to adduce the evidence was made under section 74 of the Police and Criminal Evidence Act 1984.

3 W.L.R.

Reg. v. Robertson (C.A.)

A The following grounds were advanced before us as to why the judge was wrong, it is said, to admit the evidence. First, because the men had not been "convicted." The argument is that a plea of guilty does not become a conviction within the meaning of section 74 until sentence is passed. Up to that point no conviction exists. Thereafter it subsists until quashed.

B The principal authority cited in support of that proposition was *Rex v. Plummer* [1902] 2 K.B. 339. It was there decided that where a prisoner had pleaded guilty to an indictment, the court had jurisdiction to allow him, before sentence, to withdraw his plea and plead not guilty. It is argued from that that the mere plea does not amount to a conviction. If it had amounted to a conviction, the court would have had no jurisdiction to allow him to withdraw his plea.

C However as Lord Reid made clear in *S. (An Infant) v. Recorder of Manchester* [1971] A.C. 481, that is not conclusive. This passage appears in his speech, at p. 489:

D "Several cases have held that magistrates have no power to allow a change of plea during the interval between their acceptance of a plea of guilty and final disposal of the case. They appear to me to have arisen out of a misconception of purely technical matters. Much of the difficulty has arisen from the fact that 'conviction' is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt. It is proper to say that a plea cannot be changed after 'conviction' in the former sense. But it does not at all follow that a plea cannot be changed after 'conviction' in the latter sense. It is perfectly true that 'conviction' is used in this latter sense in the Magistrates' Courts Act 1952, and a number of other statutes."

E This dual meaning of the word "conviction" is further illustrated by the judgment of this court in *Reg. v. Drew* [1985] 1 W.L.R. 914, where many of the authorities are reviewed.

F We respectfully agree with the reasoning of the trial judge on this aspect of the matter. The purpose which lies behind the enactment of section 74 was to enable proof of the commission of an offence by X to be proved by the record without the necessity of calling X to admit the truth of what appears on the record. Therefore, what is important is either that a jury has found X's offence proved, or that X himself has before a court formally admitted that he has committed the offence. G Provided that his plea has not been withdrawn nor the verdict of the jury, where there has been one, has been quashed on appeal, the conviction subsists. Whether or not X has been sentenced is irrelevant on the issue of whether he has committed the offence. Therefore the meaning of "conviction" in this section is the latter of the two referred to by Lord Reid in the passage cited, namely, a finding of guilt or a H formal plea of guilty.

The second ground of appeal is that the convictions of Moran and Eley were not within the meaning of section 74(1), relevant to any issue on the trial of this appellant on the charge of robbing Reece Wilson. As to the first charge to which the two men had pleaded guilty, namely, the robbery of the garage attendant committed on 19 November, there is no doubt that in general proof that other men committed another offence at another time is irrelevant. Likewise it would, generally speaking, be

irrelevant that two men other than the defendant had committed the burglary of which the appellant was being tried. This was the subject of the further conviction of Moran and Eley sought to be adduced in evidence.

The prosecution contended that in the particular circumstances of this case those convictions were relevant. The admissions which he had according to the police made to them were contested. It was suggested to the officers that they had fabricated their story and that no such admissions had been made. The prosecution's desire to put the convictions of Moran and Eley in was in order to show that the contents of the alleged confessions by the appellant were in accordance with the facts as they were known and the confessions were therefore more likely to be true.

Secondly, as pointed out during argument at trial, one of the matters which the prosecution had to prove was that there had in fact been a robbery at Harper's Garage on 20 November. It was therefore relevant to prove that two men had admitted committing such a robbery, although there was as it transpired no dispute that the robbery had been committed by someone.

The arguments advanced on behalf of the prosecution and of the appellant are similar to those in *Robertson* case and we need not repeat them here. Nor need we repeat our reasons for concluding that the judge was correct in his ruling that the evidence was admissible.

For those reasons we dismissed the appeal against conviction.

Appeals dismissed.

Solicitors: Crown Prosecution Service, Snaresbrook; Crown Prosecution Service, St. Albans.

L. N. W.

3 W.L.R.

A

[CHANCERY DIVISION]

In re A COMPANY (No. 00359 of 1987)

1987 Feb. 5, 6, 17, 18, 19, 20

Peter Gibson J.

B

Company—Winding up—Foreign corporation—Company having no assets within jurisdiction—Unregistered company operating mainly through ship agents in England—Company obtaining loan from petitioner bank on security of ship—Whether jurisdiction to make order—Insolvency Act 1986 (c. 45), s. 221(1)(5)¹

C

D

E

A Liberian company with a registered office in Monrovia operated mainly through an English company of ship agents with offices in London. The Liberian company contracted in 1984 for the building of a bulk carrier. About \$13.5 million of the total price of \$18 million was provided by the petitioner, an English bank, in return for a first secured mortgage on the vessel and the assignment to the petitioner of all the vessel's earnings. The company undertook that for the duration of the facility there would be no change in the ownership and control of the company and that the vessel would be kept fully insured. The vessel was delivered to the company in January 1985 and the company drew on the whole of the facility. In 1986 the company was in financial difficulties and in September defaulted on the interest payment. On 17 November the petitioner declared the whole of the company's indebtedness to be due in accordance with the provisions of the loan agreement. The petitioner recovered judgment for the amount of the debt in January 1987 and on 3 February presented a petition for the winding up of the company. On 5 February the petitioner applied for the appointment of a provisional liquidator.

On the question whether the court had jurisdiction to wind up the company under section 221 of the Insolvency Act 1986¹ notwithstanding that it was an overseas company:—

F

Held, that since the company was unable to pay its debts and its only known asset was substantially less than its liabilities, the condition for the making of a winding up order contained in section 221(5)(b) of the Insolvency Act 1986 was fulfilled; that for the court to make a winding up order against a foreign company it was not necessary to show that the company had assets within the jurisdiction, but a sufficiently close connection with the jurisdiction had to be established; that the facts that the loan agreement had been negotiated, executed and performed in England, the company's directors were resident in England, the company had bank accounts in England, while there was no evidence that the company had carried on business outside England, demonstrated a sufficient connection with the jurisdiction; and that, accordingly, since there was no more appropriate jurisdiction for the winding up of the company and since there was a reasonable possibility of benefit accruing to the creditors from the making of a winding up order, an order would be made and a provisional liquidator appointed (post, pp. 352G–H, 353H, 354G, 355A–B).

H

In re Compania Merabello San Nicholas S.A. [1973] Ch. 75 and *In re Eloc Electro-Optieck and Communicatie B.V.* [1982] Ch. 43 applied.

¹ Insolvency Act 1986, s. 221(1)(5): see post, p. 347E–F, G–H.

The following cases are referred to in the judgment:

- Allobrogia Steamship Corporation, In re* [1978] 3 All E.R. 423
Banque des Marchands de Moscou (Koupetschesky) v. Kindersley [1951] Ch. 112; [1952] 1 All E.R. 1269, C.A.
Compania Merabello San Nicholas S.A., In re [1973] Ch. 75; [1972] 3 W.L.R. 471; [1972] 3 All E.R. 448
Eloc Electro-Optieck and Communicatie B.V., In re [1982] Ch. 43; [1981] 3 W.L.R. 176; [1981] 2 All E.R. 1111
Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.)

The following additional cases were cited in argument:

- Actiesselskabet Dampskib "Hercules" v. Grand Trunk Pacific Railway Co.* [1912] 1 K.B. 222, C.A.
Deverall v. Grant Advertising Inc. [1955] Ch. 111; [1954] 3 W.L.R. 688; [1954] 3 All E.R. 389, C.A.
Lloyds Bank Ltd. v. Marcan [1973] 1 W.L.R. 339; [1973] 2 All E.R. 359
Sarflax Ltd., In re [1979] Ch. 592; [1979] 2 W.L.R. 202; [1979] 1 All E.R. 529
South India Shipping Corporation Ltd. v. Export-Import Bank of Korea [1985] 1 W.L.R. 585; [1985] 2 All E.R. 219, C.A.
Theodohos, The [1977] 2 Lloyd's Rep. 428

PETITION

On 7 January 1987, the petitioner, International Westminster Bank Plc., a subsidiary of National Westminster Bank Plc., obtained final judgment in the Queen's Bench Division Commercial Court against Okeanos Maritime Corporation, a company formed under the laws of Liberia in June 1982 with no principal place of business but operating mainly through its agents, John Samonas & Sons Ltd., 30/33 Minories, London E.C.3. Despite service of the judgment on the company's agents, the company failed to satisfy the judgment, and on 3 February 1987 the petitioner presented a petition in the Chancery Division for the winding up of the company contending that the company was an unregistered company within the meaning of section 226 of the Insolvency Act 1986, that it was unable to pay its debts within the meaning of section 221(5)(b) and that it was just and equitable that the company should be wound up by the court. On 5 February, the petitioner applied ex parte for the appointment of a provisional liquidator. The company opposed the application which was then ordered to be stood over pending the filing of evidence by the company. The matter came back before the court inter partes after an eleven-day adjournment.

The facts are stated in the judgment.

W. A. Blackburne Q.C. and *G. C. Vos* for the petitioner.
Hilary Heilbron for the company.

PETER GIBSON J. On 3 February 1987 the petitioner, International Westminster Bank Plc., a subsidiary of National Westminster Bank Plc. ("NatWest"), presented a petition for the winding up of Okeanos Maritime Corporation ("the company"). On 5 February the petitioner, appearing by Mr. Vos, applied for the appointment of a provisional liquidator. That application was made ex parte but short notice was given to the company which the next day appeared by Miss Heilbron to

3 W.L.R.

In re A Company (Ch.D.)

Peter Gibson J.

A oppose the application. As the major question raised by the application
related to the jurisdiction of the court which the company challenged,
and as the company wished to put in evidence, I acceded to her
submission that the application be stood over to enable such evidence to
be filed. The matter has come back before me inter partes after an
eleven-day adjournment. I am grateful to Mr. Blackburne leading Mr.
Vos for the petitioner and to Miss Heilbron for their helpful arguments
B in what is a very unusual case.

The affidavits filed on both sides reveal a number of matters to be in
dispute, but the following appears to be not challenged or is supported
by documentary evidence. The Samonas family is a Greek family having
at its head Captain John Samonas. His wife is Maritsa Samonas and they
have three sons, Christos, Dimitri and Nikolas. The family has been
C connected with shipping for many years. An English company, John
Samonas & Sons Ltd. ("J.S.S."), which on its headed paper describes
itself as "Shipbrokers and Shipagents" was incorporated in 1966. Its
present directors are Christos, Dimitri and Nikolas Samonas and one
other and their offices are in the City of London. Christos, Dimitri and
Nikolas Samonas are all resident in England. Captain John Samonas has
sworn two affidavits in which he gives a Greek address, but on 12
D December 1984 a letter from Dimitri Samonas on J.S.S. paper gives the
J.S.S. office address as Captain John Samonas's and his wife's address,
and Captain John Samonas's name with a London address is given in
the current London telephone directory. If he has moved to Greece it is
only recently that he has done so.

There are four ships which bear names which show their apparent
relationship to each other and to Captain John Samonas as they all
include the name "Samjohn." The *Samjohn Captain* is the vessel relevant
E to the present case, being the company's only known asset. The Samonas
family, through Liberian or Panamanian companies, owns the other
three ships. One other company I must mention is Esperos Shipping
Company S.A. ("Esperos"). This is a Panamanian company and a
search of the Panamanian Companies' Register shows as its board of
F directors Captain John Samonas, Nikolas Samonas and Mrs. Maritsa
Samonas. However, another Greek, Mr. Vennis, is its general manager.

The company was incorporated in Liberia on 16 June 1982. Until 15
August 1986 but according to Captain John, Christos, Dimitri and
Nikolas Samonas not thereafter, the board of directors of the company
consisted of Captain John Samonas (who was also president), Mrs.
G Maritsa Samonas, Christos, Dimitri and Nikolas Samonas. Its share
capital consists of 100 bearer shares of no par value. It has a registered
office in Monrovia but its byelaws allow it to have an office or offices
within or outside Liberia as the board may from time to time appoint or
the business of the company may require, and they permit it to hold
directors' meetings whenever and wherever the board requires.

The Samonas family has had dealings with NatWest over many years
H and by 1982 the Samonases were held in high regard by NatWest. On 12
May 1982 Dimitri Samonas approached Mr. Haynes, the manager of the
shipping section of the corporate financial services department of
NatWest, to finance the purchase of a newly built bulk carrier. The
Samonases were not willing to provide written guarantees of any sort,
apparently because of fears that the revenue might obtain access to such
documents with possible fiscal consequences for them. Dimitri Samonas
told Mr. Haynes that the Samonases would verbally assure NatWest that

they would support the vessel from other fleet income, their three ships all being unencumbered. On 4 June 1982 Mr. Haynes wrote to Captain John Samonas offering a facility of \$12.8 million and pointing out that NatWest had been looking for a formal undertaking by the other ship owning companies in his group but in view of the personal assurances that Captain John Samonas and his sons had given him, NatWest was not asking for a formal undertaking. The draft facility letter supplied by NatWest indicated that the loan facility was to be offered to a Liberian company to be formed.

The Samonases then changed their plans, proposing instead to purchase a new vessel, first from a Danish yard, and by April 1983 they had decided that the new vessel would be built in a Japanese yard. They sought finance for that contract from NatWest. On 23 August 1983 the company entered into a contract with a Japanese shipbuilder for the building of a 64,100 ton bulk carrier at a cost of about \$18 million. The address of the company for the service of notices was given as care of J.S.S. in London. The contract was signed by Captain John Samonas for the company and the contract included a term that the company should upon execution of the contract cause a letter of guarantee to be issued by Captain John Samonas to the shipbuilder, whereby he personally guaranteed payment of the whole of the purchase price. Only on 30 March 1984 were the terms and the execution of that contract approved by the board of the company and in turn by the shareholders.

Negotiations for the financing through NatWest of nearly \$13.5 million of the contract price continued that autumn. NatWest was content to rely simply on the Samonases' verbal assurances as Captain John Samonas was told by letter of 8 December 1983, enclosing the petitioner's draft facility letter. On 15 December 1983 in London the petitioner's offer was accepted by Dimitri Samonas signing the facility letter on behalf of the company. It was thereby agreed that the facility should be evidenced by a loan agreement and secured by a first preferred mortgage on the vessel, together with an assignment to the petitioner of all the earnings of the vessel. It was a term of the facility letter that there should be no change in the ownership and control of the company for the duration of the facility.

On 30 March 1984 there was a board meeting of the company in London. In addition to approving Captain John Samonas's action in signing the shipbuilding agreement the board resolved to borrow nearly \$13.5 million on the terms of the loan agreement and to execute the first preferred mortgage and assignment. The same day there was a meeting of shareholders of the company, the minutes showing Captain John Samonas, Dimitri and Nikolas Samonas as present as proxies for the shareholders. The meeting approved the board's resolutions.

Also on 30 March 1984 the loan agreement was executed in London by Captain John Samonas for the company. It provided for a loan of \$13,443,872 on which interest was payable at one per cent. above London Interbank Offered Rate. The vessel was to be registered under the Greek flag. The company covenanted to keep the vessel fully insured and maintain current operating accounts with the St. Mary Axe branch of NatWest in London into which all the vessel's earnings were to be paid. The company agreed not to dispose of the vessel and not to permit any change in the ownership and control of the company. Again therefore, what was envisaged was that the Samonases would own and control the company. There was a provision that if, inter alia, the

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Peter Gibson J.

A company failed to pay interest when it fell due, the petitioner could declare the whole of the indebtedness of the company to be immediately payable. It was provided that notice under the loan agreement should be given to the company care of Esperos in Greece with a copy to J.S.S. in London and legal process could be served on the company at the offices of J.S.S. J.S.S. was required to write a letter accepting its appointment as the agent of the company for service of process and notices.

On 2 October 1984 J.S.S. for the company asked the St. Mary Axe branch to open sterling and dollar accounts in the company's name and on 10 December 1984 Dimitri Samonas wrote to that bank, on J.S.S. paper but signing for the company directly, supplying the name and address of each of the directors of the company and the J.S.S. office was given as that address. Similarly Dimitri and Captain John Samonas wrote to that branch on 25 January 1985 on J.S.S. paper but directly for the company, requesting a transfer of some \$85,000 to the petitioner, debiting the company's account. At the end of December 1984 the full loan facility was drawn down and the *Samjohn Captain* was delivered to the company in early January 1985.

By the first preferred mortgage made on 25 January 1985 in accordance with Greek law the company granted the petitioner a first preferred mortgage on the *Samjohn Captain*. J.S.S. was appointed the agent for the managers of the company so long as the mortgage was in force. In the event of any default the petitioner had the right to take possession of the vessel without giving notice. Notices were again to be sent to the company care of Esperos with a copy to J.S.S. and, to comply with Greek law, an agent and representative of the company in Greece was appointed, namely the managing director of Esperos. Again, legal process could be served on the company at J.S.S.'s office in London. That deed was executed by the company in London, as was a deed of assignment of the same date, whereby the company assigned all its earnings from the vessel to the petitioner.

In 1986 the company was adversely affected by the slump in the shipping market. The first signs of financial difficulties affecting the company appeared in the late summer of 1986. The company failed to pay its insurance premium of nearly \$35,000 due on 25 July 1986. On 15 August, NatWest wrote to Dimitri Samonas about the level of borrowings on the accounts of, inter alia, the company and J.S.S. The company's sterling account was £2,691 overdrawn while the dollar account was \$62,214 overdrawn. The company was due to pay \$593,584.29 interest on 30 September. Because of the company's difficulties it was agreed that only \$250,000 needed to be paid then, but the balance of the interest instalment, together with further interest thereon, had to be paid on or before 14 November. The \$250,000 were paid but on 1 October NatWest wrote again to Dimitri Samonas pointing out that, inter alia, the company's account was in overdraft in excess of £26,000 and requesting that no further cheques be drawn.

On 3 October 1986, Dimitri Samonas for J.S.S. wrote to NatWest saying "My principals have had a very happy association with the bank for over 20 years." In the context, that could not mean the company and could only mean the Samonas family. He sought by that and a letter of 14 October the consent of the bank to the company using the earnings from the *Samjohn Captain* to keep it trading. But no consent was forthcoming and the bank warned that failure to pay the balance of the interest instalment on 14 November would be an act of default. On 22

October Dimitri Samonas wrote pointing out that the debts of the *Samjohn Captain* amounted to \$350,000 and on 24 October he wrote again saying that the vessel was not producing the funds necessary to pay all the various expenses. On 10 November he wrote again saying that he had had an opportunity of consulting with the shareholders of the company. Their own resources had been exhausted. He asked that the overdue interest be capitalised. That was refused. On 13 November Dimitri Samonas wrote that there were no funds to meet the interest payment due on 14 November. There was a default the next day. On 17 November the petitioner declared the whole of the indebtedness to be due. A B

The company had on 4 November through J.S.S. in London negotiated a charterparty whereby the vessel was to be chartered to a Japanese company, Daiichi, to take coal from Newcastle, New South Wales, to Japan and a sum of \$210,000 was to be paid initially into the NatWest account of the company. However on 18 November the company in breach of contract directed Daiichi to pay that sum to an account at the Midland Bank in London. The petitioner decided to arrest the *Samjohn Captain* which was due to arrive at Newcastle on about 19 November. A warrant for her arrest was obtained from a New South Wales Court but through ill luck bad weather delayed the vessel coming into port. On 21 November Daiichi's Australian agents in Newcastle heard of the proposed arrest and informed Daiichi. Daiichi sought and obtained from J.S.S. on 21 November an option to cancel the charter. All the decisions taken in the name of the company in respect of the charterparty were taken after the Samonases had been consulted. That option was exercised on 23 November by Daiichi's London agents telephoning Christos Samonas. In the meantime the *Samjohn Captain*, no doubt as a consequence of J.S.S. being made aware of the petitioner's intention to arrest the vessel, never put into Newcastle and so avoided arrest. Attempts by the petitioner to communicate with the vessel have failed or at any rate have met with no response. The vessel is not trading but is "semi-laid up" (in the words of Mr. Vennis as reported by Christos Samonas) somewhere—but where has never been revealed—off Indonesia. C D E F

The company failed to pay another insurance premium due in October and the insurers on 24 November visited the offices of J.S.S. and were told of the financial difficulties of the vessel and that the premium could not be paid. The petitioner is having to pay substantial sums to keep the vessel insured. There were without prejudice negotiations between the company and the petitioner in December. Dimitri and Christos Samonas attended two meetings as representatives of the company, but no agreement was reached. G

On 23 December, proceedings were issued by the petitioner in the Commercial Court for the recovery of its debt owed by the company. On 24 December Dimitri Samonas wrote to the petitioner saying that J.S.S. was no longer the agent for the company or the *Samjohn Captain*; but of course the provisions of the loan agreement and the first preferred mortgage required J.S.S. to remain agents for service of proceedings on the company. On 7 January 1987, no notice of intention to defend having been given by the company, the petitioner recovered judgment in the sum of \$14,024,095.47 plus costs. Interest continues to accrue on the debt at over \$5,000 per day. H

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A In the meantime Esperos commenced proceedings against the company in Greece claiming that it had agreed to become the agent of and to manage in Greece the *Samjohn Captain* for all the vessel's supplies, wages and essential needs, and that it was owed \$840,000 by the company. It claimed that the ship was the only asset of the company and was subject to navigational dangers of every nature, and that the company had the intention of causing Esperos loss and according to information (which and its source were not specified) the company intended secretly to sell the ship. For these reasons Esperos sought a temporary order forbidding the transfer of the legal status of the vessel, which order was granted on 8 December by the Piraeus court.

C The application before me has been supported by evidence put in by the petitioner of the insolvency of the company and of the incurring of huge costs and expenses including the accrual of interest since 14 November 1986. Those costs and expenses are estimated by the petitioner to exceed \$800,000 and that sum continues to increase so long as the vessel is not given up.

D The affidavit evidence put in on behalf of the company in relation to the question of jurisdiction consists of affidavits from Captain John, Dimitri, Christos and Nikolas Samonas and a short affidavit from Mr. Flint, a solicitor, who states that he has the care and conduct of this matter on behalf of the company. Alone of the deponents he states that he is duly authorised to make the affidavit, although he does not state who in the company so authorised him. Mr. Flint in his affidavit deposes only to a conversation with Mr. Vennis. The burden of that affidavit evidence can be summarised thus: no member of the Samonas family has ever had any beneficial interest in any share in the company; all the Samonases ceased to be directors at a board meeting in Greece on 15 August 1986 when they all resigned and three Greeks with the surname Lemos were elected; by a management agreement dated 1 January 1985 the company appointed Esperos as manager of the *Samjohn Captain* and by a further agreement of the same date Esperos appointed J.S.S. as its agent; J.S.S.'s agency for Esperos was terminated on 21 November 1986 by mutual agreement and all documents relating to the vessel were forwarded to Esperos; no member of the Samonas family owns any shares in or exercises any control or influence over Esperos and the management and control of the vessel are and have since 21 November 1986 been fully in the hands of Esperos, and to the best of the Samonases' knowledge there are no assets of the company within the jurisdiction.

G This evidence raises to my mind as many or more questions as or than those which it purports to answer. No affidavit has been supplied by anyone claiming to be a director or officer of the company. Not even Mr. Vennis has put in an affidavit, although he is said to be not only the general manager but also the sole shareholder of Esperos and although on 12 February the company's solicitors said that an affidavit would be sworn by Mr. Vennis, and that despite a general strike in Greece they anticipated being in a position to serve that affidavit the following morning.

H The deponents in their affidavits are noticeably coy about the identity of the shareholders, past and present, of the company, why it has never been explained, and despite being asked by the petitioner's solicitors to provide answers to the question of ownership, no information has been forthcoming. When Dimitri Samonas swore that he did not know by

whom the shares in the company were held, in my judgment he was being less than frank, having regard to the fact that on 30 March 1984 at the shareholders' meeting he was a proxy for the shareholders and on 10 November 1986 he had told NatWest by letter that he had been consulting the shareholders of the company. If the Samonases were not the shareholders, why did they allow the negotiations with the bank for the financing of the cost of a bulk carrier to proceed on the basis that they were? The stipulation that the beneficial ownership should not change was pointless unless the Samonases, on whose verbal assurances the bank was asked to rely and did rely, were the owners. Why would Captain John Samonas have given a personal guarantee to pay the full cost of building the ship if he had no beneficial interest in the company which owned the ship? It is not a sufficient explanation to say, as he does, that the shipbuilder required it or that the company would find the money: why should he, and not the shareholders, be content to give such a huge guarantee? A B C

Dimitri Samonas says that the Samonases resigned as directors on 15 August at a time when the company was able to pay and was paying its trade debts as they fell due. Apart from the inconsistency of this with the evidence of the failure to pay the July insurance premium, why did the directors resign then in flagrant breach of the loan agreement, providing as it did that there should be no change in the control of the company? Dimitri Samonas accepts that he continued to be involved in the affairs of the vessel, although he says only as a director of J.S.S. as the London agent for the vessel. How were the new directors chosen? There is no evidence indeed that the new directors agreed to become directors. If they did, why is there no evidence whatsoever of any meeting by them or of any decision or act on their part? D E

There is no evidence as to how and why the agency of J.S.S. was terminated in breach of the company's obligation under the first preferred mortgage apart from the statement that it was by mutual agreement with Esperos. Further, why if the agency of J.S.S. was terminated on 21 November was Christos Samonas accepting on 23 November for the company Daiichi's exercise of the option to terminate the charterparty, and why on 24 November was J.S.S. telling the insurance agents that the insurance premiums would not be paid? Is it really to be believed that Dimitri and Christos Samonas, in negotiating in December for the company as Christos Samonas now deposes, were acting only in their personal capacity at the request of Mr. Vennis instead of acting as they had always done for the company? It was not revealed at the time that they were acting merely in their personal capacity. F G

In relation to Esperos, why if no Samonas owns any share in or exercises control or influence over Esperos are the only directors shown in the Panamanian Companies' Register members of the Samonas family? Captain John and Nikolas Samonas say they are non-executive directors but presumably there must be an executive director. Why, if they own no shares in the company, did they give personal guarantees as security for a guarantee of \$5,000 given for Esperos by the Piraeus branch of NatWest? It is suggested by the Samonases that Mr. Vennis is in control of Esperos but against that must be set evidence that in January 1987, when he was asked by that Piraeus branch to provide cash backing for that and another guarantee of £6,000, Mr. Vennis said that he had to speak to London. Why on 5 February 1987, when pressed for H

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A a definite answer, did Mr. Vennis says that the matter was out of his hands and that his "boss" had told him that nothing would be decided?

B There is no evidence to explain or justify the company's flagrant breach of its contractual obligations or of the steps which it has taken to avoid the arrest of the vessel. The inevitable inference, to my mind, is that those in control of the company are deliberately seeking to keep the vessel out of the hands of the petitioner regardless of the insolvency of the company and the harm that is being done to the legitimate interests of the company's creditors. The purpose of all this may be seen from the open offer that has recently been made by the company by its solicitors: it seeks to force the petitioner to accept only \$9 million in total extinction of the petitioner's security and the petitioner releasing not only the company but also its present and past directors and officers.

C The conduct of those in control of the company seems to me to be nothing short of disgraceful.

D The company's evidence, as Miss Heilbron was constrained to admit, was not as complete or as satisfactory as it might be. On the third day of this hearing, towards the close of her submissions, she applied for an adjournment for several days to enable further evidence to be put in to deal with the question to what extent the company had carried on business within the jurisdiction. I refused that application. It had been alleged in the petition as well as in the affidavit in support of the application for a provisional liquidator that the company had traded here, and the company has had ample time to complete its evidence. I have been indulgent in allowing evidence to be adduced in the course of this hearing and I must decide this application on the evidence that is now before me.

E The first and major question is whether the court has jurisdiction to wind up the company notwithstanding that it is an overseas company. I start with the statutory provisions for the winding up of unregistered companies, now to be found in Part V of the Insolvency Act 1986. The company is of course such a company. Section 221(1) provides:

F "Subject to the provisions of this Part, any unregistered company may be wound up under this Act; and all the provisions of this Act and the Companies Act about winding up apply to an unregistered company with the exceptions and additions mentioned in the following subsections."

G The provisions about winding up include section 125(1) which (so far as material) provides that the court should not refuse to make a winding up order on the ground only that the company's assets have been mortgaged to an amount equal to or in excess of these assets or that the company has no assets. Section 221(5) provides:

H "The circumstances in which an unregistered company may be wound up are as follows:—(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (b) if the company is unable to pay its debts; (c) if the court is of opinion that it is just and equitable that the company should be wound up."

The reader of those provisions without the benefit of judicial authority might be forgiven for thinking that the question whether for the purpose of exercising the statutory jurisdiction the court has jurisdiction to wind up an unregistered company falls to be answered by reference to the

statutory conditions. In the present case what is asserted by the petitioner and is abundantly clear from the evidence is that the company is unable to pay its debts. Not only is there an unsatisfied judgment debt in excess of \$14 million but it is common ground that the only known asset of the company, the vessel, is worth substantially less than that sum. On the company's own evidence of the vessel's value in November 1986, it was worth a mere \$7 million. The petitioner puts the value of the *Samjohn Captain* somewhat higher, but even on the higher value it is clear that there is a substantial shortfall.

However, it is plain from authorities binding on me that the question of jurisdiction is not determined simply by reference to the statutory provisions and that there are what Megarry J. in *In re Compania Merabello San Nicholas S.A.* [1973] Ch. 75, 86, called the inherent requirements of jurisdiction to make a winding up order in respect of a foreign company which have to be satisfied in addition to the statutory conditions. Megarry J. summarised the essentials of the relevant law relating to the existence of jurisdiction to make a winding up order in what he called normal cases in respect of a foreign company, at pp. 91–92:

“(1) There is no need to establish that the company ever had a place of business here. (2) There is no need to establish that the company ever carried on business here, unless perhaps the petition is based upon the company carrying on or having carried on business. (3) A proper connection with the jurisdiction must be established by sufficient evidence to show (a) that the company has some asset or assets within the jurisdiction, and (b) that there are one or more persons concerned in the proper distribution of the assets over whom the jurisdiction is exercisable. (4) It suffices if the assets of the company within the jurisdiction are of any nature; they need not be ‘commercial’ assets, or assets which indicate that the company formerly carried on business here. (5) The assets need not be assets which will be distributable to creditors by the liquidator in the winding up: it suffices if by the making of the winding up order they will be of benefit to a creditor or creditors in some other way. (6) If it is shown that there is no reasonable possibility of benefit accruing to creditors from making the winding up order, the jurisdiction is excluded.”

When Mr. Blackburne opened the petitioner's case to me he, like Mr. Vos on the ex parte application, put it on the footing that jurisdiction was founded by the presence of assets within the jurisdiction because, he said, there were good claims against at least Dimitri, Christos and Nikolas Samonas that they had been guilty of fraudulent trading or wrongful trading within the meaning of sections 213 and 214 of the Insolvency Act 1986 which, at the suit of the liquidator, would be likely to produce a substantial sum of money by way of contributions to the company's assets. The question whether there are assets within the jurisdiction such as to give the court jurisdiction to wind up must as Miss Heilbron submitted and I accept, be determined as at the moment the petition is presented. But to my mind it is fallacious to reason that there are assets to found the jurisdiction because, if the court has jurisdiction and makes a winding up order, assets will then arise: compare *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210, 257.

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A Seeing the way the judicial wind was blowing, Mr. Blackburne then adroitly changed tack. He submitted that the existence of assets within the jurisdiction was not necessary to found jurisdiction. Whilst that is normally the way that both a sufficient connection with the jurisdiction and a benefit to the creditors are shown, it was not, he said, an essential requirement in every case. What was important, he submitted, was to satisfy the court of a sufficient connection with the jurisdiction. Miss Heilbron's first line of defence was that the presence of assets within the jurisdiction must be shown.

B Before looking at authority let me consider the rationality of that proposition. Take a case, no doubt unusual, where a foreign company is incorporated abroad but thereafter the only jurisdiction with which it has a close connection is this jurisdiction. For example, if the company has been trading here actively, incurring trade debts here, perhaps at a time when there was no prospect of paying in full the debts as they fell due, but then, fearing court proceedings a director causes all the assets of the company to be removed from the jurisdiction. In those circumstances why should not the English court have jurisdiction to wind up the company at the suit of a creditor if satisfied that there is a reasonable possibility of benefit resulting from the winding up? Why should the mere fact that the assets were removed, perhaps to a place which is not known, deprive the court of jurisdiction where there is no other jurisdiction with which the company has a closer connection? I cannot see any logical reason why the court should not have jurisdiction.

D However, Miss Heilbron was able to rely on what was said in *Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* [1951] Ch. 112. In that case a Russian bank had been dissolved in Russia in 1918. In 1932 Eve J. made an order winding up the company on the basis that the bank's agent had registered the bank here in 1920. As any agency must have terminated with the company's dissolution the basis of Eve J.'s decision could not withstand a challenge. However, in 1949 the bank's liquidator brought an action against English defendants to recover sums alleged to be due to the bank. The defendants took out a summons to dismiss on the basis, in effect, that the bank did not exist and that the winding up order was invalid. Harman J. dismissed the summons on a ground that is not material to the present case but also held that the fact that the company had assets in this country conferred jurisdiction to make the winding up order. The defendants appealed. The Court of Appeal would have differed from Harman J. in respect of the ground on which he dismissed the summons but then went on to consider whether Eve J. had jurisdiction to make the winding up order on a ground other than registration. They considered whether it was a statutory condition for the exercise of jurisdiction to wind up a foreign company that it should have conducted business here and concluded that it was not. They then considered whether there was jurisdiction to wind up the bank which had been dissolved. Sir Raymond Evershed M.R. said, at pp. 125-126:

H "As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper

distribution of the assets. . . . The existence of assets here, the presence here of persons claiming as creditors of the bank or said to be indebted to them, seem to constitute at least the indicia of a business in some sense formerly conducted here. Where, therefore, the circumstances exist which, upon the general principle above referred to would make the case appropriate for the exercise by our court of its winding up jurisdiction, it would appear that the question whether the foreign corporation carried on business in this country would generally be academic, unless it is also necessary to show that that business was carried on directly and from some established or specified place or places in this country."

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And the court went on to hold that it was not so necessary.

Miss Heilbron fastens on the words "There must be assets here to administer," but such words must be read in their context. Evershed M.R. was speaking in the context of a case where the presence of assets and creditors in this country was sufficient, as the Court of Appeal held, to confer jurisdiction on the English court. If he was attempting to lay down a universal rule then he was going beyond what was necessary for his decision.

C

That appears to be the way Megarry J. in the *Merabello* case [1973] Ch. 75 viewed what Evershed M.R. said. At the start of the passage at p. 91 which I cited, he referred to the essentials as being those in normal cases. Earlier, at p. 86, he described as the usual essentials the presence of assets and creditors here. Again, he said, at p. 88:

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"a petitioner who can satisfy section 399 [of the Companies Act 1948, the predecessor of section 221 of the Insolvency Act 1986] must normally go on and show that the company has assets of some sort here, and that there are claimants for those assets over whom there is jurisdiction . . ."

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As he put it, it suffices if there are.

Megarry J. was also not prepared to give the words of Evershed M.R. their literal meaning—that there must be assets to administer in the winding up. In the *Merabello* case the only asset here was a claim which, under the Third Parties (Rights against Insurers) Act 1930 (20 & 21 Geo. 5, c. 25), on a winding up order would vest automatically in the petitioner in that case. That asset would never be administered in the liquidation. I respectfully echo Megarry J.'s words, at p. 91:

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"Words in a judgment must be construed in relation to the subject matter of the case in question, and not as if they were Acts of Parliament."

G

Miss Heilbron rightly pointed out that the ratio of the decision in the *Merabello* case, unlike the present case, turned on the existence of an asset of the company within the jurisdiction immediately before the winding up. However, in *In re Eloc Electro-Optieck and Communicatie B.V.* [1982] Ch. 43 Nourse J. held that the court had jurisdiction to wind up a Dutch company which had no assets within the jurisdiction. In that case the Dutch company had traded in England but never had a place of business here. The petitioners were two employees whom the Dutch company dismissed. They recovered judgment against that company in 1978. The Dutch company ceased operating in 1979. On the hearing of the petition the Dutch company was not represented but in a

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A reserved judgment Nourse J. held that the court had jurisdiction to wind it up. He referred to Megarry J.'s summary of the essentials in a normal case and to the fact that the petitioners had applied to the Department of Employment for payment out of the redundancy fund but that under the statutory provisions no payment could be made until the company was wound up. He stated that there was a reasonable possibility of benefit accruing to the petitioner from the making of a winding up order. Nourse J. continued, at p. 48:

“The benefit would consist of assets coming into the hands of the petitioners not from the company but from an outside source which can only be tapped if an order is made. In the light of that consideration and of the facts, first, that the company did carry on business in England and Wales, secondly, that it employed the petitioners in that business, and, thirdly, that the potential source of assets is directly related to that employment, there is, in my judgment, sufficient to found the jurisdiction of the court. To put it another way, it would, in my judgment, be a lamentable state of affairs if the court's jurisdiction was excluded by the mere technicality that the assets, in respect of which the reasonable possibility of benefit accruing to the petitioners derived, belonged not to the company but to an outside source. I think that support for this view is to be found in the fourth and fifth essentials in Megarry J.'s summary [1973] Ch. 75, 92: . . .”—and then he cites those essentials and continues—“That shows, first, that the assets can be of any nature and, secondly, that the consequential benefit accruing to a creditor or creditors need not be channelled through the hands of the liquidator. To my mind that confirms that the ownership of the assets by the company is not a matter of crucial importance. I must again observe that Megarry J.'s summary of the essentials was directed to *normal* cases.”

And accordingly, he held that this was a case in which the court had jurisdiction to wind up a Dutch company.

To my mind it is clear first that the assets to come into the hands of the petitioners in that case were not assets existing at the moment of presentation of the petition: they were the potential fruits of a claim that could only be made if the company was wound up. Secondly, the assets were never in any sense assets of the company. Nourse J., at pp. 46 and 47, had referred to an argument presented to him by counsel for the petitioners to the effect that there was no overriding requirement that the company should have assets within the jurisdiction and that what was important was the carrying on of business in the country. Nourse J. stated that he found it unnecessary to decide whether that proposition could be made out. But whilst he may not have decided the question whether the mere carrying on of business was enough, if I may say so with the greatest respect, Nourse J. does seem to me to have decided that there is no universal requirement in every case that there should be assets within the jurisdiction to found the jurisdiction to wind up a foreign company. In an abnormal case like the *Eloc* case, the court has jurisdiction, even though there are no assets here.

As I understand that decision therefore, it does support Mr. Blackburne's proposition that there need be no assets within the jurisdiction provided that there is a sufficient connection with the

jurisdiction and provided that there is a reasonable possibility of benefit accruing to the creditors from the winding up. A

Miss Heilbron submitted that the *Eloc* case was distinguishable on its facts. Of course, the facts were different. The source of the benefit was to come from a third party which had nothing to do with the Dutch company and the benefits would never accrue to the company but directly to the petitioners, but I cannot see why that should make the present case one less suitable for the court's jurisdiction. The benefit in the present case would consist of the contribution to the assets of the company to make up for losses caused by the wrongful or fraudulent trading of the company. Further, a substantial element in the fraudulent and wrongful trading claim would be the amount of interest that has continued to accrue and that is of course directly related to the petitioner's debt. Another factual difference from the *Eloc* case is that there the petitioners were ex-employees. But the fact that the petitioner here is a creditor relying on a debt incurred by the company under an agreement made here again does not seem to me to be a material difference. In both the *Eloc* case and the present case it is an important circumstance that there is said to have been the carrying on of business in this country by the company in question. B C

Miss Heilbron then said that the *Eloc* case was wrongly decided, first because it was inconsistent with *Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* [1951] Ch. 112. For the reasons which I have already given I do not accept that. She also said that it was wrongly decided because, for the court to have jurisdiction to wind up a foreign company with no assets here, the company has to have been trading here at the time the petition was presented. She relied by analogy on the statutory requirements for service on a foreign corporation in respect of which the ability to serve on that company at a place of business established by that company in this country has been held to be limited by the necessity to show that the company was carrying on business at the time of service. I cannot obtain any assistance from those specific statutory provisions or the authorities thereon, dealing as they do only with service. What Parliament has thought fit to provide in relation to service is likely to be governed by the necessity to bring that which has to be served to the notice of the foreign company. The question of jurisdiction seems to me to involve a wholly different concept, that is to say a sufficient connection with this country. I would add that no authority on jurisdiction has been cited to me to support Miss Heilbron's proposition on this point. D E F

In the circumstances, I am prepared consistently with the *Eloc* case [1982] Ch. 43 to hold that the presence of assets in this country is not an essential condition for the court to have jurisdiction in relation to the winding up of a foreign company. In my judgment, provided a sufficient connection with the jurisdiction is shown, and there is a reasonable possibility of benefit for the creditors from the winding up, the court has jurisdiction to wind up the foreign company. G H

I turn then to the question whether there is a sufficient connection with the jurisdiction. The following matters seem to me to provide such a connection. First, the company incurred the debt on which the petitioner, an English company, relies under an English loan agreement negotiated and executed here, and requiring performance here. Second, there is clear evidence that the company has carried on business in England. All the directors and officers of the company were resident in

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A England at least until August 1986. All the negotiations for the loan from the petitioner were carried on in London, all the loan documents were executed in London, and the only bank accounts of the company that are known were in London. Even as late as 18 November 1986 the company, when in breach of its contractual obligation decided that the Daiichi freight should not be paid into the NatWest account, directed payment to an account with another London bank. Charterparties were negotiated and agreed here. In relation to the Daiichi charterparty, the petitioner's evidence, which is accepted by Dimitri Samonas, is that all the arrangements were made in London and the decisions were taken here by J.S.S. for the company after reference to the Samonases. That shows that even in November management decisions on the company's business were being taken in London. At least two business letters were written directly in the name of the company from J.S.S.'s offices and those offices were the address given to NatWest as the address of the directors of the company. Miss Heilbron submitted that it was not sufficient for a company to trade here through agents but I do not follow this. If what was done was done in the name of and for the company I fail to see why that is not the company carrying on business here through its agents. She also referred me to the requirements that, under the loan agreement and the first preferred mortgage, notices under those documents were to be given to the company care of Esperos. She also relied on the agreements of 1 January 1985 for the Esperos company to be the manager and J.S.S. to be the agent or sub-manager in respect of the *Samjohn Captain*. But there is no evidence that any act was done by J.S.S. pursuant to that agreement, or that Esperos exercised any control whatever over J.S.S. In all their dealings with NatWest and the petitioner it was never suggested by the Samonases that J.S.S. was merely acting as sub-managers or agents for Esperos as distinct from acting for the company. In my judgment therefore, it can be said, on the evidence before me, that at least until November 1986 the company has been effectively managed from London by the Samonas family and has carried on business here, either directly or through J.S.S. There is, I would stress, no evidence that the company has carried on business outside this country at all. The only business transacted at the one board meeting known to have taken place abroad in August 1986 was merely to accept the directors' resignations and to appoint other directors.

It is also appropriate for the court to consider whether any other jurisdiction is more appropriate for the winding up of this admittedly insolvent company. In my judgment, there is none. Miss Heilbron accepts that Liberia is not a serious rival to this country for the purpose of jurisdiction. The company seems to have had nothing to do with Liberia after its incorporation. But she suggested that Greece might be a more appropriate jurisdiction. I do not accept that. Apart from the fact that the vessel flies a Greek flag and that notices under the loan agreement and first preferred mortgage are required to be sent to the company care of Esperos in Greece I cannot see on what basis Greece would be a more appropriate jurisdiction to wind up the company. In my judgment, for the reasons I have given, the company has a much closer connection with this jurisdiction.

I am therefore satisfied that, on the evidence that has been put before me, the company has a sufficiently close connection with the jurisdiction, and that there is no more appropriate jurisdiction for the winding up of the company which plainly ought to be wound up.

I turn next to the question whether there is a reasonable possibility of benefit accruing to creditors from the making of a winding up order. That such is the appropriate test appears from the *Merabello* case [1973] Ch. 75 and the *Eloc* case [1982] Ch. 43. Similarly in *In re Allobrogia Steamship Corporation* [1978] 3 All E.R. 423 the company there had a claim of the same type as in the *Merabello* case and that was the asset which founded jurisdiction for the court. Slade J. held that it was not necessary to show that the claim was one which was certain to succeed. It was sufficient to show that the claim had a reasonable possibility of success.

In the present case Mr. Blackburne has submitted that there is a reasonable possibility of the liquidator recovering contributions to the assets of the company from members of the Samonas family under sections 213 and 214 of the Insolvency Act 1986. To my mind it is abundantly clear that those who have been in charge of the company since at least the end of October 1986 have been conducting the affairs of the company in a way that is likely to bring them within the scope of one or both of those sections, and whilst the Act does not state how much can be recovered under those sections, the additional costs and debts incurred at a time when the company should have ceased trading and given up the vessel provide a likely measure of those contributions.

I did not understand Miss Heilbron to contend that sections 213 and 214 could not apply in the present case. She quarrelled about one item in the quantification of the costs and expenses incurred since November 1986, but that is a comparatively minor matter. I recognise that the question whether the liquidator will wish to and will be able to succeed against the Samonas turns on disputed questions of fact in view of the apparent resignation of the Samonas of their directorships and the termination of J.S.S.'s agency. But I bear in mind the wide terms of those sections, for example, that for fraudulent trading under section 213 someone who is knowingly a party to the fraudulent trading of the company may be liable, and similarly for wrongful trading under section 214 shadow directors may be held liable. On the evidence before me I would agree with Mr. Blackburne that there is a reasonable possibility of the liquidator succeeding in proceedings against at least Dimitri and Christos Samonas and they are resident in this country. I think it undesirable to say more on what may well have to be litigated at a later date.

Accordingly I reach the conclusion that on the existing evidence before me there is a reasonable possibility of benefit accruing to the creditors from the winding up of the company. It seems to me therefore that the court has jurisdiction to make a winding up order in relation to the company.

Ought the court to exercise its power to appoint a provisional liquidator at this stage? Mr. Blackburne submitted that I should because the single known asset of the company, the *Samjohn Captain*, is being kept out at sea and the debts of the company are thereby constantly increasing by over \$5,000 per day. Further, he pointed to what was said by Esperos in the Greek proceedings, in particular that the company may be trying to sell the vessel. The provisional liquidator, he submits, will be able to exercise the wide powers now conferred on such an officer under sections 234 to 236 of the Insolvency Act 1986 to obtain information to ascertain the whereabouts of the vessel and who are in

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In re A Company (Ch.D.)

Peter Gibson J.

A control of her, with a view to bringing the vessel back into responsible hands.

This is an unusual application in that the court will normally only be looking to safeguard assets within the jurisdiction that are in jeopardy, but then this is a highly unusual case. Those in control of the company have behaved badly in flouting its contractual obligations in running up costs unnecessarily and in seeking to force the petitioner to accept far less than it is entitled to. In the meantime, the company's debts increase daily. In these special circumstances therefore it seems to me that it is appropriate to appoint a provisional liquidator. The official receiver would normally be appointed but because of the unusual tasks with which the provisional liquidator will be faced in seeking to recover the vessel, the petitioner has requested the appointment of Mr. Houghton, a partner in Touche Ross & Co. The official receiver has indicated his acquiescence in such an appointment. I shall so order.

Order accordingly.

Solicitors: Wilde Sapte; Watson, Farley & Williams.

D

K. N. B.

E

[HOUSE OF LORDS]

REGINA RESPONDENT

AND

F

SAUNDERS APPELLANT

1987 April 1, 2, 6;
July 16

Lord Keith of Kinkel, Lord Griffiths,
Lord Mackay of Clashfern, Lord Ackner
and Lord Goff of Chieveley

G

*Crime—Homicide—Murder—Jury unable to agree on murder charge—
Whether conviction of manslaughter valid without prior acquittal
of murder—Criminal Law Act 1967 (c. 58), s. 6(2)*

The Criminal Law Act 1967 provides by section 6(2):

“On an indictment for murder a person found not guilty of murder may be found guilty—(a) of manslaughter . . .”

H

The appellant was charged on an indictment containing a single count of murder, in that he had killed the victim by stabbing her with a carving knife. At the trial, the prosecution maintained that notwithstanding the amount of alcohol that the appellant had consumed, he had been able to form the necessary intent to kill or cause grievous bodily harm and was, therefore, guilty of murder, but that, if the jury were not satisfied that he had had the necessary intent, he was guilty of manslaughter. No plea of guilty of manslaughter was tendered on behalf of the appellant. After the jury had indicated that they were having difficulty on the question of intent and the judge had given them a further direction, he subsequently asked the prosecution

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[1987]

whether they would accept a verdict of manslaughter, to which they agreed. The judge recalled the jury and directed them that if at least 10 of them were agreed that all the ingredients of manslaughter were made out and the only thing dividing them was whether the necessary intent for murder had been established, he would be prepared to discharge them from returning a verdict on murder and accept a verdict based on manslaughter. The appellant's counsel assented to that direction being given. The jury subsequently returned a unanimous verdict of guilty of manslaughter, and the judge discharged them from giving a verdict on the charge of murder. The appellant appealed against conviction, submitting on the basis of section 6(2) of the Act of 1967, to which attention had not been directed at the trial, that the jury could not validly have returned a verdict of manslaughter because they had not first acquitted him of murder. The Court of Appeal (Criminal Division) dismissed the appeal.

On appeal by the appellant:—

Held, dismissing the appeal, that on its true construction section 6(2) of the Criminal Law Act 1967 did not apply to a situation where the jury had never been able to reach a verdict of acquittal of murder because they had been unable to agree on such a verdict; and that, since a judge had a judicial discretion to discharge a jury from giving a verdict if they were unable to agree, he was entitled to discharge them from giving a verdict of murder where they were agreed on a verdict of manslaughter and justice was properly satisfied by such a verdict (post, pp. 357G—358A, 361C—D, 362B—C, H—363A, 365B—C).

Winsor v. The Queen (1866) L.R. 1 Q.B. 289 applied.

Reg. v. Greenwood (1857) 7 Cox C.C. 404 and *Rex v. Clifford* [1914] Ir. L.T. 28 considered.

Per curiam. (i) It is not necessary, where there is a possibility on a count of murder of a jury returning a verdict of manslaughter, that the indictment should contain two counts, namely murder and manslaughter. Such a course would be contrary to long established practice and undesirable (post, pp. 357G—358A, 364B—D, 365B—C).

(ii) If the appellant's submission had been correct, there would have been no valid conclusion to the trial and it would have been a classic case where a venire de novo could have been granted (post, pp. 357G—358A, 365A—B, B—C).

Decision of the Court of Appeal (Criminal Division) [1986] 1 W.L.R. 1163; [1986] 3 All E.R. 327 affirmed.

The following cases are referred to in the opinion of Lord Ackner:

Connelly v. Director of Public Prosecutions [1964] A.C. 1254; [1964] 2 W.L.R. 1145; [1964] 2 All E.R. 401, H.L.(E.)

Director of Public Prosecutions v. Nasralla [1967] 2 A.C. 238; [1967] 3 W.L.R. 13; [1967] 2 All E.R. 161, P.C.

Mackalley's Case (1611) 9 Co.Rep. 61b

Newton's Case (1849) 13 Q.B. 716

Reg. v. Collison (1980) 71 Cr.App.R. 249, C.A.

Reg. v. Greenwood (1857) 7 Cox C.C. 404

Reg. v. Rose (Newton) [1982] A.C. 822; [1982] 3 W.L.R. 192; [1982] 2 All E.R. 731, H.L.(E.)

Reg. v. Salisbury (1553) 1 Pl. 97

Reg. v. Yeadon (1861) Leigh & C. 81

Rex v. Clifford [1914] Ir. L.T. 28

Rex v. Hancock (1931) 23 Cr.App.R. 16, C.C.A.

Winsor v. The Queen (1866) L.R. 1 Q.B. 289

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- A The following additional cases were cited in argument:
Bromley's Case (1630) Het. 66
Farrell v. Alexander [1977] A.C. 59; [1976] 3 W.L.R. 145; [1976] 2 All E.R. 721, H.L.(E.)
Reg. v. Charlesworth (1861) 9 Cox C.C. 44
Reg. v. Cross and Channon [1971] 3 All E.R. 641; 55 Cr.App.R. 540, C.A.
Reg. v. Ellis (1838) 8 C. & P. 654
- B *Reg. v. Lillis* [1972] 2 Q.B. 236; [1972] 2 W.L.R. 1409; [1972] 2 All E.R. 1209, C.A.
Reg. v. McLoughlin (1838) 8 C. & P. 635
Reg. v. O'Connell (unreported), 8 November 1985, C.A.
Reg. v. Parker [1969] 2 Q.B. 248; [1969] 2 W.L.R. 1063; [1969] 2 All E.R. 15, C.A.
Reg. v. Robinson (Adeline) [1975] Q.B. 508; [1975] 2 W.L.R. 117; [1975] 1 All E.R. 360, C.A.
- C *Reg. v. Thomas* (1875) L.R. 2 C.C.R. 141
Rex v. Baxter (1913) 9 Cr.App.R. 60, C.C.A.
Rex v. Fisher (1921) 91 L.J.K.B. 145, C.C.A.
Rex v. O'Brien (1911) 6 Cr.App.R. 108, C.C.A.
Rex v. Thomas (1949) 33 Cr.App.R. 200, C.C.A.
Rex v. Tonks [1916] 1 K.B. 443, C.C.A.
- D *Shipton, In re* [1957] 1 W.L.R. 259; [1957] 1 All E.R. 206n., D.C.

APPEAL from the Court of Appeal (Criminal Division).

This was an appeal by Keith Saunders by leave of the House of Lords from the judgment of the Court of Appeal (Criminal Division) (Lawton L.J., Drake and Hirst JJ.) [1986] 1 W.L.R. 1163 given on 23 May 1986 dismissing the appellant's appeal against his conviction of manslaughter on 9 September 1985 in the Maidstone Crown Court (Otton J. and a jury).

The Court of Appeal refused the appellant leave to appeal from their decision, but on 24 July 1986 the Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Ackner) [1986] 1 W.L.R. 1163, 1169 allowed a petition by him for leave.

The facts and the question certified by the Court of Appeal are set out in the opinion of Lord Ackner.

James Townend Q.C. and *James Turner* for the appellant.

Nicholas Purnell Q.C. and *David Radcliffe* for the Crown.

G Their Lordships took time for consideration.

16 July. LORD KEITH OF KINKEL. My Lords, I have had the opportunity of reading in draft the speech to be delivered by my noble and learned friend Lord Ackner. I agree with it, and for the reasons he gives I too would answer the certified question as he proposes and dismiss the appeal.

H LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Ackner. I agree with it, and for the reasons that he gives would answer the certified question as he proposes and dismiss the appeal.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend

Lord Ackner. I agree with it, and for the reasons that he gives would answer the certified question as he proposes and dismiss the appeal. A

LORD ACKNER. My Lords, this appeal raises a short and highly technical point of law. The facts, which I shall shortly recite, disclose a case which even the most charitably minded would be obliged to describe as totally without merit.

In September 1985 the appellant stood trial at the Crown Court at Maidstone before Otton J. and a jury on an indictment which contained the single count of murder. The prosecution's case, put quite simply, was that on 29 October 1984 the appellant and Jeanette Lazenby, with whom he had been living, went out for the day. They had both consumed alcohol, a moderate amount on the part of Miss Lazenby, a considerable amount of drink on the part of the appellant. B

In the afternoon they travelled back to the home of Mr. Ayres in Tunbridge Wells where they were living. They went into the kitchen, an argument developed, the appellant at some stage got hold of a carving knife and deliberately stabbed Jeanette Lazenby, thus killing her. The prosecution maintained that, notwithstanding that amount of drink, the appellant was able to and did, in fact, form the necessary intent to kill or cause serious bodily harm and was therefore guilty of murder. The Crown submitted in the alternative, that if the jury were not satisfied that the appellant had the necessary intent, then he was guilty of manslaughter. C

Amongst the many witnesses who gave evidence for the prosecution was Mr. Ayres, who returned to his house in the afternoon, heard an argument going on between the deceased and the appellant and twice remonstrated with them about the noise they were making. Thereafter having heard a particularly loud scream from the kitchen, he rushed in and found Jeanette lying on her back on the floor with a patch of blood on her jumper. The appellant said "what have I done, what have I done?" Mr. Ayres having unsuccessfully tried to resuscitate the girl, the police and the ambulance were called. D

The appellant did not give evidence at the trial, the explanation put forth on his behalf being that he had no recollection of what had happened in the kitchen. A surprising variety of possibilities were suggested for the jury's consideration such as, that the deceased had killed herself either accidentally or intentionally, that she had been killed by some unidentified third party, that the appellant had accidentally committed the act which caused her death, that the appellant had killed her in the course of lawfully defending himself against her, that the appellant had killed her as a result of provocation by her, that the appellant had killed her but had been so drunk at the time as not to have the necessary mens rea for murder, and that the appellant had killed her without the intention of killing her or doing serious bodily harm. A pathologist called by the Crown gave evidence that the fatal stab wound, having regard both to its direction and to the force with which it must have been delivered, could not have been self-inflicted. The only possible third party was Mr. Ayres and it was not suggested that he had attacked the deceased. As regards self defence and provocation, the accused in his statements to the police had made no suggestion of any facts which could raise these defences. E

The jury retired at 12.49 p.m. on the fourth day of the trial. At 3.50 p.m. the judge gave the jury a majority direction. Shortly after 4 p.m. F G H

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A the judge received a note from the jury which read: "The jury is split between murder and manslaughter at present and would welcome further guidance on the distinctions between them." This note was discussed in the absence of the jury by the judge with counsel, since the note did not indicate the basis upon which the jury were considering manslaughter. At 4.15 p.m. with the concurrence of counsel, the judge asked the foreman of the jury: "Is the matter which is troubling you a distinction between murder and manslaughter on the question of the intent in relation to the effect of drink?" Having received an affirmative answer the judge then gave the jury an appropriate further direction stating, *inter alia*:

C "ask yourselves the question whether you feel sure that at the time he attacked Jeanette Lazenby he had the requisite intent to kill or cause serious bodily harm, but before you can convict you must be satisfied so that you feel sure not merely that Keith Saunders was capable of forming the intent, but also that he did in fact, may I repeat in fact, form that intent. If you are sure he did have the intention to kill or to cause serious injury, then he is guilty of murder; but if you think he might not have had the necessary intent, but you are satisfied he caused the death by a deliberate and unjustified act, then he is not guilty of murder but guilty of manslaughter."

E Sometime after 5 p.m. the judge was concerned that the jury had still failed to reach a verdict. He indicated to counsel that he proposed to recall them, to emphasise the desirability of their reaching a verdict, but that if after retiring once again they should indicate that there was no prospect of reaching a verdict, then he would discharge them and order a retrial. Mr. Townend for the appellant, pointed out that in view of their answer to the judge's question, they could well have agreed at least on a verdict of manslaughter. The judge then inquired whether the prosecution would be prepared to accept a verdict of manslaughter. Mr. Purnell for the prosecution, informed the judge that no such plea had been tendered by Mr. Townend, since he was not in a position on his instructions to offer such a plea, but that if it had been offered, he would have accepted it, in the light of the evidence on alcohol. He considered that it was not in the interests of justice that there should be another week's trial and accordingly he was prepared to accept a verdict of manslaughter.

G After some further discussion the judge suggested recalling the jury and directing them in the following terms:

H "If at least 10 of you are agreed that all the ingredients of manslaughter are made out, and the only thing which is dividing you is whether the necessary intent for murder has been established, then provided at least 10 of you are agreed on that, I am prepared to discharge you from returning a verdict on murder and I am prepared to accept a verdict based on manslaughter."

Mr. Townend assented to the judge taking this course. Accordingly the jury were recalled into court at 5.47 p.m. and the judge gave the direction to which I have referred. At 6 p.m. the jury returned and in answer to the question put by the clerk of the court as to whether "In respect of the offence of murder, have at least 10 of your number agreed on your verdict?" the answer was "No." The clerk then asked

"In respect of the offence of manslaughter, have at least 10 of your number agreed on your verdict?" to which the answer was "yes" and that verdict was a unanimous one of guilty of manslaughter. The jury was subsequently discharged from giving a verdict on the charge of murder.

Thereafter the judge, having heard medical evidence called by the Crown as to the appellant's personality and his previous record of violence, sentenced him to life imprisonment.

Since the trial took place Mr. Townend's attention was drawn to section 6(2) of the Criminal Law Act 1967 which is in these terms:

"On an indictment for murder a person found not guilty of murder may be found guilty—(a) of manslaughter, or of causing grievous bodily harm with intent to do so; or (b) of any offence of which he may be found guilty under an enactment specifically so providing, or under section 4(2) of this Act; or (c) of an attempt to commit murder, or of an attempt to commit any other offence of which he might be found guilty; but may not be found guilty of any offence not included above."

He accordingly appealed to the Court of Appeal (Criminal Division) and submitted that the jury could not have validly returned a verdict of manslaughter, because they had not first *acquitted* the appellant of murder. This would mean that the trial had ended without a valid verdict. In the Court of Appeal Mr. Townend accepted that a trial which ends without a valid verdict is no trial at all and accordingly on the authority of *Reg. v. Rose (Newton)* [1982] A.C. 822 the court was entitled to order a retrial on a venire de novo. I share the Court of Appeal's difficulty in appreciating how success in the Court of Appeal would have advanced the interest of the appellant, who would then be in jeopardy on a retrial of being convicted of murder. Moreover, I entirely agree with the Court of Appeal that it would be disregarding the public interest if a retrial were not ordered. The Court of Appeal, however, dismissed the appeal but certified the following point of law as being of general public interest:

"If on an indictment charging murder a jury cannot agree that murder has been proved and are discharged from returning a verdict on the charge of murder but they are agreed that all the elements of manslaughter have been proved, can they validly return a verdict of manslaughter having regard to the provisions of section 6(2) of the Criminal Law Act 1967?"

Your Lordships subsequently gave the appellant leave to appeal to your Lordships' House.

Mr. Townend's submission is a simple one. Where an accused is tried on an indictment containing a single count of murder, section 6(2) makes it a condition precedent to a valid conviction of manslaughter that the accused has first been acquitted of murder. Mr. Townend, while recognising that it is the long established practice not to include in an indictment for murder a count of manslaughter, submits that section 6(2) makes this desirable whenever there is a possibility of the jury returning a verdict of manslaughter. Where such a possibility is not recognised, then the remedy, on the jury announcing a failure to agree on the offence of murder, is for the judge at that very late stage to allow the indictment to be amended to add a count of manslaughter.

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A Mr. Purnell's submission is equally simple. The Act, as its long title records, was essentially to amend the law

"by abolishing the division of crimes into felonies and misdemeanours and to amend and simplify the law in respect of matters arising from or related to that division or the abolition of it . . ."

B Section 6(2) of the Act did not take away the powers of the common law that existed before the Act. The section provided specifically for a particular situation, namely where the jury had acquitted of murder. It made it clear that such an acquittal did not necessarily bring the trial to an end. Where the judge had properly directed the jury to consider an available lesser offence, then for the trial to be fully concluded, the jury had to bring in a verdict on the lesser offence. If they failed to agree then they would have to be discharged and a new trial could then properly be ordered limited to the lesser offence. The section was thus giving effect to the Privy Council decision of *Director of Public Prosecutions v. Nasralla* [1967] 2 A.C. 238.

C In my judgment section 6(2) was not concerned with and had no application to a situation in which the jury had never been able to reach a verdict of acquittal of murder because they could not agree on such a verdict. That position was provided for by the common law which has not been abrogated by the statute.

D The crime of murder has always been in a special category. As long ago as *Reg. v. Salisbury* (1553) 1 Pl. 97 juries have been entitled to return verdicts of manslaughter on indictments charging murder:

E "when he was arraigned for killing a man upon malice prepense, the substance of the matter was, whether he killed him or not, and the malice prepense is but matter of form or the circumstance of killing. And although the malice prepense makes the fact more odious, and for this cause the offender shall lose divers advantages, which he should otherwise have, as sanctuary, clergy, and the like, yet it is nothing more than the manner of the fact, and not the substance of the fact, for the substance of the fact is the killing him, and then when the substance of the fact and the manner of the fact are put in issue together, if the jurors find the substance and not the manner, yet judgment shall be given according to the substance" (*per* Bromley C.J., at p. 101).

F That decision was followed in *Mackalley's Case* (1611) 9 Co. Rep. 61b. In *East's Pleas of the Crown* (1803 ed.), vol. I, p. 371, it is stated:

G "Upon every indictment for petit treason or murder, the jury may negative the higher offence, and find their verdict for any lesser species of homicide; . . . So in appeals, the defendant in an appeal of murder may be found guilty of manslaughter only; . . ."

H In *Deacon's Digest of the Criminal Law* (1831), vol. I, p. 458, it is stated:

"So, if A be charged with the murder of B—that is, with feloniously killing B of malice prepense—and all but the fact of malice prepense be proved, A may clearly be convicted of manslaughter; . . ."

It was not until *Newton's Case* (1849) 13 Q.B. 716 that it was decided that the judge, in the proper exercise of his judicial discretion, could discharge a jury before they had reached a verdict. In *Winsor v.*

The Queen (1866) L.R. 1 Q.B. 289, 303 Cockburn C.J. stated in terms that, A

“after the jury have retired to consider their verdict, and have remained in deliberation a full and sufficient time, if they are not agreed, and there is no reasonable expectation of their coming to a unanimous decision, it is within the province of a judge presiding on a criminal trial, in the exercise of his discretion, to discharge the jury.” B

The case is historically an interesting one since it shows in some detail the use and misuse of juries which had been made in the past. Given that the judge has the judicial discretion to discharge a jury from giving a verdict, there would appear to be no good reason either in law or in common sense why on a charge of murder the trial judge should not, in the judicial exercise of his discretion, discharge the jury from giving a verdict of murder where they are agreed on a verdict of manslaughter and the judge considers that justice is properly satisfied by such a verdict. C

The industry of counsel has discovered no case which clearly so decides. Mr. Purnell has, however, drawn our attention to two cases which certainly have the appearance of having proceeded on that basis. D
In *Reg. v. Greenwood* (1857) 7 Cox C.C. 404 the prisoner was indicted for murder and rape on a child under 10. Wightman J. told the jury that the malice which constitutes murder was, in this case, implied. He directed the jury that if they were of the opinion that the prisoner had connection with the girl and she died from its effect, then that act being, under the circumstances of the case a felony in point of law, this would, of itself, be such malice as would justify them in finding him guilty of murder. After retirement the jury informed the court that they were satisfied that the prisoner had had connection with the girl and that her death resulted therefrom, but were not agreed as to finding him guilty of murder. Wightman J. informed them that under those circumstances it was open to them to find the prisoner guilty of manslaughter and that they might ignore the doctrine of constructive malice if they thought fit. E
The jury found a verdict of manslaughter. Whether or not the jury were expressly discharged from entering a verdict on the offence of murder is not clear. F

In *Rex v. Clifford* [1914] Ir. L.T. 28 the prisoner, on being arraigned for the murder of his wife, pleaded not guilty of murder, but guilty of manslaughter. Upon Crown counsel informing the judge that this plea was not acceptable on the ground “that the case was one proper to be investigated by a jury on the capital charge,” it was ordered that the trial should proceed. The following day counsel for the defence unsuccessfully sought to plead autrefois convict, which plea was rejected. The trial of the prisoner on the indictment for murder was then proceeded with. The jury failed to agree. An application was then made for judgment upon the prisoner’s plea of “guilty of manslaughter” and he was sentenced after Cherry L.C.J. had discharged the jury. G H

In a trial on an indictment for murder, where manslaughter is a possible verdict, the jury’s task is first to consider whether or not they are satisfied that the accused is guilty of murder. It is only when they have made the positive determination that the accused is not guilty of murder that they should then proceed to consider the lesser offence of manslaughter. However, there is no legal principle which prevents this

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A impediment to considering the lesser offence being removed by judicial
intervention, namely by discharging the jury from the obligation of
returning a verdict on the major offence, if the justice of the case so
requires. This appeal provides a very good example. This was a case,
where as previously stated, the prosecution would have accepted a plea
to manslaughter, if Mr. Townend's instructions had permitted his offering
that plea. Before the judge took the course that he suggested, he invited
B the views of the prosecution and the defence. The course he proposed
had their joint support. He concluded that it would be a just
determination of the trial to accept a verdict of guilty on the alternative
offence of manslaughter, avoiding as it would the burden of a retrial
with all the anxiety which this would entail. I shall perhaps add that if,
having invited the prosecution's submissions, these proved hostile to the
C course contemplated by the judge, he in the proper exercise of his
judicial discretion would be fully entitled, having considered those
submissions, to adhere to the course he proposed. In such circumstances
there could be no question of the prosecution re-indicting the accused
for murder. To attempt to do so would clearly be an abuse of the
process of the court and the indictment would be stayed: see *Connelly v.*
Director of Public Prosecutions [1964] A.C. 1254.

D Mr. Townend accepts that a judge has the inherent power to
discharge a jury from giving a verdict on a particular charge. He further
agrees that before so discharging the jury, the judge must give the
prosecution an opportunity to make submissions as to whether that is
the proper course to adopt. He submits, however, that the judge in this
case by discharging the jury from giving a verdict on the charge of
E murder, gave them a total discharge of their obligations, there being one
and only one count in the indictment. This submission, in my judgment,
overlooks that in this indictment there were comprised two offences, the
greater i.e. murder, and the unstated lesser alternative i.e. manslaughter,
all comprised in one count: see *Director of Public Prosecutions v.*
Nasralla [1967] 2 A.C. 238, 248g.

F Mr. Townend placed much reliance on *Reg. v. Collison* (1980) 71
Cr.App.R. 249, a decision of the Court of Appeal (Criminal Division).
The facts are set out succinctly in the headnote. The appellant was
charged on an indictment containing only one count—wounding with
intent to do grievous bodily harm contrary to section 18 of the Offences
against the Person Act 1861. At the end of the summing up the jury
were directed that they must return a verdict either of guilty of wounding
G with intent or of unlawful wounding (contrary to section 20 of the Act of
1861) or of not guilty. They returned to court after retiring stating that
they were not unanimous that it was wounding with intent. They were
then given the requisite direction on majority verdicts but the requisite
majority was not achieved. After legal argument the judge granted an
application by the prosecution to amend the indictment by adding a
second count of unlawful wounding contrary to section 20 of the Act of
H 1861. The appellant was convicted of unlawful wounding and appealed
on the ground, inter alia, that the jurisdiction to order an amendment of
the indictment only arose if it appeared to the court that the indictment
in its unamended form was defective and he submitted that the
indictment in the present case was not, at the time that the amendment
was allowed, defective. At the conclusion of the judgment of the court,
delivered by Thompson J., appears the statement, at p. 255:

"We can see nothing wrong or improper in what the judge did by allowing the amendment. It may be that the difficulty that had arisen could have been otherwise overcome. However that may be, it was right that he should take steps to permit the jury to deliver the verdict upon which their deliberations had led them to agree."

A

It seems quite clear that the Court of Appeal, while deciding that the action taken by the judges was not open to a valid attack, was careful to avoid the suggestion that his difficulty could not have been otherwise overcome. *Reg. v. Collison* is not an authority for the proposition contended for by Mr. Townend that where there is a possibility on a count of murder of a jury returning a verdict of manslaughter, the indictment should contain two counts. Not only would this be contrary to long established practice, but I wholly agree with the observation of Lawton L.J. when giving the judgment of the court in the instant appeal that this would tend to confuse the jury. Moreover, such a course would not deal with the case, which is not uncommon, in which the possibility of a verdict of manslaughter only becomes apparent during the course of the trial. There is the further important point that there are cases in which the prosecution, on the basis of the evidence which they propose to present, consider that the only true verdict is that of murder. To include a separate count of manslaughter could well lead to the suggestion by the defence that since the prosecution have charged manslaughter, manslaughter must on the facts be an acceptable alternative.

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I have already made mention of the fact that before the Court of Appeal Mr. Townend accepted that a trial which ends without a valid verdict is no trial at all and that accordingly on the authority of *Reg. v. Rose (Newton)* [1982] A.C. 822 the Court of Appeal was entitled to order a retrial on a venire de novo. His junior has, however, submitted, with his leader's tacit approval, that *Reg. v. Rose* is not an authority for that proposition. In the course of his speech, with which Lord Scarman, Lord Roskill, Lord Bridge of Harwich and Lord Brandon of Oakbrook concurred, Lord Diplock stated, at p. 833, that the court could grant a venire de novo if there had been an irregularity of procedure which had resulted in there having been no trial that had been validly commenced. He continued: "It could do so if the trial had come to an end without a properly constituted jury ever having returned a valid verdict." Mr. Turner accepted that if the submissions made by his leader were correct, then the verdict returned by the jury was not a lawful verdict. He, however, submitted that the observations of Lord Diplock were obiter and should not be followed. I am quite unable to accept either submission. What I have quoted was part of the ratio decidendi. In stating the basis upon which a venire de novo can be granted, Lord Diplock was approving *Rex v. Hancock* (1931) 23 Cr.App.R. 16 where the accused, having been put in charge of the jury, changed his original plea of "not guilty" to one of "guilty" during the course of the hearing and the judge discharged the jury without obtaining a verdict of guilty from them. He further approved the decision in *Reg. v. Yeadon* (1861) Leigh & C. 81 where the jury brought in two successive verdicts inconsistent with one another as a result of the chairman of quarter sessions unlawfully refusing to accept the first. These, said Lord Diplock, at p. 832, are examples of cases in which the jury has been discharged without arriving at a lawful verdict, and in consequence of this there has

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Lord Ackner

- A been neither a conviction nor an acquittal of the defendant. Mr. Turner was obliged to submit that either *Rex v. Hancock* and *Reg. v. Yeadon* were wrongly decided, alternatively that although an equivocal verdict may be neither a conviction nor an acquittal, an unlawful verdict (which some might say is worse) cannot be so treated. The short answer is that if the appellant's main submission is correct, then there was no valid conclusion to the trial and it would be a classic case where a writ of venire de novo could be granted.
- B

I would answer the certified question in the affirmative and accordingly dismiss this appeal.

- C LORD GOFF OF CHIEVELEY. My Lords, I have had the opportunity of reading in draft the speech delivered by my noble and learned friend Lord Ackner. I agree with it, and for the reasons he gives I too would answer the certified question as he proposes and dismiss the appeal.

*Appeal dismissed. Certified question answered in affirmative.
Costs of appellant out of central funds.*

- D Solicitors: *Berry & Berry, Tunbridge Wells; Crown Prosecution Service, Headquarters.*

M. G.

E

[HOUSE OF LORDS]

- F GOVERNMENT OF BELGIUM APPELLANT
AND
POSTLETHWAITE AND OTHERS RESPONDENTS

[On appeal from REGINA v. GOVERNOR OF ASHFORD REMAND CENTRE AND ANOTHER, *Ex parte* POSTLETHWAITE AND OTHERS]

G

1987 April 6, 7, 8; 13
June 29, 30;
July 13

Watkins L.J. and Mann J.
Lord Bridge of Harwich, Lord Templeman,
Lord Griffiths, Lord Ackner and
Lord Goff of Chieveley

H

Extradition—Treaty—Construction—“Evidence . . . presented within two months”—English evidence being adduced by requesting state—Whether requirement that evidence be legally admissible—Extradition Act 1870 (33 & 34 Vict. c. 52), s. 10—Anglo-Belgian Extradition Treaty 1901 (S.R. & O. 1902 No. 208), art. V

In 1985 a riot occurred involving English football supporters at the Heysel Stadium in Brussels before the start of the European Cup Final, in which 39 people died and over 600 were injured. On 5 June 1986, after police investigation in

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[1987]

Belgium and in England with a view to identifying those persons who had been actively involved in the riot, warrants were issued in Belgium for the arrest of the first 26 respondents, all United Kingdom nationals, charging them with, inter alia, manslaughter of one of those killed in the riot. On 3 July 1986 requisitions for their surrender pursuant to section 7 of the Extradition Act 1870 and article II of the Extradition Treaty dated 29 October 1901¹ between the United Kingdom and Belgium, accompanied by the warrants of arrest and the duly authenticated sworn evidence taken in Belgium, were received at the Foreign Office. The Secretary of State's order to proceed was delivered to the Chief Metropolitan Magistrate at Bow Street Magistrates' Court. The Director of Public Prosecutions, on behalf of the Government of Belgium, furnished to the magistrate, in addition to the Belgian evidence, written statements under section 102 of the Magistrates' Courts Act 1980 in respect of the 75 English witnesses on whose evidence he was proposing to rely. On 8 September 1986 the magistrates issued warrants for the arrest of the first 26 respondents. At the hearing of the committal proceedings, which began on 3 February 1987, it was submitted, inter alia, that the statements tendered under section 102 of the Act of 1980 had not been "presented" within the two months' time limit laid down by article V of the Treaty in that they had not been tendered in evidence without objection or, in the case of objection, with oral evidence to substantiate the contents of the statements given by the makers; and that, accordingly, there was insufficient evidence against the first 26 respondents. The magistrate rejected that submission and made orders for committal under section 10 of the Extradition Act 1870. On appeal, the Divisional Court held that when the two months' time limit had expired none of the English evidence had been presented in accordance with article V and accordingly issued writs of habeas corpus discharging the first 26 respondents.

On appeal by the Government of Belgium:—

Held, allowing the appeal, that the purpose of the time limit in article V of the Treaty was to ensure that a person was not held in custody in the requested state until such time as the requesting state had sufficient evidence to justify a committal; that where England was the requested state and the necessary evidence was that of witnesses in England, it was not necessary that the evidence produced within the two-month time limit was in a legally admissible form and there had been sufficient compliance with the time limit by the production to the magistrate of statements complying with section 102 of the Magistrates' Courts Act 1980 albeit none of those statements had been tendered in evidence either without objection or substantiated by oral evidence (post, pp. 384B–C, 389E–F, 390C–E, 392G–393A, A–D).

In re Arton (No. 2) [1896] 1 Q.B. 509, D.C.; *Reg. v. Governor of Ashford Remand Centre, Ex parte Beese* [1973] 1 W.L.R. 969, 1426, D.C. and H.L.(E.) and *Reg. v. Governor of Pentonville Prison, Ex parte Sotiriadis* [1975] A.C. 1, H.L.(E.) applied.

Held, further, that on the presumption that it was for the magistrate and not the Secretary of State to be satisfied that the crime of manslaughter was punishable in Belgium, the duly authenticated Belgian warrant showed that the offence for which extradition was requested was within the description of manslaughter and the duly authenticated deposition of the principal deputy public prosecutor which accompanied the

¹ Anglo-Belgian Extradition Treaty 1901, arts. II, V: see post, pp. 373E–374A, E–F.

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A requisition for surrender stated that the offence was contrary to the Belgian Penal Code; and that, therefore, there had been sufficient evidence before the magistrate and within the time limit that the extraditable offence of manslaughter still remained an offence in Belgium (post, pp. 390H—391C, 393A—D).

Decision of the Divisional Court of the Queen's Bench Division, post, pp. 369A et seq. reversed.

B The following cases are referred to in the opinion of Lord Bridge of Harwich:

Arton (No. 2), In re [1896] 1 Q.B. 509, D.C.

Reg. v. Governor of Ashford Remand Centre, Ex parte Beese [1973] 1 W.L.R. 969; [1973] 3 All E.R. 250, D.C.; [1973] 1 W.L.R. 1426; [1973] 3 All E.R. 689, H.L.(E.)

C *Reg. v. Governor of Pentonville Prison, Ex parte Sotiriadis* [1975] A.C. 1; [1974] 2 W.L.R. 253; [1974] 1 All E.R. 692, H.L.(E.)

The following additional cases were cited in argument before the House of Lords:

Atkinson v. United States of America Government [1971] A.C. 197; [1969] 3 W.L.R. 1074; [1969] 2 All E.R. 1146; [1969] 3 All E.R. 1317, D.C. and H.L.(E.)

D *Nielsen, In re* [1984] A.C. 606; [1984] 2 W.L.R. 737; [1984] 2 All E.R. 81, H.L.(E.)

Rees, In re [1986] A.C. 937; [1986] 2 W.L.R. 1024; [1986] 2 All E.R. 321, H.L.(E.)

Reg. v. Governor of Brixton Prison, Ex parte Kotronis [1971] A.C. 250; [1969] 3 W.L.R. 528; [1969] 3 All E.R. 304, D.C.; [1971] A.C. 250; [1969] 3 W.L.R. 1107; [1969] 3 All E.R. 1337, H.L.(E.)

E *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556; [1962] 3 W.L.R. 1013; [1962] 3 All E.R. 529, H.L.(E.)

Reg. v. Governor of Pentonville Prison, Ex parte Ecke (Note) (1973) 73 Cr.App.R. 223, D.C.

Reg. v. Governor of Pentonville Prison, Ex parte Kirby (Note) [1979] 1 W.L.R. 541; [1979] 2 All E.R. 1094, D.C.

Rex v. Governor of Brixton Prison, Ex parte Servini [1914] 1 K.B. 77

F *United States of America v. Gaynor* [1905] A.C. 128, P.C.

The following cases are referred to in the judgment of Divisional Court:

Bennaim, In re (unreported), 22 February 1985, D.C.

Nielsen, In re [1984] A.C. 606; [1984] 2 W.L.R. 737; [1984] 2 All E.R. 81, H.L.(E.)

G *Reg. v. Governor of Pentonville Prison, Ex parte Herbage (No. 3)*, 30 July 1986; *The Times*, 6 August 1986, D.C.

Reg. v. Governor of Pentonville Prison, Ex parte Sotiriadis [1975] A.C. 1; [1974] 2 W.L.R. 253; [1974] 1 All E.R. 692, H.L.(E.)

Reg. v. Governor of Pentonville Prison, Ex parte Voets [1986] 1 W.L.R. 470; [1986] 2 All E.R. 630, D.C.

Reg. v. Weil (1882) 9 Q.B.D. 701, C.A.

H The following additional cases were cited in argument before the Divisional Court:

Arton (No. 2), In re [1896] 1 Q.B. 509, D.C.

Bluhm, In re [1901] 1 K.B. 764, D.C.

Government of the United States of America v. McCaffery [1984] 1 W.L.R. 867; [1984] 2 All E.R. 570, H.L.(E.)

Rees, In re [1986] A.C. 937; [1986] 2 W.L.R. 1024; [1986] 2 All E.R. 321, H.L.(E.)

Reg. v. Coney (1882) 8 Q.B.D. 534

Reg. v. Governor of Brixton Prison, Ex parte Armah [1968] A.C. 192; [1966] 3 W.L.R. 828; [1966] 3 All E.R. 177, H.L.(E.)

Reg. v. Governor of Brixton Prison, Ex parte Schtraks [1964] A.C. 556; [1962] 3 W.L.R. 1013; [1962] 3 All E.R. 529, H.L.(E.)

Reg. v. Governor of Pentonville Prison, Ex parte Kirby (Note) [1979] 1 W.L.R. 541; [1979] 2 All E.R. 1094, D.C.

United States of America v. Gaynor [1905] A.C. 128, P.C.

APPLICATIONS for writs of habeas corpus.

Twenty-six applicants, Graham Simon Postlethwaite, Mark Charles Woods, Terence Michael Wilson, Gary Allan Rutter, Paul Anthony Albert Howard, Michael John Barnes, Steven McDonald, Gary Evans, Graham Anthony Reavey, John Davies, Ronald Francis Jepson, Alan Woodray, David Edward Duncan, James William Wallace, Andre Sambor, Stanley James Conroy, David Louis Giles, Paul Leslie Wright, Keith Eugene Reed, Barry Frank Rickman, Ronald Joseph O'Brien, Timothy Williams, Gary Thomas Haynes, Gary Cooper, Anthony Owen Hogan and Kevin Barry Hughes applied for writs of habeas corpus to issue directed to the governors of Ashford Remand Centre and Pentonville Prison where they were detained pending removal to Belgium consequent to orders made by the Chief Metropolitan Stipendiary Magistrate at Bow Street Magistrates' Court on 3 March 1987.

The facts are stated in the judgment of Watkins L.J.

Michael Morland Q.C. and *Timothy R. A. King* for the applicants Mark Woods, Gary Alan Rutter and Gary Evans.

Michael Morland Q.C. and *Michael John Kennedy* for the applicants John Davies and Gary Cooper.

Michael Morland Q.C. and *Anna Worrall* for the applicant Michael John Barnes.

Michael Morland Q.C. and *David Harris* for the applicant Andre Sambor.

Michael Morland Q.C. and *David Geey* for the applicant Stanley James Conroy.

Michael Morland Q.C. and *John Greaves* for the applicant Barry Frank Rickman.

Benet Hytner Q.C. and *David M. Sumner* for the applicant James William Wallace.

Benet Hytner Q.C. and *Eric Goldrein* for the applicants Graham Anthony Reavey, Keith Eugene Reed and Alan Woodray.

Benet Hytner Q.C. and *Jacqueline Wall* for the applicants Terence Michael Wilson, Paul Anthony Albert Howard, Anthony Hogan and Stephen McDonald.

John Kay Q.C. and *Christopher J. Cornwall* for the applicants Gary Thomas Haynes, Kevin Barry Hughes and David Edward Duncan.

John Kay Q.C. and *David A. Turner* for the applicants Timothy Williams and Ronald O'Brien.

John Kay Q.C. and *Richard J. Bennett* for the applicant Paul Leslie Wright.

John H. B. Saunders for the applicants Ronald Francis Jepson and David Louis Giles.

Antonis Georges for the applicant Graham Simon Postlethwaite.

Michael Sherrard Q.C., *Robert Rhodes* and *Daniel Janner* for the Government of Belgium and the Secretary of State.

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A

Cur. adv. vult.

B

13 April. WATKINS L.J. read the judgment of the court. We have considered the applications for writs of habeas corpus of Mark Charles Woods and 25 other Englishmen whose homes, although in the main in and around Liverpool and Manchester, are as far apart as Southampton in the south and Kendal in the north, Ipswich in the east and Bristol in the west. Their ages range from 19 to 34 years. Very few of them have criminal records, some are unemployed. All are on bail awaiting trial for the offence of manslaughter, the trial to take place, if they are extradited to that country, in Belgium.

C

If the provisions of the Extradition Acts, commencing with that of 1870, the Treaty, as later amended, between us and His Majesty the King of the Belgians concluded in 1901 and applied by Order in Council in 1902 and rules of evidence applying to committal proceedings have been complied with, all these applicants will no doubt be extradited to Belgium to stand trial.

D

The question we have to consider is whether the relevant ones of those provisions have been complied with. If one or more of them have not been the consequence which we shall be driven to will be deeply regrettable and serious having regard to the horrifying circumstances from which the extradition proceedings have sprung. If those proceedings are flawed in the ways suggested on behalf of the applicants it is a misfortune which, in our view, with more careful observance of legal requirements, prudently allowing in that regard for expressions of alternative or differing constructions of one or more provisions of Act and Treaty, could easily have been avoided. This we regret to have to say is an approach to the preparation of proceedings, those of actual committal especially, which has been absent in a number of extradition matters which have come to the notice of this court in applications for habeas corpus in recent times.

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The crime of manslaughter committed by a British subject abroad can be prosecuted in this country. Thus a trial on indictment could have taken place here of all the applicants in which event extradition proceedings would not have been necessary and the difficulties, if such there are, in the way of the Director of Public Prosecutions defeating these applications for writs of habeas corpus avoided. But the decision was to hold the trial in Belgium, which necessitated the making of a request, which was in fact made, by the Belgium Government for extradition. Even so, the foremost, if not all, of those difficulties would have been avoided if the evidence emerging from this country (the English evidence) had been taken to Belgium and given to an examining magistrate there and so, properly authenticated, formed part of the evidence accompanying the request for extradition. That simple procedure was not adopted. Instead the request was accompanied only by the evidence, so far as we are concerned, emanating from Belgium (the Belgian evidence).

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It was in Belgium that the event, one of the most awful and tragic to attend a sporting occasion, with which the evidence was concerned took place. It unfolded before the eyes of untold millions of people watching it on television and, of course, of those attending the European Cup Championship soccer match between Juventus of Italy and Liverpool of England at the Heysel Stadium in Brussels on 29 May 1985.

Precautions had been taken by Belgian Police and officials responsible for control of spectators to keep separate supporters of the two teams. The adequacy of those precautions do not affect us, the utter collapse of them does. The majority of the English supporters were accommodated on terraces in blocks called X and Y, while the Italians were placed in an adjacent block called Z. A wire netting fence and a line or two of police officers separated the rival supporters.

A short while before the match was due to begin the English supporters, many of them undoubtedly the worse for drink, became extremely boisterous, noisy and restive. Suddenly they went on the rampage. They smashed down the wire netting fence, broke through the police ranks and advanced menacingly upon the Italians. They and the police retreated before what had become a riotous mob bent on attacking them. Three times the English launched attacks, hurling all manner of missiles upon their desperately frightened victims who had no ready avenue of escape. Under the crush of people who were in a state of panic a retaining wall collapsed. Hundreds of men, women and children were injured as they were trampled upon. No fewer than 39 of them were killed, 34 of whom were Italians and one a 10-year-old boy. All of them were asphyxiated.

More particularly, the cause of death of one Italian, Mr. Mario Ronchi, was stated to be:

“Attributable to asphyxia resulting from mechanical compression of the thoracic cage. A further result of this was cerebral anoxia. The contused lesions on the frontal regions of the limbs were most likely the result of dragging and trampling and did not contribute directly to the cause of death.”

The late Mr. Ronchi has been made a representative victim in the sense that every applicant is charged with having unlawfully killed him.

Police forces here and in Belgium, with the aid of a video film of what is properly called a riot, have succeeded in identifying all the applicants as some of those who were participants. Every one of them has been interviewed by Merseyside Police. Contemporaneous notes of those interviews, many of which resulted in admissions of riotous conduct, formed the English evidence. The Belgian evidence consisted, *inter alia*, of video film, photographs and identification of the applicants from films and photographs. There is some Italian evidence too, which need not further be mentioned now. If the English evidence was admissible in the committal proceedings then, subject to what we say about it later in this judgment, it is potentially strongly indicative of the commission of unlawful conduct causative of death committed by most, if not all, of the applicants.

The committal proceedings conducted by the very experienced Chief Metropolitan Magistrate at Highbury Corner Magistrates' Court, took place on 3 March 1987. His expressed reasons for rulings he made leading to committing each applicant for extradition require to be set out in full: see *post*, pp. 381E—382D.

Mr. Morland, on behalf of the applicants Woods, Rutter, Barnes, Evans, Davies, Sambor, Conroy, Cooper and Rickman, contends that the chief magistrate acted unlawfully in two respects, namely: (a) as this was an “exceptional accusation case” the magistrate was required to hear evidence of Belgian law as to whether or not the conduct alleged against each applicant constituted the crime of “homicide commis sans

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A premeditation ou guet-apens" punishable according to law in force in Belgium with regard to extradition. This the magistrate failed to do.
B (b) The magistrate failed to set at liberty each of these applicants because sufficient evidence had not been presented within two months of his arrest. These applicants were arrested on or before 12 September 1986 and therefore the crucial date is 12 November 1986.

B These dates must be regarded in the light of our observations on the relevant part of the treaty which appear later in this judgment.

C Mr. Hytner, on behalf of Wilson, Howard, McDonald, Reavey, Woodray, Wallace, Reed and Hogan, adopts Mr. Morland's contentions, and further contends that in finding E (see post, p. 381H) the magistrate reversed the burden of proof. He went on to contend that it is clear upon the magistrate's own findings some unlawful conduct occurred after the death of Mario Ronchi. He submits that proof that an applicant entered the stadium and joined the affray after the death of Mario Ronchi could not possibly lead in England to a conviction of manslaughter. Since this is so, a vital link in the chain of proof must be the time of death in relation to the time of the unlawful act or acts alleged against each applicant.

D He went on to say that, since in every case the onus of proof is upon the prosecution to prove its case, unless there is some evidence that an applicant participated in the disturbances causing the retreat of the spectators in Z block prior to the death of Mario Ronchi, such an applicant should be set at liberty. Whilst he says it is conceded that there may be circumstances in which it would be safe to infer from participation at a particular time that such participation must have begun earlier, the disturbances in the stadium did not and could not have given rise to such an inference.

F He singles out for special submission Wallace and Reed. As to Wallace, his submission is that the evidence discloses that upon Wallace entering the terraces, which was after the disturbances had already begun, he was attacked by a Belgian police officer who dragged him by the scarf around his neck and hit him over the head with a baton. Other police officers did likewise. He had not provoked this attack in any way, and all he did thereafter was to retaliate and chase those officers. That chase by him of the officers was wholly independent, so it is contended, of the riot which was going on in which he played no role.

G As to Reed, the contention was that if the English evidence was admissible there is no evidence of participation by Reed prior to the death of Mario Ronchi.

Mr. Kay, on behalf of Duncan, Haynes, Hughes, Williams, O'Brien and Wright, adopts Mr. Morland's contentions. So do counsel for Jepson, Giles and Postlethwaite respectively.

H These grounds upon which the applications are founded we now proceed to examine, although not necessarily in the order in which they were advanced.

The submission that no sufficient evidence for the extradition of an applicant was presented within a certain period of his arrest and that therefore he was entitled to his liberty requires a consideration both of the Extradition Act 1870 and of the extradition treaty recited in the Order in Council 1902 No. 208 which made the Act of 1870 applicable to Belgium. There were subsequent conventions and exchanges of notes which were recited in further Orders in Council, that is to say 1907 S.R.

& O. No. 544, 1911 S.R. & O. No. 793, 1924 S.R. & O. No. 574 and 1975 S.I. No. 1034.

When the Act of 1870 is applied to a foreign state by an Order in Council then the application is subject to "the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the Order": section 5 of the Act of 1870. This subsection will include a subsection to the provisions of a treaty embodied in the Order in Council.

The provisions of the Act of 1870 are familiar. Under section 8, as it here applies, a requisition can be made to a Secretary of State by a diplomatic representative of Belgium for the surrender of a fugitive criminal who is in the United Kingdom. Upon receipt of that requisition a Secretary of State may require a "police magistrate" to issue a warrant for the apprehension of the fugitive. Upon apprehension the fugitive is brought before the magistrate: section 9. The function of the magistrate is to determine whether the evidence presented against the fugitive is such that it would justify his committal for trial in England if the offence with respect to which the requisition was made had been committed in England: section 10. The word "evidence" in section 10 means evidence admissible under the English rules of evidence subject only to the statutory exception contained in section 14 of the Act of 1870 which relates to foreign depositions. This section states:

"Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act."

This principle is well established: for a recent formulation see *Reg. v. Governor of Pentonville Prison, Ex parte Voets* [1986] 1 W.L.R. 470, and the judgment of Lloyd L.J., at p. 472g.

The applicants in the present case were arrested on various days between 8 and 12 September 1986. The arrests were made on the authority of warrants issued in response to a requirement of the Secretary of State for the Home Department. There is, however, another procedure for arrest which was not employed in this case. It is the procedure by way of provisional warrant. It is a procedure which Lord Diplock has described as being that of "precautionary arrest:" *Reg. v. Governor of Pentonville Prison, Ex parte Sotiriadis* [1975] A.C. 1, 25c. It is a procedure which is authorised by section 8(2) of the Act of 1870. The reason why the word "provisional" is commonly employed has been explained by Lord Diplock, at p. 25:

"This kind of warrant is provisional in two respects. It must be reported to the Secretary of State who may order it to be cancelled and the person apprehended on it to be discharged. Secondly, when a person apprehended on a provisional warrant is brought before a metropolitan magistrate, the magistrate is required by the last paragraph of section 8 to discharge the prisoner unless '... within such reasonable time as, with reference to the circumstances of the case, he may fix, ...' he receives from the Secretary of State an order signifying that a requisition has been made for the surrender of the prisoner. Under this paragraph the magistrate is bound to fix a date by which the order must be received although, no doubt, he has power also to extend it from time to time if he considers that the circumstances justify his doing so."

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A The treaty recited in the Order in Council of 1902 is drawn in the English and French languages. Article I provides:

B "It is agreed that His Britannic Majesty and His Majesty the King of the Belgians shall, on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally, under the circumstances and conditions stated in the present Treaty, any persons who, being accused or convicted, as principals or accessories, of any of the crimes hereinafter specified, committed within the territories of the requiring party, shall be found within the territories of the other party:— . . . 3. Manslaughter . . . [Homicide commis sans premeditation ou guet-apens.] . . . Provided that the surrender shall be made only when, in the case of a person accused, the commission of the crime shall be so established as that the laws of the country where the fugitive or person accused shall be found would justify his apprehension and commitment for trial if the crime had been there committed, and in the case of a person alleged to have been convicted, on such evidence as, according to the laws of the country where he is found, would prove that he had been convicted. In no case can the surrender be made unless the crime shall be punishable according to the laws in force in both countries with regard to extradition. In no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalization."

C The French words attendant upon the word "manslaughter" are, translated into English, "homicide without premeditation or felonious intent."

E Article II provides:

"In the dominions of His Britannic Majesty, other than the Colonies or foreign possessions of His Majesty, the manner of proceeding shall be as follows:—

F "1. In the case of a person accused—The requisition for the surrender shall be made to His Britannic Majesty's Principal Secretary of State for Foreign Affairs by the Minister or other diplomatic agent of His Majesty the King of the Belgians, accompanied by a warrant of arrest or other equivalent judicial document issued by a judge or magistrate duly authorised to take cognizance of the acts charged against the accused in Belgium, together with duly authenticated depositions or statements taken on oath or upon solemn affirmation before such judge or magistrate, clearly setting forth the said acts, and containing a description of the person claimed, and any particulars which may serve to identify him. The said Secretary of State shall transmit such documents to His Britannic Majesty's Principal Secretary of State for the Home Department, who shall then, by order under his hand and seal, signify to some police magistrate in London that such requisition has been made, and require him, if there be due cause, to issue his warrant for the apprehension of the fugitive. On the receipt of such order from the Secretary of State, and on the production of such evidence as would, in the opinion of the magistrate, justify the issue of the warrant if the crime had been committed in the United Kingdom, he shall issue his warrant accordingly. When the fugitive shall have been apprehended, he shall be brought before a competent magistrate. If the evidence to be then produced shall be

such as to justify, according to the law of England, the committal for trial of the prisoner, if the crime of which he is accused had been committed in England, the magistrate shall commit him to prison to await the warrant of the Secretary of State for his surrender, sending immediately to the Secretary of State a certificate of the committal and a report upon the case. . . .”

Article III deals with the manner of proceeding in Belgium and we need not recite it. Article IV deals with and amends the provisional warrant procedure. It provides:

“A fugitive criminal may, however, be apprehended under a warrant signed by any police magistrate, justice of the peace, or other competent authority in either country, on such information or complaint, and such evidence, or after such proceedings as would, in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the prisoner convicted in that part of the dominions of the two contracting parties in which he exercises jurisdiction: Provided, however, that, in the United Kingdom, the accused shall, in such case, be sent as speedily as possible before a competent magistrate. He shall be discharged, as well in the United Kingdom as in Belgium, if within [two months] a requisition shall not have been made for his surrender by the diplomatic agent of the requiring state in the manner directed by articles II and III of this Treaty . . .”

The reference to “two months” was substituted for a reference to “fourteen days” by S.R. & O. 1907 No. 544 which recited a supplementary convention of 29 October 1901. The periods are and were, a quantification of the “reasonable time” referred to in the final paragraph of section 8 of the Act. Article V provides:

“If within two months, counting from the date of arrest, sufficient evidence for the extradition shall not have been presented, the person arrested shall be set at liberty. He shall likewise be set at liberty if, within two months of the day on which he was placed at the disposal of the diplomatic agent, he shall not have been sent off to the reclaiming country.”

This court has held that the period referred to in article V runs from the date of an arrest pursuant to a warrant issued in consequence of a Secretary of State’s order following a requisition by the Belgian Government: see *In re Bennaim* (unreported) 22 February 1985. Although he did not in terms say so, Mr. Michael Sherrard, for the Government of Belgium, invited us to disregard that decision, presumably on the basis that it was per incuriam although wherein lay the ignorance he did not say. His submission was that the first sentence of article V had no application in the case where arrest was pursuant to a warrant issued in consequence of a requisition by the Belgian Government but was confined to arrests under provisional warrants; that is to say, those arrests contemplated by article IV. We find this submission impossible to accept. Had the first sentence of article V been intended to apply only to article IV then we would have expected the High Contracting Parties to have incorporated the sentence in article IV. As it is the sentence is incorporated in an article which (like all succeeding articles) is on its face of general application. Mr. Sherrard does not contest the general

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- A application of the second sentence in article V. Moreover, it is to be observed that article II (unlike articles in other treaties) does not require that a requisition should be accompanied by the "evidence." All that is required is a statement of the acts charged against the accused and a description of the person claimed. Whether what is provided is sufficient for the issue of a warrant is a matter for the magistrate but, as Sir George Jessel M.R. observed in *Reg. v. Weil* (1882) 9 Q.B.D. 701, 706,
- B what is sufficient for a warrant "is very different from the evidence which is required under section 10 to justify the committal of the prisoner." Mr. Sherrard accepted that this was so. In that circumstance it can be sensibly understood that a period should be put upon the presentation of "sufficient evidence for the extradition." What does not seem sensible is that a period should be put upon the production of
- C evidence to support extradition only where the requisition was preceded by an arrest pursuant to a provisional warrant. We can think of no reason why the High Contracting Parties should have agreed such a provision and there is good reason why they should not. An arrest pursuant to a provisional warrant is an event over which the foreign government has no control. Why should a government agree to a starting date over which it has no control? That would not be reasonable.
- D Thus, in *Ex parte Sotiriadis* [1975] A.C. 1, 18 Lord Wilberforce said:

"it would seem to be contrary to the intention of the treaty, and unworkable, that the two months' period should run from a date which the foreign government may have had no part in selecting and on which the charges relied on by the foreign government had not been established." (See also Lord Diplock, at p. 27b).

- E These observations were made in a case concerning a treaty which had an equivalent to article V of the Belgian Treaty but no equivalent to article IV. They are, however, apposite in the present case. In our judgment "arrest" in article V means arrest pursuant to a warrant issued in consequence of a Secretary of State's order following a requisition by the Belgium Government. We see no reason whatever to doubt the
- F decision of this court in *In re Bennaim*.

- In the present case the two months' period expired at the latest on 12 November 1986, which was two months after the last of the applicants was arrested. At that date there was available what has been referred to as "the Belgian evidence" and "the English evidence." The English evidence, as we have indicated, consisted entirely of written statements with accompanying exhibits. In substance they were statements by police officers who interviewed applicants and notes of interview in which some participation in the riot was admitted. "The Belgian evidence" was duly authenticated and, subject to hearsay affecting identification, was on 12 November admissible as evidence by reason of section 14 of the Act of 1870. "The English evidence" was on 12 November only contingently admissible. It was not duly authenticated and therefore was not
- G admissible by reason of section 14. It might, however, become admissible
- H if the conditions mentioned in section 102(2) of the Magistrates' Courts Act 1980 became satisfied.

Section 102 provides:

"(1) In committal proceedings a written statement by any person shall, if the conditions mentioned in subsection (2) below are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person. (2) The said conditions

are— . . . (d) none of the other parties, before the statement is tendered in evidence at the committal proceedings, objects to the statement being so tendered under this section.”

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As at 12 November that condition was not satisfied as to any part of “the English evidence.” After pursuing an argument which we found difficult to follow, Mr. Sherrard conceded that “the English evidence” was not “evidence” as at 12 November in that it was not on that date admissible evidence.* The concession was, in our judgment, correct. The statements on that date were not admissible.

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The case presented to the magistrate was based upon both the Belgian and the English evidence. He should not have had regard to “the English evidence.” Mr. Sherrard said that there was a case against at least some of the applicants on the basis of the Belgian evidence alone. However, he very responsibly said that as the chief magistrate was not invited to give his mind to the case of any applicant on that basis alone, the Belgian Government did not wish to argue that basis alone before this court. Accordingly, all applicants enjoy the benefit of our decision in regard to article V. What relief they shall enjoy will later be announced.

C

The submission that there was no evidence, either within or without the two month period, that manslaughter is punishable under the law of Belgium with regard to extradition, is of a technical nature. There was indeed no such evidence, but it is submitted on behalf of the applicants that the second proviso to article I of the Treaty requires such evidence. In our judgment it plainly does. Unless it does we can attribute no meaning to the proviso. Mr. Sherrard submitted that the only purpose of the proviso was to cover a case where a crime listed in article I ceased to be such under the law of either state. That may be the purpose, but it does not remove the plain incumbency of proof that the limiting requirement of the treaty has been satisfied for an analogous case, see *Reg. v. Governor of Pentonville Prison, Ex parte Herbage* (No. 3), 30 July 1986, *The Times*, 6 August 1986. The decision of the House of Lords in *In re Nielsen* [1984] A.C. 606 does not bear upon the point. The treaty in that case (that is to say the treaty with Denmark recited in an Order in Council dated 26 June 1873) contained no equivalent to the proviso to article I, but we would regard the case as authority for the proposition that proof of the satisfaction of the limiting requirement does not open up the question of what is “manslaughter” under the law of Belgium, let alone the question of whether an applicant’s conduct fell within it.

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If satisfaction of the limiting requirement was the only point in the case we would either remit for the simple evidence to be provided or take such evidence (provided it be duly authenticated) ourselves. We have, with the help and consent of counsel, taken such evidence. The requirement is satisfied but the evidence is, for reasons which we have already provided, now too late.

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[His Lordship commented upon the causation argument of Mr. Hytner in relation to Wallace and Reed, and continued:] Turning finally

* But see post, p. 389E–F.

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A to the general argument on causation, whilst we fully understand the thrust of it, namely that the prosecution must prove who participated in events which led to death in each case, that participation must pre-date death and departure from the scene before death may avoid conviction for manslaughter, we regard these premises in the circumstances as wholly unrealistic. The scene depicted on the video film was of continuous movement of rioters backwards and forwards on the terraces, using one form of violence or another until there was a mad stampede of frightened, terrified victims into a corner in which there was no room for all of them and from which there was no escape.

B In our judgment, the findings of the magistrate at D, E and H (see post, pp. 381G—382A) are unassailable and entirely appropriate. It is for the court of trial to examine individual participation and its implications as each case is developed by the prosecution in that court. The evidence as a whole, on the supposition that it was admissible in the magistrates' court, in our view entitled the magistrate to find by inference that there was a prima facie case of participation causative of death. We reject the submissions made to the contrary. In any event, they are not crucial to the success or otherwise of these applications which succeed, in our judgment, upon the submissions as to article V upon which all applicants rely.

D With very considerable dismay, therefore, for the reasons we have given we grant the writs.

Applications granted.

Leave to appeal refused.

E Solicitors: *E. Rex Makin & Co., Liverpool; Dundon Ede & Studdert; Keith Levin & Co., Liverpool; Bell & Joynson, Liverpool; Prettys, Ipswich; Greenhouse Stirton & Co.; Bindman & Partners for Silverman, Livermore & Co., Liverpool; Paul Rooney & Co, Liverpool; Forbes Partners, Blackburn; Cuthbert Barker, Newcastle under Lyme; Renshaws, Kendal; Director of Public Prosecutions.*

[Reported by GERALDINE FAINER, Barrister-at-Law.]

G 7 May. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Goff of Chieveley) allowed a petition by the Director of Public Prosecutions, on behalf of the Government of Belgium, for leave to appeal.

H The Director of Public Prosecutions, on behalf of the Government of Belgium, appealed against the decision of the Divisional Court of the Queen's Bench Division discharging the first 26 respondents out of the custody of the 27th and 28th respondents, the governors of Pentonville Prison and Ashford Remand Centre, following the making of a committal order against each of the first 26 respondents under section 10 of the Extradition Act 1870 by the Chief Metropolitan Magistrate at the Bow Street Magistrates' Court for them to be surrendered to the Government of Belgium on the grounds of each being accused of the crime of manslaughter.

The facts are set out in the opinion of Lord Bridge of Harwich.

Sir Nicholas Lyell Q.C., S.-G., Michael Sherrard Q.C., Robert Rhodes and Daniel Janner for the Director of Public Prosecutions. A

Michael Morland Q.C., Eric Goldrein, David Harris and Timothy R. A. King for the first 26 respondents.

Clive Nicholls Q.C. and R. Alun Jones, neither of whom appeared below, for the prison and remand centre governors.

Their Lordships took time for consideration. B

13 July. LORD BRIDGE OF HARWICH. My Lords, the Government of Belgium seek the extradition of the 26 respondents on charges of manslaughter. They were committed to prison by order of the Chief Metropolitan Magistrate ("the magistrate") on 3 March 1987 pursuant to section 10 of the Extradition Act 1870 there to await the warrant of a Secretary of State for their surrender to the Belgian authorities. They applied for writs of habeas corpus ad subjiciendum. These applications were allowed by order of the Divisional Court (Watkins L.J. and Mann J.) on 30 April subject to a stay of execution of the writs pending any appellate proceedings in your Lordships' House. The appeals of the Government of Belgium, pursuant to leave duly granted by the House, now fall for determination. C

The extradition charges arise out of the terrible and tragic events which occurred at the Heysel Stadium in Brussels on 29 May 1985. Liverpool Football Club were to play Juventus of Turin in the final of the European Cup Championship. What happened will be vividly remembered by all who saw television news pictures or read newspaper accounts of it at the time. It is succinctly and graphically described in the judgment of the Divisional Court delivered by Watkins L.J., ante, p. 370A-D: D

"The majority of the English supporters were accommodated on terraces in blocks called X and Y, whilst the Italians were placed in an adjacent block called Z. A wire netting fence and a line or two of police officers separated the rival supporters. A short while before the match was due to begin the English supporters, many of them undoubtedly the worse for drink, became extremely boisterous, noisy and restive. Suddenly they went on the rampage. They smashed down the wire netting fence, broke through the police ranks and advanced menacingly upon the Italians. They and the police retreated before what had become a riotous mob bent on attacking them. Three times the English launched attacks, hurling all manner of missiles upon their desperately frightened victims who had no ready avenue of escape. Under the crush of people who were in a state of panic a retaining wall collapsed. Hundreds of men, women and children were injured as they were trampled upon. No fewer than thirty-nine of them were killed, thirty-four of whom were Italians and one a ten year old boy. All of them were asphyxiated." E F G H

The manslaughter charges of which the respondents stand accused before the appropriate Belgian court relate to one of the Italian victims named Mario Ronchi.

It is hardly surprising that the investigation to identify and assemble necessary evidence to justify the prosecution of any individuals who might be held criminally liable in such a case should have taken a long

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A time. It was not until 5 June 1986 that the Belgian court issued warrants for the arrest of the respondents.

B The Order in Council which directs, pursuant to section 2 of the Act of 1870, that the Act shall apply to Belgium is No. 208 of 1902 which embodies the principal extradition treaty concluded between His Britannic Majesty and His Majesty the King of the Belgians on 29 October 1901 ("the Treaty"). Amendments made by later treaties embodied in later Orders in Council are not material for present purposes.

C On 3 July 1986 requisitions for the surrender of the respondents pursuant to section 7 of the Act of 1870 and article II of the Treaty were received at the Foreign Office. They were accompanied, as article II requires that they should be, by warrants issued by the Belgian court together with the Belgian evidence in the form of depositions or statements on oath taken in Belgium and duly authenticated in the manner provided by section 15 of the Act of 1870. As article II requires, the documents were transmitted to the Home Office and on 27 August 1986, still in pursuance of section 7 and article II, the Home Secretary issued his orders to the magistrate signifying that the requisitions had been made and requiring him, if there were due cause, to issue his warrants for the apprehension of the respondents (conventionally and conveniently referred to as the "orders to proceed"). The orders, accompanied by the authenticated warrants, depositions and statements together with necessary translations, were transmitted to Bow Street Magistrates' Court.

E In accordance with the normal practice in extradition matters the Director of Public Prosecutions had the conduct on behalf of the Government of Belgium of the proceedings in England. He was proposing at the committal hearing to rely on the evidence of 75 English witnesses, including 52 police officers who had interviewed the respondents. All these witnesses resided in England. None had testified in Belgium. Following a practice which the Solicitor-General informed your Lordships had been adopted in such cases ever since 1967, when the provisions now found in section 102 of the Magistrates' Courts Act 1980 were first enacted as section 2 of the Criminal Justice Act 1967, he furnished to the magistrate written statements of all those witnesses which complied with the conditions laid down by section 102(2)(a) and (b) ("the section 102 statements"). It is convenient at this point to interpose in the narrative a citation of the relevant provisions of section 102:

H "(1) In committal proceedings a written statement by any person shall, if the conditions mentioned in subsection (2) below are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person. (2) The said conditions are—(a) the statement purports to be signed by the person who made it; (b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true; (c) before the statement is tendered in evidence, a copy of the statement is given, by or on behalf of the party proposing to tender it, to each of the other parties to the proceedings; and (d) none of

the other parties, before the statement is tendered in evidence at the committal proceedings, objects to the statement being so tendered under this section.” A

Resuming the narrative, the magistrate had the section 102 statements as well as the Belgian evidence before him when he issued warrants pursuant to section 8 of the Act of 1870 for the arrest of all the respondents on 8 September 1986. The warrants were executed on 10 and 12 September. The respondents first appeared before the magistrate on 15 September and were all remanded on bail to 10 November. I should mention at this point that, with certain exceptions, where bail was withdrawn for reasons extraneous to this case, the respondents effectively remained at liberty throughout the ensuing proceedings until their bail was withdrawn by order of the Divisional Court on 30 June 1987, the day on which the argument of the appeal before your Lordships was concluded. B C

Shortly after 15 September 1986 each of the several solicitors acting for one or more of the respondents was served with copies of the relevant documents, sc. the Belgian warrants and evidence and the section 102 statements, affecting his own client or clients. In anticipation of the second remand hearing on 10 November, the D.P.P. wrote to all the defence solicitors on 3 November suggesting that, for the purpose of the effective committal hearings, the respondents should be divided into three groups. On 10 November the respondents were further remanded to 22 December. The defending solicitors required to see and were in due course supplied with copies of all the section 102 statements to enable them to consider the proposed grouping. On 10 November it was made clear that the magistrate's commitments would prevent him from proceeding with the substantive hearing before the New Year. On 22 December the magistrate ordered that the cases against all the respondents be heard together, not in groups. The hearing was ordered to commence on 3 February 1987 and was then estimated to last eight weeks. The respondents were ordered to, and in due course did, notify to the D.P.P. the names of those witnesses who had made section 102 statements whom they required to be called to give oral evidence. In the event it proved possible, with the co-operation of defending counsel, to complete the hearing in half the time estimated and, as already indicated, the magistrate made his orders of committal under section 10 of the Act of 1870 on 3 March 1987. D E F

Subject to any “conditions, exceptions and qualifications” imposed pursuant to section 2 on the operation of the Act of 1870 by the Order in Council which directs that the Act shall apply to Belgium, the proceedings before the magistrate were governed by sections 9 and 10 of the Act of 1870 which provide, so far as presently relevant: G

“9. When a fugitive criminal is brought before . . . the magistrate, the . . . magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, or as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England. The . . . magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime. H

“10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal

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- A is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the . . . magistrate shall commit him to prison, but otherwise shall order him to be discharged. . . . If he commits such criminal to prison, he shall commit him . . . , there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit."
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These sections must be read in the light of the important definitions in section 26:

- C "The term 'extradition crime' means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in Schedule 1 to this Act: . . .
- "The term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of Her Majesty's dominions; . . ."
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Manslaughter is, as one would expect, one of the crimes described in Schedule 1 to the Act of 1870.

- Thus, unless his powers under the Act of 1870 were restricted by the terms of the Treaty embodied in the Order in Council, the only issue for the magistrate to decide was whether, had the Heysel Stadium riot occurred in England, the evidence would have justified committal of the respondents for trial in England on charges of manslaughter. In relation to that issue the magistrate set out his findings of fact and conclusions of law in the following paragraphs:
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"A(1) There is no dispute that Mr. Ronchi died of asphyxia as a result of being crushed. (2) There is no dispute that this crushing, and therefore his death, was a consequence of those spectators in Z block retreating to the bottom corner of that section. (3) I do not think there is any dispute that this retreat was caused by the fear engendered from the charges of and the conduct of a number of Liverpool supporters. B. To my mind this conduct and these charges were all part and parcel of one concerted action, the purpose of which was to fight with others (either spectators or police) and/or to drive the spectators from that section. It was this concerted action which aroused the fear and caused the panic which led to the death. C. It follows that anyone involved in any such unlawful act or acts whether charging, throwing missiles or fighting, wherever those acts took place, is responsible for the acts of any others so involved. D. Again it follows, if I am right, that it matters not when Mr. Ronchi died as long as it is established that he died as a result of the unlawful conduct of one or more of those participating in such actions and as I have said this does not appear to be in dispute. E. It is for the court of trial and not this court to decide whether such participation began after death or whether the participants ceased to take part before the panic set in. It is enough for the purposes of committal for there to be evidence that a defendant took part in the riot, affray, threatening behaviour, call it what you will. . . . H. In my view, there is sufficient evidence against all the

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defendants that they took part in one or more unlawful acts: that is charging, throwing missiles or fighting. These acts were continuous over a period of some 15 minutes and formed part of the concerted action against the Italians. I. The fact that it was said that some of these acts were directed at the police has little relevance as they were capable of causing, and did cause, terror amongst the spectators. This can be seen in some videos where the crowd is seen surging down the terraces towards the field although there is at least a double line of police between them and the Liverpool supporters. J. All the defendants except Duncan identify themselves as being involved. In the case of Duncan, he is identified by Mr. Reston, and even if that were not so, he figures in one incident where he is seen on the video tape with outstanding clarity. K. As far as Hogan is concerned, it could well be that his admissions are qualified, but here again the quality of the photographs and the video is such that I consider that combined with those admissions there is sufficient evidence for him to be committed. L. As far as Howard is concerned, having heard how the prosecution put their case against him and having heard Mr. Goldrein's further submission, I have come to the conclusion that in his case as well, there is sufficient prima facie evidence against him to warrant a committal."

The evidence on which the magistrate based these findings and conclusions fell into three categories. The Belgian evidence comprised the depositions and statements on oath taken in Belgium which, being duly authenticated as required by section 15 of the Act of 1870, were admissible in evidence pursuant to section 14. The English evidence comprised those section 102 statements tendered and duly received in evidence as admissible under that section in the absence of objection on behalf of any of the respondents under subsection (2)(d) and the oral evidence of the makers of other section 102 statements to which objection was taken under subsection (2)(d) before the statements were tendered in evidence. The Italian evidence comprised statements taken in Italy from Italian witnesses.

The magistrate expressly stated that he set aside the Italian evidence as of no weight and I need, therefore, say no more about it. It is not now disputed that the magistrate could properly conclude that a sufficient prima facie case of manslaughter was made out to justify committal for trial of all the respondents on the basis of the Belgian evidence and the English evidence considered together, nor are any of the magistrate's findings or conclusions reached on that basis now sought to be impugned. Conversely, it is not contended on behalf of the Government of Belgium that the magistrate's orders can be supported on the basis that the Belgian evidence alone justified committal. The magistrate was never asked to consider that question.

The main submission advanced on behalf of the respondents, both before the magistrate and your Lordships, relies upon the provision of article V of the Treaty that:

"If within two months, counting from the date of arrest, sufficient evidence for the extradition shall not have been presented, the person arrested shall be set at liberty."

The submission in outline is that "evidence" in this provision must not only be sufficient in content to justify the extradition sought but must be

A “presented” within the time limit of two months in a form which is legally admissible; hence, when the time limit here expired on 10 or 12 November 1986, none of the English evidence had been duly presented; the evidential material contained in the section 102 statements did not become legally admissible until either the section 102 statements were tendered in evidence without objection or, in the case of objection, oral evidence to substantiate the contents of the statements was given by the makers.

I do not know how far the submission was developed before the magistrate. He felt able to deal with it shortly. After dismissing the Italian evidence, which had not been put before him in any form until January 1987, he continued:

C “Having said that, I think that in fact this deals with the submission because the remainder of the evidence, namely the Belgian evidence, the English evidence with all the photographs, video clips and interviews with the defendants, was before me when I issued the warrants.”

D It was the submission which I have outlined above that found favour with the Divisional Court and by which they felt constrained, with an understandable expression of dismay, to accede to the applications for writs of habeas corpus. Aside from the main issue to which the submission for the respondents gives rise, counsel appearing for the Government of Belgium before the Divisional Court sought to avoid its effect by contending that article V of the Treaty did not apply to any person arrested pursuant to a magistrate’s warrant issued after receipt of an order to proceed under section 7 of the Act of 1870 from the Secretary of State, but only to a person arrested pursuant to a provisional warrant issued before the order to proceed. The Divisional Court rejected this contention and it was not renewed by the Solicitor-General in arguing the appeals before your Lordships. The point, therefore, does not fall for decision. But since it was taken in the appellant’s written case and I had given some attention to it before the oral argument, I ought to say that I see no reason to doubt the correctness of the Divisional Court’s rejection of the point.

In approaching the main issue two important principles are to be borne in mind. The first is expressed in the well known dictum of Lord Russell of Killowen C.J. in *In re Arton* (No. 2) [1896] 1 Q.B. 509, 517 where he said:

G “In my judgment these treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent.”

H I also take the judgment in that case as good authority for the proposition that in the application of the principle the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would “hinder the working and narrow the operation of most salutary international arrangements.” The second principle is that an extradition treaty is “a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute.” *Reg. v. Governor of Ashford Remand Centre, Ex parte Beese* [1973] 1 W.L.R. 969, 973, *per* Lord Widgery C.J. In applying this second principle,

closely related as it is to the first, it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose.

In the light of these principles one must ask at the outset of the examination of the issue what object in the scheme of the Act of 1870 and the Treaty the time limit of two months from the initial arrest within which the requesting state must present evidence sufficient for the extradition is intended to serve. In general terms the object is clearly to provide a safeguard against persons accused of an extradition crime in the requesting state being held in custody indefinitely in the requested state while the requesting state assembles the evidence necessary to justify a committal. Such evidence will obviously be required to establish the case against the accused to a higher standard than evidence which may justify the issue of a warrant for his arrest. But whilst the attainment of this object implies the assumption of an obligation by the requesting state to use due diligence to present its evidence within the time limit, it would be unreasonable to suppose that the high contracting parties were content to assume any obligation, when in the role of requesting state, with which it would not lie within their own power to comply. Herein lies the question, which to my mind, is crucial to the resolution of the main issue in this appeal. If the criterion for compliance with the time limit is, as the respondents submit, that evidence can only be presented when it is in a form which is legally admissible, how may the requesting state ensure compliance with this obligation?

The answer propounded in the judgment of the Divisional Court to this question is implicit in the criticism levelled at the D.P.P. for his failure to ensure the admissibility of the English evidence by sending the English witnesses to give their evidence to the Belgian court so that it could be authenticated under section 15 of the Act of 1870 and thereby rendered admissible under section 14. My Lords, I do not, with respect, think that this criticism was justified. The D.P.P., in submitting the section 102 statements to the magistrate, was relying on a well established practice which had never previously been questioned. There is, in any event, no legal process available to compel the attendance of English witnesses before the Belgian court. But that apart, and assuming that the D.P.P. ought to have anticipated that the present point might be taken, to require so many witnesses as could be persuaded, or in the case of police officers instructed, to travel to Belgium and give evidence there would have involved a substantial expenditure of public time and money. The voluminous section 102 statements, exceeding 1,500 pages, would have had to be translated or the evidence given through an interpreter in French, the language of the Belgian court. The authenticated depositions or statements on oath in French would then have been the admissible documents and either re-translations into English would have been required or possibly the section 102 statements would have served as the English versions. If the D.P.P. had taken this course I think he might well have been criticised for going to these lengths without good reason or, as would perhaps have been suggested on behalf of the respondents, with the object of denying them the right to cross-examine the English witnesses in the committal proceedings. His

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A explanation that this was a necessary technical precaution to avoid falling foul of the time limit in article V of the Treaty would not necessarily have carried conviction.

But all this is beside the more fundamental point as to whether, in seeking to discern the underlying intention of the high contracting parties as to how the time limit imposed by article V of the Treaty was to be complied with in the case of evidence to be given by witnesses present, not in the requesting state, but in the state where the committal proceedings were to take place, we can possibly conclude that they contemplated that such witnesses would travel to the requesting state to give evidence there. Mr. Morland, for the respondents, did not advance any argument to this effect before the Divisional Court and did not feel able, in argument before your Lordships, to support the view that his suggested construction of article V of the Treaty can be supported on this basis. He went so far as to say that the suggested course could be considered improper and an abuse of process. For my part, I think the issue is resolved by a consideration of the reciprocal provisions relating to evidence in articles II and III of the Treaty. Article II embodies the procedure to be followed upon a requisition for the surrender of a fugitive criminal by Great Britain to Belgium. Article III embodies the procedure to be followed upon a requisition for the surrender of a fugitive criminal by Belgium to Great Britain. The opening paragraph setting forth the procedure applicable in the case of a person accused is in identical terms, *mutatis mutandis*, in both articles:

E “The requisition for the surrender shall be . . . accompanied by a warrant of arrest or other equivalent judicial document issued by a judge or magistrate duly authorised to take cognizance of the acts charged against the accused in Belgium [article II]/Great Britain [article III] together with duly authenticated depositions or statements taken on oath or upon solemn affirmation before such judge or magistrate, clearly setting forth the said acts, and containing a description of the person claimed, and any” other in article III

F “particulars which may serve to identify him.”

We know that duly authenticated depositions or statements taken on oath or upon solemn affirmation before the Belgian judge or magistrate are admissible in the English proceedings without the necessity for Belgian witnesses to travel to England. We may safely infer that duly authenticated depositions or statements taken on oath or upon solemn affirmation before the British judge or magistrate are admissible in evidence in the Belgian proceedings without the necessity for British witnesses to travel to Belgium. Finding thus that the Treaty makes reciprocal provision to avoid the necessity for witnesses present in the state where the extradition crime was committed to travel to the state where the fugitive criminal is found and where the extradition proceedings will take place, it would surely stand the scheme of the Treaty on its head to interpret article V as imposing an obligation with which the requesting state could only safely ensure compliance by procuring that witnesses present in the state where the extradition proceedings will take place and available to give evidence in those proceedings, should travel to the requesting state to give evidence there for the purpose of having it formally authenticated. Moreover, such an interpretation can manifestly do nothing to enhance the substantial justice of the extradition procedure.

Mr. Morland propounds the only other possible answer to the question how the requesting state must act in order to secure compliance with the time limit, if his submission as to the interpretation of article V is right, namely that the proceedings must be heard by the magistrate and all necessary evidence to establish a prima facie case against the accused must be actually adduced before him within two months from the arrest. It is not open to Mr. Morland on authority to contend that the application of the time limit requires that the hearing of the whole case for committal under section 10 must be completed within two months of the arrest. This proposition was rejected in relation to a parallel provision in another extradition treaty by the Divisional Court in *Reg. v. Governor of Ashford Remand Centre, Ex parte Beese* [1973] 1 W.L.R. 969 and the decision was affirmed by this House [1973] 1 W.L.R. 1426.

It is obvious that if, in order to comply with the time limit, it is necessary that the hearing before the magistrate should proceed so far that sufficient evidence may be adduced by the requesting state to establish a prima facie case, compliance with the time limit will be, to a greater or lesser degree, beyond the control of those responsible for the conduct of the case on behalf of the requesting state and may indeed be rendered impossible by circumstances beyond anybody's control. In the circumstances of the instant case the representative of the D.P.P. present at the first remand hearing on 15 September 1986 should, according to the respondents' submission, have protested at the remand to 10 November, when two months would have already elapsed from the first arrests, and applied that the hearing should commence, if not immediately, within days and continue without interruption until sufficient English evidence had been called to establish a prima facie case against each of the respondents. Even assuming that the magistrate had been able and willing to grant such an application, if the numerous counsel appearing for different respondents had chosen to exercise to the full their right of cross-examination, they could well have ensured the expiry of the time limit before the hearing of the English evidence was complete, whereupon the respondents, or some of them, would have been entitled to be discharged.

Recognising these difficulties in the way of acceptance of his suggested answer to the question how compliance with the time limit is to be achieved in any extradition case, like the present, where a substantial volume of English evidence is relied on, Mr. Morland was in the end driven to submit that these difficulties could properly be overcome by the magistrate curtailing or even deferring cross-examination and by the witnesses being called in chief, if time is running short, simply to confirm on oath or affirmation the contents of their section 102 statements. The prospect of the committal proceedings developing into some kind of race against the clock is wholly unacceptable and, if all that the suggested strict construction of article V achieves is the addition within the time limit of the sanction of an oath or affirmation in open court to the sanction already accepted in a section 102 statement by the maker's acknowledgement in accordance with subsection (2)(b) of his liability to prosecution, it is, here again, difficult to see what the adoption of that construction can possibly contribute to the substantial justice of the extradition procedure.

However, the matter does not stop there. It is submitted for the respondents that we are bound by the authority of this House in *Reg. v.*

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A *Governor of Pentonville Prison, Ex parte Sotiriadis* [1975] A.C. 1 to construe the word "evidence" in article V as meaning nothing less than legally admissible evidence. That case turned on a provision in the treaty with the Federal Republic of Germany that:

"If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, he shall be set at liberty."

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Nothing turns on any difference in language between that provision and the provision of the Treaty which your Lordships are considering. The word "presented" in article V of the Treaty appears in the French text as "produits." The first question in issue in *Ex parte Sotiriadis* was whether the "apprehension" from which time runs in the German treaty refers to the arrest of a fugitive on a provisional warrant issued before the Secretary of State's order to proceed under section 7 of the Act of 1870 or to the first remand in custody by the magistrate pursuant to the Secretary of State's order to proceed. The second question was whether "production" refers to production of the evidence by the requesting state to the Foreign Office or to the court at Bow Street. The evidence there consisted entirely of duly authenticated depositions or statements on oath taken in Germany.

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The Divisional Court had decided both questions in favour of the respondent fugitive. The House decided both against him. Their Lordships held unanimously that "apprehension" referred not to the arrest on a provisional warrant, but to the first remand in custody pursuant to the Secretary of State's order to proceed. We are not concerned with that point. Their Lordships decided by a majority (Lord Wilberforce, Lord Cross of Chelsea and Lord Kilbrandon; Lord Diplock and Lord Simon of Glaisdale dissenting) that "production" meant production by the requesting state to the Foreign Office, not production to the court. I should mention, in parenthesis, that it is not suggested on behalf of the present respondents that the submission of the section 102 statements directly to the magistrate before he issued his warrants was not a sufficient "presentation" if those statements could properly be regarded as "evidence."

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Both parties to the instant appeal claim to derive support from the decision in *Sotiriadis* [1975] A.C. 1. The Solicitor-General draws our attention to passages from the majority speeches. Lord Wilberforce said, at p. 18:

"I do not think that it can have been intended that where, as between governments, the necessary evidence has been delivered within the treaty period, the requesting government is to lose its treaty rights on account of delay in transmission to the requested state's courts, and it does not logically follow from the fact that it is the courts which have to pronounce on the sufficiency of the evidence that the date of production is to be the date of production to the court."

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Lord Cross of Chelsea said, at pp. 32-33:

"But what is the position if the evidence in question consists of sworn depositions or statements taken in the foreign state which by article XI are made evidence in this country if they are certified and authenticated as therein provided? When are they 'produced' by the foreign state? One view would be that they are not 'produced' until

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they are laid before the magistrate in open court; but I cannot think that that can be right. Suppose that depositions properly certified and authenticated and accompanied by translations which raise a strong prima facie case against the fugitive have been lodged at Bow Street within the two month period but owing to pressure of business or an epidemic of influenza affecting the magistracy the case cannot be heard until after the two months have expired, how could it be said with any show of reason that the foreign state had failed to produce sufficient evidence within the period specified in the treaty? To say so would be to add insult to injury. But if one goes so far—as I think that one must—as to say that the foreign state produces sufficient evidence within the two months if sworn depositions duly certified and authenticated which the magistrate subsequently finds to be in themselves sufficient to justify committal arrive at Bow Street within the two months, ought one not to go further and say that the lodging of such documents with the Foreign Office within the two months is sufficient even if they are not transmitted to Bow Street until after the expiry of the two months?"

These passages seem to lend strong support to the submission of the Solicitor-General that the provision imposing the time limit must be interpreted in such a way that compliance with it by the requesting state cannot be frustrated by circumstances over which the requesting state has no control.

All that Lord Diplock said, in his dissenting opinion on the production point, with which Lord Simon of Glaisdale simply agreed, was this, at p. 28:

"My Lords, on the view which I hold, that the time limit under article XII of the treaty did not start to run until 4 June 1973, it does not affect the outcome of this appeal whether sufficient evidence for the extradition is 'produced' within the meaning of that article (a) when it is delivered by the German Government to the Foreign Office or (b) when it is received at Bow Street magistrates' court or (c) when it is tendered in evidence at the hearing in open court in the presence of the accused. The conclusion at which I have myself arrived on this point is that evidence for the extradition, as distinct from evidence for the arrest, is not produced until it is received at Bow Street magistrates' court though this may be before it is tendered in open court. But as a majority of your Lordships are of opinion that production to the Foreign Office is sufficient no useful purpose would be served by setting out the reasons which lead me to take a different view."

On the face of it the decision in *Ex parte Sotiriadis* is not directed to the meaning of the word "evidence" in the relevant provision. Nevertheless, there is an indication, at p. 14, that the point was raised in argument by junior counsel for the appellant and counsel for the respondents in the instant appeal submit that the speeches in *Sotiriadis* proceed on the tacit assumption that evidence means legally admissible evidence. In particular, Mr. Morland points out that translations of the authenticated documents had been delivered to Bow Street within two months of the provisional arrest; it was only the authenticated documents themselves which arrived later. Hence, he submits, it must be taken to have been accepted in *Sotiriadis* that production of evidence meant

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A production in legally admissible form. He relies, in particular, on the following passage from the speech of Lord Diplock, at p. 29:

B “(3) If the hearing of the cases against the prisoner has not been completed before two months from the date of the rearrest (under (1) above) or of the first remand under (2), the prisoner should be brought before the magistrate on the day on which the two months expires or as soon thereafter as is practicable, for the magistrate to make his finding whether the evidence which has already been produced to him in support of the charges made against the prisoner would be sufficient, in the absence of any further evidence, to justify the prisoner’s committal for trial if the charges had been in respect of indictable offences committed in England. He may take into consideration not only evidence which has been adduced at any previous hearing in open court but also any duly authenticated depositions taken in Germany which had in fact been received at the Foreign Office before the time limit expired although they have not been previously tendered in open court. If he finds this evidence to be insufficient the prisoner must be discharged. If, on the other hand, he finds it to be sufficient he must continue with the hearing until both parties have completed their evidence, and then decide upon the totality of the evidence whether the case for extradition has been made out.”

E My Lords, I accept that the House in *Sotiriadis* proceeded on the implicit assumption that the “evidence” required to be produced by the relevant provision of the German extradition treaty, in a case where the only evidence relied on by the requesting state consisted of depositions and statements on oath taken in the requesting state, meant such evidence as duly authenticated. For my part, I am not disposed, nor have we been invited, to question this assumption. But I do not accept that it inexorably follows from this that “evidence,” to be presented within the time limit imposed by article V of the Treaty which we have to consider, must then be in legally admissible form. The primary factor which governed the decision of the majority and which emerges from the views expressed in *Sotiriadis* was that compliance with the time limit should be a matter within the control of the requesting state. If this leads to the conclusion that “evidence” may mean different things according to the category of evidence relied on by the requesting state, so be it. Logically it may be attractive to say that “evidence” must always mean the same thing, viz. legally admissible evidence. But if pragmatically it is necessary to interpret the word more flexibly in order to avoid frustrating the object and intent of the Treaty, I prefer the pragmatic solution.

H We were helpfully supplied by the Solicitor-General with a comprehensive analysis of extradition treaties containing different provisions relating to the time when foreign states seeking extradition are required to furnish the necessary evidence to justify it. I am the more willing to accept that the word “evidence” may be used with a flexible meaning in such treaties in the light of the formula which I find used in the several treaties most recently concluded. I take as a typical example the treaty with Finland concluded in 1975 and embodied in the Finland (Extradition) Order 1976 (S.I. No. 1037 of 1976). This provides by article 8:

“(1) Subject to the provisions of article 19 of this Treaty the request for extradition shall be made through the diplomatic channel. . . .

(3) If the request relates to an accused person, it must . . . be accompanied by a warrant of arrest issued by a judge or other competent authority in the territory of the requesting party and by such evidence as, according to the law of the requested party, would justify his committal for trial if the offence had been committed in the territory of the requested party, including evidence that the person sought is the person to whom the warrant of arrest refers.”

Here, if the word “evidence” means, in relation to Finnish witnesses, duly authenticated depositions or statements on oath taken in Finland in accordance with the assumption implicit in *Sotiriadis*, it nevertheless cannot possibly mean, in the context, admissible oral evidence where the evidence of English witnesses is to be relied on.

I see no insuperable difficulty in interpreting the word “evidence” in all such treaty provisions as referring to written statements which set forth the relevant evidence which witnesses are able to give of their own knowledge and which are, for the purpose of establishing their authenticity, using that word in an entirely non-technical sense, attested in the form most appropriate to the category of the statements in question. This will mean as a general rule: in the case of statements taken in the requesting state, duly authenticated depositions or statements on oath; in the case of English evidence before 1967, sworn affidavits; in the case of English evidence since 1967, statements made under section 2 of the Criminal Justice Act 1967, now section 102 of the Magistrates’ Courts Act 1980. Any stricter interpretation would indeed, in the language of Lord Russell of Killowen C.J., “hinder the working and narrow the operation of most salutary international arrangements”* and should, on that account, be rejected.

The only other point taken on behalf of the respondents arises under a provision in article I of the Treaty. Article I contains a list of the crimes to which the reciprocal arrangements for extradition apply. Manslaughter is one of the crimes included in this list. But at the end of the list article I contains a provision that:

“In no case can the surrender be made unless the crime shall be punishable according to the laws in force in both countries with regard to extradition.”

It is submitted for the respondents that they are entitled to habeas corpus because the expert evidence of a Belgian lawyer was not “presented” within two months of their arrest in compliance with article V to prove that manslaughter remains “punishable according to the laws in force” in Belgium “with regard to extradition,” although an affidavit to that effect by a Belgian lawyer to fill the supposed lacuna was received with the consent of counsel for the respondents in the Divisional Court proceedings.

My Lords, I cannot forbear to say that this submission is, in my opinion, utterly devoid of merit or substance. Assuming that this was a matter for the magistrate and not for the Secretary of State, which I doubt but will not take time to consider further, an English court is surely entitled to presume that so grave a crime as manslaughter

* *In re Arton* (No. 2) [1896] 1 Q.B. 509, 517.

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- A originally included in the list of crimes to which an extradition treaty with a foreign state applies remains punishable and an extradition crime by the law of that foreign state until the contrary is proved. But in any event the duly authenticated Belgian warrant shows that the offence charged, in the English translation, was "premeditated wilful assault and battery leading to death without the intention of so doing," an offence
- B which clearly corresponds to the English offence of manslaughter, and the duly authenticated deposition of a Mr. Andre Vandoren, the Principal Deputy Public Prosecutor, which accompanied the requisition for surrender, states that this offence is contrary to the Belgian Penal Code. If evidence was required, I do not understand why this did not suffice. Where the Government of Belgium, whose good faith is certainly not to be called in question, are seeking extradition for an extradition
- C crime listed in the Treaty, it would, in my opinion, be absurd to hold Mr. Vandoren's deposition to be defective because it contains no express reference to the law "with regard to extradition."

I would accordingly allow the appeals, set aside the orders of the Divisional Court and dismiss the respondents' applications for habeas corpus.

- D LORD TEMPLEMAN. My Lords, an extradition treaty made between the governments of friendly countries enables a country whose laws have been violated within its territory to obtain from abroad the attendance for trial of persons accused of offending against those laws.

- E In 1902 an Extradition Treaty was made between the governments of the United Kingdom and Belgium. The Belgian Treaty became enforceable in this country under and in accordance with the provisions of the Extradition Act 1870 as amended from time to time. Each country agreed to extradite or surrender to the other country persons accused or convicted of committing specified serious crimes within the territory of the other country. The Treaty and the Act of 1870 set forth the procedure to be followed in extradition proceedings and provide
- F safeguards against delay, injustice and oppression.

- By articles II and IV of the Treaty the Belgian authorities may make a requisition to the British Foreign Secretary requiring the surrender of a person accused of committing an extradition crime in Belgium. In the present case a requisition was duly made for the extradition of each of the respondents to stand trial for an extradition offence alleged to have been committed in Belgium and corresponding to the English crime of
- G manslaughter. Each respondent was, in accordance with the Act of 1870, arrested and brought before the Chief Metropolitan Magistrate.

By section 26 of the Extradition Act 1870:

- H "The term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of Her Majesty's dominions; . . ."

By section 9:

"When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England."

By article II of the Treaty:

"If the evidence to be then produced shall be such as to justify, according to the law of England, the committal for trial of the prisoner, if the crime of which he is accused had been committed in England, the magistrate shall commit him to prison to await the warrant of the" Home Secretary for his surrender to the Belgian authorities.

By section 14 of the Act of 1870 evidence on the hearing of committal proceedings for extradition may include:

"Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements . . . if duly authenticated . . ."

Evidence on committal proceedings for the trial of a prisoner charged with an indictable offence committed in England may by section 102 of the Magistrates' Courts Act 1980 include a written statement signed by the person who made it and containing a declaration of truthfulness provided, *inter alia*, that no objection is taken by the accused to the admission of the statement.

By article V of the Treaty:

"If within two months, counting from the date of arrest, sufficient evidence for the extradition shall not have been presented, the person arrested shall be at liberty. . . ."

In the present case evidence was taken in Belgium. The Belgian evidence consisted of statements which appeared to comply with the provisions of section 14 of the Act of 1870. The Belgian evidence was within two months of the arrest of each respondent, sent to and received by the magistrates' court, but awaited consideration and admission by the magistrate upon the hearing of the committal proceedings. Evidence was also taken in England. The English evidence consisted of statements which appeared to comply with the provisions of section 102 of the Magistrates' Courts Act 1980. The English evidence was within two months of the arrest of each respondent sent to and received by the magistrates' court but awaited consideration and admission by the magistrate upon the hearing of the committal proceedings. When the committal proceedings took place more than two months after the arrest of each respondent, the magistrate considered and admitted the Belgian evidence and the English evidence. It is conceded that the Belgian evidence was rightly admitted but it is argued that the magistrate ought to have rejected the English evidence because it was not finally admitted until two months after the relevant date of arrest. But article V does not require the full committal proceedings to take place within two months of the date of the arrest. The progress of committal proceedings is a matter for the magistrate who, in practice, deals with extradition proceedings with the utmost despatch consistently with the needs of the prosecution and the requirements of the defence. Article V enables the accused to procure his release if within two months of the date of arrest the Belgian authorities have not presented to the court sufficient evidential material to justify extradition. In the present case the requirements of article V were fulfilled by the presentation, within two months of arrest to the court at Bow Street, of the duly authenticated Belgian evidence and the statements of the English witnesses which were

3 W.L.R. Reg. v. Govr. of Ashford, Ex p. Postlethwaite (H.L.(E.)) Lord Templeman

A to be proffered under section 102 of the 'Magistrates' Courts Act 1980 or who were to be called if the defence so required.

For these reasons and for the reasons given by my noble and learned friend, Lord Bridge of Harwich, I would allow this appeal.

B LORD GRIFFITHS. My Lords, I have read the speeches prepared by my noble and learned friends, Lord Bridge of Harwich and Lord Templeman. I agree with them and would allow the appeals, set aside the orders of the Divisional Court and dismiss the respondents' applications for habeas corpus.

C LORD ACKNER. My Lords, I have read the speeches prepared by my noble and learned friends, Lord Bridge of Harwich and Lord Templeman, and for the reasons which they give I would allow the appeals, set aside the orders of the Divisional Court and dismiss the respondents' applications for habeas corpus.

D LORD GOFF OF CHIEVELEY. My Lords, I have read the speeches prepared by my noble and learned friends, Lord Bridge of Harwich and Lord Templeman, and for the reasons which they give I would allow the appeals, set aside the orders of the Divisional Court and dismiss the respondents' applications for habeas corpus.

Appeals allowed.

Orders of Divisional Court set aside.

E *Solicitors: Crown Prosecution Service, Headquarters; Bindman & Partners for Silverman, Livermore & Co., Liverpool; Frederick Howarth Son & Maitland, Bury; Dundon Ede & Studdert for Keith Levin & Co., Huyton; Renshaw & Bailey, Kendal; E. Rex Makin & Co., Liverpool; Cuthbert Barker, Newcastle-under-Lyme; Bell & Joynson, Runcorn; Backhouses, Blackburn; Prettys, Ipswich; Paul Rooney & Co., Liverpool; Treasury Solicitor.*

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[1987]

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[CHANCERY DIVISION]

RIGNALL DEVELOPMENTS LTD. v. HALIL

[1986 R. No. 3142]

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1987 Feb. 19;
March 10

Millet J.

*Vendor and Purchaser—Defective title—Completion notice—Adverse entry in local land charges register—Condition of sale that purchaser deemed to have searched local land charges register—Whether vendor relieved of duty to make full and frank disclosure—Whether purchaser deemed to have notice of entry in register—Law of Property Act 1925 (15 & 16 Geo. 5, c. 20), s. 198(1)*¹

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The defendant was the freehold owner of a house let to a protected tenant and the defendant's predecessor in title had applied to the local authority for an improvement grant under the Housing Act 1974. The grant was approved and registered by the local authority in the register of local land charges and that encumbrance could be removed on payment pursuant to the provisions of the Act. At the time the defendant purchased the property, her solicitors knew that the charge had been registered. Subsequently the defendant decided to dispose of the property by sale at auction and it was a condition of the contract that the purchaser was deemed to have made local searches and inquiries and that the property was sold subject to all matters that might be disclosed by a search or inquiries of the relevant local authority. The plaintiff agreed to purchase the property without making a search of the register but when the plaintiff learnt of the charge it refused to complete until the encumbrance was removed from the register. The defendant served notice to complete on 31 December 1985 and, when the plaintiff had obtained the removal of the encumbrance from the register and was willing to complete, demanded payment of interest from 31 December 1985 on the purchase price.

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On the plaintiff's summons for a declaration that the defendant had not been entitled to serve notice to complete on 31 December 1985 and an order for specific performance of the contract:—

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Held, (1) that equity required the defendant, as vendor, to disclose all defects in title of which she was aware and without such disclosure, she could not rely on the conditions of sale that deemed that the purchaser had searched the register and purchased the property subject to any encumbrances shown on the register; and that since the defendant's solicitor had knowledge of the defect in title, the defendant must be taken to have known of the entries on the register and, therefore, had been under a duty to make full and frank disclosure to the plaintiff of the encumbrance and she was not exonerated from that duty by the conditions of sale (post, pp. 399E, 400A–B, C–D).

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Nottingham Patent Brick and Tile Co. v. Butler (1885) 15 Q.B.D. 261 applied.

¹ Law of Property Act 1925, s. 198(1); see post, p. 401B–C.

3 W.L.R.

Rignall Developments Ltd. v. Halil (Ch.D.)

A (2) That, although under section 498(1) of the Law of Property Act 1925, an entry on the register was deemed to be actual notice to all persons and for all purposes, notice was not the same as knowledge; that, accordingly, the defendant could not claim that the plaintiff had knowledge of the encumbrance by relying on those deeming provisions to exonerate her from her duty to make full and frank disclosure (post, pp. 401c-D, 402H—403A, D—E, 404A—C).

B *In re Forsey and Hollebone's Contract* [1927] 2 Ch. 379 doubted.

The following cases are referred to in the judgment:

Ellis v. Rogers (1885) 29 Ch.D. 661

Faruqi v. English Real Estates Ltd. [1979] 1 W.L.R. 963

Forsey and Hollebone's Contract, In re [1927] 2 Ch. 379

C *Gloag and Miller's Contract, In re* (1883) 23 Ch.D. 320

Nottingham Patent Brick and Tile Co. v. Butler (1885) 15 Q.B.D. 261

No additional cases were cited in argument.

ORIGINATING SUMMONS

D The plaintiff, Rignall Developments Ltd., entered into a contract dated 3 December 1985 to purchase from the defendant, Gulseren Halil, a house known as 218 Bellenden Road, Peckham, and, when it objected to an adverse entry against the property in the local land charges register, the defendant served on it a notice to complete on 31 December 1985. The plaintiff did not complete on that date but, having arranged for the entry in the local land charges register to be removed, it indicated its willingness to complete but the defendant refused to complete unless the plaintiff paid interest on the purchase price from 31 December 1985.

E By summons dated 30 May 1986, the plaintiff sought against the defendant, inter alia, a declaration that a good title to the property had not been shown in accordance with the contract of sale; a declaration that the defendant was not entitled to give notice to complete on 31 December 1985 being unable at that date to show good title to the property; a declaration that the defendant was not entitled to claim interest on the balance of the purchase price payable under the contract; and that the defendant be ordered to complete the contract on payment of the contractual purchase price of £14,000 within 14 days.

F The facts are stated in the judgment.

G *Jonathan Ferris* for the plaintiff.
Justin Fenwick for the defendant.

Cur. adv. vult.

H 10 March. MILLETT J. read the following judgment. For 60 years, ever since the judgment of Eve J. in *In re Forsey and Hollebone's Contract* [1927] 2 Ch. 379, a prudent purchaser has searched the register of local land charges before contract, and has not relied exclusively on making his search in the course of the normal process of investigation of title between contract and completion. Recently, however, the time taken by many local authorities, particularly in London, to reply to inquiries and to deal with applications for official searches of the

registers kept by them has become a scandal which threatens to impede the proper working of a free market. Where land is sold by auction, it may be impossible for prospective bidders to obtain official searches in the time available. Where residential property is sold by private treaty, delay can cause havoc with the long chain of transactions which may be involved. There is a growing and useful practice for the vendor's solicitor to obtain and supply the purchaser's solicitor with a copy of the entries on the register at the same time as the draft contract. The present case calls for reconsideration of the consequences of the purchaser's failure to search the register or to obtain copies of the entries thereon before contract, and the correctness of the decision in *In re Forsey and Hollebone's Contract* has been challenged.

The case concerns a freehold dwelling in Peckham known as 218, Bellenden Road ("the property"). At an auction held on 3 December 1985, the plaintiff agreed to purchase the property from the defendant for £16,000 and paid a deposit of £1,600 to the auctioneers as stakeholders. The contract incorporated the National Conditions of Sale (20th ed.) as well as certain general and special conditions. These included general condition 11:

"The purchaser shall be deemed to have made local searches and inquiries and to have knowledge of all matters that would be disclosed thereby and shall purchase subject to such matters."

Special condition 5 provided:

"The property is also sold subject to any matters which might be disclosed by a search and/or inquiries of the relevant local authority either at the date of sale or at the date of completion and (whether or not he has carried out any such search and/or inquiries) the purchaser shall be deemed to buy with full notice and knowledge of all such matters and shall not raise any objection thereon or requisition relating thereto."

The date fixed for completion was 31 December 1985. The plaintiff did not complete on that date because of a subsisting entry on the register of local land charges to which it took objection. The defendant, relying on the conditions which I have read, denied that this was an objection which the plaintiff was entitled to raise, and served notice to complete.

The plaintiff's solicitors eventually obtained the removal of the entry, but not until 14 April 1986. The plaintiff then sought to complete, but the defendant refused to complete unless the plaintiff paid interest on the balance of the purchase price since 31 December 1985 which the plaintiff declined to do. The amount involved was small, and the sensible course would have been for the parties to complete and leave the question of interest to be resolved later. Instead, both sides took up entrenched positions, and the sale has still not been completed. The plaintiff now seeks specific performance on payment of the balance of the purchase price, but without interest; and the defendant seeks to rescind the contract and forfeit the deposit. The case turns on whether the defendant had by 31 December 1985 shown a good title to the property in accordance with the contract, and this depends on whether the plaintiff was entitled to object to the entries on the register notwithstanding the conditions of the contract which I have read.

A At all material times the property was let to a protected tenant and it was sold to the plaintiff subject to the tenancy. In 1978 the freehold owner had applied to the local authority for an improvement grant under the Housing Act 1974. The application was accompanied by a certificate of availability for letting dated 10 November 1978. It was approved on 4 April 1979 and registered in the register of local land charges on 6 April 1979. The date which the local authority in due course certified as the date on which the property first became fit for occupation after the completion of the relevant works ("the certified date") was 2 June 1980. The grant was paid on 15 February 1982.

B The plaintiff had not searched the register of local land charges prior to the auction and was unaware of the entries it contained. They were not disclosed by the defendant. On 11 December 1985 the plaintiff's solicitors applied to the local authority for an official search of the register and on the same day they submitted requisitions on title. One of these asked whether any improvement grant had been obtained in respect of the property. The defendant's solicitors replied, disputing the plaintiff's right to make the inquiry, and claiming that it was barred by the contract. Without prejudice to that contention, however, they disclosed that there was with the deeds a search dated October 1984 which revealed that a certificate of availability for letting had been issued on 10 November 1978 and an improvement grant had been paid on 15 February 1982. Eventually the plaintiff's solicitors received the official certificate of search which confirmed the existence of the relevant entries. They disclosed the dates of the certificates of availability for letting and of the approval and payment of the grant, but not the certified date.

E The proprietorship register at the Land Registry shows that the defendant was registered as proprietor of the property with title absolute on 1 November 1984. It does not disclose whether she was a purchaser for value; but a donee does not normally investigate his donor's title and from the proximity of the dates I infer that the search of the local land charges register, made in October 1984, was made on her behalf at the time of her acquisition of the property, and that she was.

F The significance of the entries on the register cannot be understood without reference to the relevant provisions of the Housing Act 1974. With immaterial passages omitted, they are as follows: section 73:

G "(1) . . . where an application for an improvement grant . . . has been approved by a local authority the provisions of this section shall apply with respect to the occupation, during the period of five years beginning with the certified date (in this section referred to as 'the initial period'), of the dwelling . . . to which the grant relates. . . . (3) For the purposes of this section, the following are 'qualifying persons' in relation to a dwelling, namely,—(a) the applicant for the grant and any person who derives title to the dwelling through or under the applicant, otherwise than by a conveyance for value; . . . (4) In any case where the application for the grant was accompanied by a certificate of availability for letting with respect to the dwelling, it shall be a condition of the grant that, throughout the initial period, (a) the dwelling will be let or available for letting as a residence, and not for a holiday, by a qualifying person . . ."

“(1) The provisions of this section shall apply in any case where, under or by virtue of any provision of this Part of this Act, a condition (in this section referred to as a ‘grant condition’) is imposed as a condition of grant. (2) If and so long as a grant condition remains in force—(a) it shall be binding on any person, . . . who is for the time being the owner of the dwelling to which the grant relates; . . . (3) . . . a grant condition shall be in force throughout the period of five years beginning on the certified date. . . . (5) A grant condition shall be treated as not being registrable by virtue of section 15 of the Land Charges Act 1925 . . . but, as soon as may be after an application for a grant has been approved, any condition of that grant shall be registered in the register of local land charges . . . (6) In this Part of this Act ‘the certified date’ in relation to a dwelling in respect of which an application for a grant has been approved, means the date certified by the local authority by whom the application was approved as the date on which the dwelling first becomes fit for occupation after completion of the relevant works to the satisfaction of the local authority.”

Section 76:

“(1) The provisions of this section shall have effect in the event of a breach of a condition of a grant (in this section referred to as ‘the relevant grant’) at a time when the condition is binding on the owner of the dwelling concerned by virtue of section 75(2) above. (2) Where the relevant grant related to a single dwelling, an amount equal to the amount of the relevant grant, together with compound interest thereon as from the certified date, calculated at the appropriate rate . . . shall, on being demanded by the local authority forthwith become payable to the authority by the owner for the time being of the dwelling . . . (4) Nothing in subsection (2) or, as the case may be, subsection (3) above shall prevent a local authority from determining not to demand any such amount as is referred to in that subsection or from demanding an amount less than that which they are entitled to demand under that subsection. (5) Upon satisfaction of the liability of an owner of a dwelling to make a payment under this section to a local authority in respect of a breach of a condition of grant, the condition shall cease to be in force with respect to that dwelling.”

Section 77(1):

“If, at any time while a condition of grant remains in force, the owner of the dwelling to which the condition relates . . . pays to the local authority by whom the grant was made the like amount as would (on a demand by the local authority) become payable under section 76 above in the event of a breach of that condition, all conditions of the grant shall cease to be in force with respect to that dwelling.”

The definition of “qualifying person” in section 73(3)(a) has the result that a grant is repayable on any sale of the property during the initial period, even though the property continues to be occupied by a protected tenant. The object evidently is to prevent short-term speculators from buying properties, improving them at the expense of the ratepayers,

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A and then selling them at a profit which reflects the expenditure of public money. The sale to the defendant in 1984, if, as I infer, she had bought the property, and the present sale to the plaintiff, if within the initial period, would both constitute breaches of a condition of the grant and make the grant repayable. The certified date did not appear on the register, but from the information available to the plaintiff's solicitors in December 1985 it must have seemed probable that there had been a
B breach of condition in 1984, and possible that another would occur if completion took place on 31 December. In those circumstances, the plaintiff refused to complete in the absence of confirmation from the local authority that it would not seek to recover the amount of the grant from the plaintiff, or from the defendant that, if required, she would repay it out of the proceeds of sale.

C On 14 April 1986 the local authority's legal department, whose dilatoriness had largely caused the problem, finally notified the plaintiff's solicitors that the initial period had expired in June 1985, that there would not be a breach of grant condition if the plaintiff completed its purchase, and that it had given instructions for the entries on the register of local land charges to be removed. The plaintiff then offered to complete, and the parties adopted the positions I have described.

D The defendant relied upon the express terms of the contract. The property, it was submitted, was not sold free from encumbrances, but subject to the entries on the register of local land charges; and the plaintiff had no right to object to them. The defendant had, therefore, shown a good title to that which she had agreed to sell, and was entitled to serve notice to complete. Moreover, by general condition 11 the
E plaintiff was deemed to have searched the register and to have knowledge of the entries thereon.

It is, however, a well-established rule of equity that, if there is a defect in title or encumbrance of which the vendor is aware, the vendor cannot rely upon conditions such as those in the present case unless full and frank disclosure is made of its existence. The leading authority is *Nottingham Patent Brick and Tile Co. v. Butler* (1885) 15 Q.B.D. 261.
F Wills J. said, at p. 271:

"The fourth condition provides that the property is sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. Such a condition, however, does not relieve the vendor from the necessity of disclosing any incumbrance or liability of which he is aware, but simply protects him if it should afterwards turn out that the property is subject to some burden or right in
G favour of a third person of which he is unaware . . . It would be nothing short of a direct encouragement to fraud if a vendor were at liberty by a condition of this kind to sell to a purchaser as an absolute and unburdened freehold a property which he knew to be subject to liabilities which would materially reduce its market value . . . In honesty and in law alike he was bound to give the purchaser
H full and fair information what it was that he had for sale, and was inviting him to buy, and, having failed to do so, he cannot insist upon the bargain procured by the suppression of material matters affecting the nature of the subject of sale. I entirely acquit the defendant of anything like intentional misconduct, but in the preparation of the particulars of sale he unfortunately relied upon his solicitor, who, as I cannot help believing, was under the

mistaken impression that he could better the position of the vendor by abstaining from making himself acquainted with the contents of the earlier deeds in his possession, and open to his perusal.”

As that case shows, the knowledge of the vendor's solicitor is treated as that of the vendor, and it is no answer for him to say that he has not read the contents of his own conveyancing file. In the present case, therefore, the defendant must be taken to have known of the entries on the register, since a search had been made on her behalf at the time of her purchase and a copy of the entries was with the deeds in her solicitor's possession. To entitle her to rely on the relevant conditions of the contract in these circumstances, it was incumbent on her to disclose the existence and nature of the entries to the plaintiff before contract. Had the information disclosed in the answers to requisitions been included in the particulars of sale, there could have been no objection to conditions precluding all further inquiry and making the sale subject to the entries in question. In the absence of such disclosure the conditions cannot be relied on. It is hardly necessary to add that the equitable principle cannot be circumvented by the inclusion in the contract of a condition deeming the purchaser to have searched the register and to know of its contents. The purchaser's acceptance of such a condition is on the basis that the vendor has made the disclosure required of him.

In answer to this, it was first submitted on behalf of the defendant that the conditions of grant did not create an encumbrance or burden on the property, but only a personal liability upon the owner. But the grant is repayable on demand by the owner for the time being of the property, so that the potential liability binds successive owners of the property affected—which is why it is required to be registered—and in my judgment that is enough. Then it was submitted that the entries on the register were only “bare” entries, without any reality behind them. Unknown to the parties, it was said, the initial period had expired, so that the grant was not repayable and the entries were obsolete. In fact that appears to be incorrect if, as I infer, there had been a breach of grant condition in 1984. As I read the statutory provisions, once there has been a breach of grant condition during the initial period, repayment may be demanded, even after the expiration of that period, from the owner of the property at the date of the demand. But in any case, neither the entries on the register nor the defendant's answers to requisitions disclosed the certified date or showed that the initial period had expired. It was for the defendant to show a good title to the property free from the risk that repayment of the grant might be demanded from the plaintiff, and she failed to do so.

Next it was submitted that the plaintiff could have inspected the register before the auction, that a prudent purchaser would have done so, and that there was no reason for equity to come to the assistance of the imprudent. I cannot accept that submission. In *Faruqi v. English Real Estates Ltd.* [1979] 1 W.L.R. 963 the equitable principle was applied in a case where the relevant documents were made available for inspection and the vendors had given the purchasers a fair and proper opportunity of seeing what they were buying. But, as Walton J. pointed out, any purchaser reading the conditions of sale would be entitled to assume that, while there were no doubt entries on the register, they were only the usual sort of entries which would not adversely affect the

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A value of the property. That observation applies with equal force to the present case.

As to the plaintiff's alleged imprudence, the modern practice of making pre-contract searches dates only from 1927 and is a result of the decision in *In re Forsey and Hollebone's Contract* [1927] 2 Ch. 379. But even if that is the only safe and prudent course, why should the purchaser's imprudence relieve the vendor of the obligation of candour?

B Finally, and most formidably, reliance was placed on section 198(1) of the Law of Property Act 1925 as amended by the Local Land Charges Act 1975. That deems the registration of any instrument or matter in any local land charges register to constitute:

C "actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected."

D Equity, it was submitted—and I agree—does not insist on the performance of idle rituals, and does not require a vendor to disclose to a purchaser matters already known to him. For this submission to help the defendant, however, the actual notice of which section 198 speaks, must be equated with knowledge. That is the crucial equation which was made in *In re Forsey and Hollebone's Contract*.

E In that case, land was sold free from encumbrances. In accordance with normal conveyancing practice, the purchaser's solicitor did not search the local land charges register until after exchange of contracts and shortly before the date fixed for completion. He then discovered that the local authority had resolved to prepare a town planning scheme. The resolution had been registered as a local land charge, but neither the vendor nor the purchaser was aware of its existence at the date of the contract.

F The purchaser applied for a declaration that the vendor had not shown a good title to the property sold in accordance with the contract and for repayment of the deposit. Her application was dismissed by Eve J. and the Court of Appeal on the ground that a resolution to prepare a town planning scheme did not operate to impose a subsisting encumbrance on the land affected. At first instance, however, Eve J. gave a second ground for his decision (upon which the Court of Appeal expressed no opinion) that even if the registered resolution was an encumbrance, it was an encumbrance of which the purchaser must, under section 198, be deemed to have contracted with actual notice, and she was therefore precluded from refusing to complete the contract. In his words, at p.387:

G "[The vendor] has only to point to the section . . . to show that when the contract was entered into vendor and purchaser must alike *be deemed to have known* of the existence of the incumbrance which the purchaser insists on as a good ground for avoiding the contract." (my emphasis).

H Eve J. thus equated the actual notice attributed to the purchaser by section 198 with knowledge for the purpose of the well-known rule that, in the case of an open contract for the sale of land, a purchaser cannot object to an irremovable encumbrance of which he was aware at the date of the contract. An encumbrance is irremovable if the owner of the land is not entitled as of right to procure its discharge by the payment of money. The rule rests upon implication. A person who knows that a property has some incurable defect or is subject to some irremovable

encumbrance, and yet contracts to buy it, must impliedly be taken to have agreed to accept the vendor's title despite the existence of that defect or encumbrance. To this extent the implication in an open contract that the property is sold free from encumbrances is negated. (Normally, the purchaser's knowledge of the state of the title cannot deprive him of the benefit of an express term that the land is sold free from encumbrances. Eve J. attributed this to the parol evidence rule, but it would, I think, be more accurate to attribute it to the obvious impossibility, even if the evidence were received, of implying a term inconsistent with an express term of the contract.) The rule has no application to an encumbrance like that in the present case, which can be removed on payment: see section 77 of the Housing Act 1974. The purchaser's knowledge of such an encumbrance is not inconsistent with the vendor's obligation to make the payment necessary to obtain its discharge on completion: see *In re Glog and Miller's Contract* (1883) 23 Ch.D. 320. Hence the crucial importance of the contractual provisions on which the defendant relies.

This part of Eve J.'s judgment represents an alternative ground for his decision, and cannot be dismissed as merely obiter. It has stood for nearly 60 years, but not without challenge. It was greeted at the time by conveyancers with consternation and incredulity. Its interpretation of section 198 was described as "startling" and its effect as "revolutionary." It has since been subjected to severe criticism by the editors of *Emmett on Title* and other eminent conveyancers. It has led to a change in conveyancing practice, which is both inconvenient and time-consuming, and which is unlikely to be adopted by those who buy at auction or who contract before consulting solicitors. For such purchasers, the decision constitutes a potential trap. Even in ordinary sales by private treaty, the need to search the local land charges register before contract rather than at the same time as the other registers, that is to say shortly before completion, is inconvenient and entails a delay which can put the contract at risk. Pre-contract searches of the land charges register—to which section 198 also applied—are, of course, impractical, since registration in that register, unlike the local land charges register, is effected against the name of the estate owner for the time being, and until contract it is not known against what names the search should be made.

These problems, aggravated by the reduction in the statutory period of title from 30 to 20 years, led to the reversal of the relevant part of Eve J.'s decision by section 24 of the Law of Property Act 1969 following the Law Commission Report on Land Charges Affecting Unregistered Land (1969) (Law Com. No. 18). That section, however, does not apply to local land charges, in respect of which pre-contract searches are feasible and had by 1969 become normal practice. In relation to local land charges, therefore, the decision in *In re Forsey and Hollebone's Contract* [1927] 2 Ch. 379 has not been reversed by statute, but neither has it been confirmed thereby.

In my judgment, the equation of the actual notice referred to in section 198 with the state of mind required for terms to be implied into an open contract is deeply suspect. I find it impossible to reconcile with principle or authority. If a purchaser knows, or even mistakenly believes, that he cannot expect to obtain a title free from encumbrances, and yet enters into a contract of purchase on that basis, the inference is obvious. But the inference depends upon his state of mind, which may be

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A affected by error, or ignorance, or forgetfulness. Notice, even actual notice, however, has nothing to do with the person's state of mind, and is not affected by such matters. In the absence of knowledge, notice cannot support the necessary inference.

B This is neatly demonstrated by the decision of the Court of Appeal in *Ellis v. Rogers* (1885) 29 Ch.D. 661. In that case, the purchaser knew before he entered into the contract that the land was subject to restrictive covenants, but he wrongly believed that they had been extinguished when the land had been compulsorily acquired by a railway company. He later discovered that the covenants were still extant and would bind him if he completed. When he refused to complete, the vendor contended that, having known of the existence of the covenants from the outset, the purchaser must be taken to have agreed to accept the title subject to them. The Court of Appeal rejected this contention.

C As Cotton L.J. put it, at p.671:

D "The vendor knew nothing of the covenants. The purchaser knew of them, but thought that they had been discharged, so that both parties were contracting on the footing that a good title was to be made, and as a good title cannot be made, the purchaser is not bound."

E This shows that notice and knowledge are not synonymous. The purchaser had actual notice of the existence of the covenants. Had he completed before discovering his error, he would unquestionably have been bound by them as a purchaser with notice. His ignorance of their continuing subsistence, while negating any inference which might otherwise have been drawn from his *knowledge* of them, would not avail him against the covenantee, for it would not affect his *notice* of them.

F There are two further grounds for suspecting Eve J.'s reasoning. First in *Ellis v. Rogers*, 29 Ch.D. 661, 666, Kay J. pointed out that to force the title on the purchaser it is essential that he should have knowledge, not only of the existence of the encumbrance, but of the vendor's inability to remove it. Section 198 cannot help with this. Unless

G consciously aware of the existence of an encumbrance, a purchaser cannot form any useful opinion on the vendor's ability to remove it.

H Secondly, it is unlikely that the notice attributed to the purchaser by section 198 was intended to have any greater effect than actual notice would have had before 1926; and notice of equities before 1926 had nothing to do with the relationship of vendor and purchaser or with the interpretation and effect of their contract of sale. It was concerned exclusively with the enforcement of third parties' rights. The fundamental rule of equity is that an equitable interest is binding on everyone, except a bona fide purchaser for value without notice. The Land Charges Act 1925 substituted registration for notice, and was likewise concerned exclusively with the protection of third parties' rights. Section 198 of the Law of Property Act 1925 forms an integral part of the machinery of registration. In this context, the natural reading of section 198 is that registration constitutes actual notice to all persons and for all purposes for which such notice is material, that is to say for the purpose of the enforcement of third parties' rights against the land affected.

In the present case, the defendant asks me not merely to apply the decision in *In re Forsey and Hollebone's Contract* [1927] 2 Ch. 379, but to extend it by applying it in a different though closely related context. There, both vendor and purchaser were equally ignorant of the existence

of the local land charge; it constituted an irremovable encumbrance; and the question was whether section 198 had the effect of modifying the vendor's contractual obligation to make a good title. Here, the defendant, through her solicitor, knew of the existence of the entry on the register; she could have procured its removal by repaying the grant if necessary; and the question is whether her failure to disclose what she knew prevents her from relying on the express terms of the contract. I cannot think that a vendor who knew of the existence of a registered charge, and who deliberately deceived the purchaser by telling him that there was no such charge, or that it was not registered, could escape liability for fraud by claiming that by virtue of section 198 the purchaser must be taken to have had actual notice of the truth. Similarly, I am not prepared to hold that a vendor who knows of a registered charge, and who wishes to make the sale subject to it, is exonerated by section 198 from his obligation to make full and frank disclosure of its existence before he can take advantage of an appropriate condition of sale.

It is, therefore, not strictly necessary to reach any conclusion whether the decision in *In re Forsey and Hollebone's Contract* can be supported where the existence of a registered local land charge is unknown to the vendor at the date of contract (so that it is not unconscionable for him to rely upon a special condition of sale without disclosing it) or where it represents an irremovable defect of title (so that he does not need to rely on any special condition). Such cases can be dealt with as and when they arise. In my judgment, the reasoning of the decision is too unsound to permit of any extension, however logical, to a situation not directly covered by it.

I shall grant a declaration that the defendant failed to show a good title in accordance with the contract before 14 April 1986, that the defendant is not entitled to interest on the balance of the purchase money and I shall grant a decree of specific performance of the contract upon payment by the plaintiff of the balance of the purchase price, less the costs of the plaintiff of obtaining the removal of the relevant entries on the local land charges register.

Judgment for plaintiff with costs.

Solicitors: Armstrong & Co., Forest Hill; Bazley White & Co.

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A [CHANCERY DIVISION]

SMITH AND OTHERS V. CROFT AND OTHERS (No. 2)

[1985 S. No. 637]

B 1986 Oct. 29, 30, 31; Knox J.
 Nov. 3, 4, 5, 6, 7, 10, 11,
 13, 14, 17, 18, 19, 20, 21;
 Dec. 19

C *Company—Shareholder—Rights against company or directors—Minority shareholders' action—Minority shareholders alleging ultra vires acts by company and directors—Majority of independent minority shareholders not wishing to pursue action—Whether minority shareholders' action to be struck out—Whether striking out procedure appropriate—R.S.C., Ord. 18, r. 19*

D F. Ltd. was a company engaged in the specialised business of guaranteeing the completion of films on time and within their budget. The articles of association provided that a director should be remunerated for his services at the rate of £150 per annum, the chairman receiving an additional £100 per annum, but the rate of remuneration could be increased by an ordinary resolution. The directors were also empowered to appoint one or more of their number to be holders of an executive office, and any director appointed to such office was to receive such additional remuneration by way of salary, lump sum, commission or participation in profits as the directors might determine.

E During the course of 1982 the appointed executive directors and companies with which they were associated acquired sufficient shares in F. Ltd. to give them overall voting control. The shares were bought by means of payments made to three of the associated companies in August 1982 of £33,000 each, part of which was then lent to the fourth to discharge a bank loan taken out for the purpose of obtaining cash to buy shares in F. Ltd. and the remainder was used for the purchase of shares by the three associated companies.

F The plaintiffs, who held a minority of shares in F. Ltd., brought an action against F. Ltd., three executive directors and the chairman, a non-executive director, and four companies closely associated with one or other of the three executive directors, claiming that the directors had paid themselves excessive remuneration, that the payments in 1982 to the associated companies were contrary to section 42 of the Companies Act 1981¹ and that certain payments of expenses to directors were excessive. The plaintiffs between them held 11.86 per cent. of the issued shares in F. Ltd.; the defendants between them held 62.54 per cent.; of the remaining shares 2.54 per cent. were held by a company which actively supported the plaintiffs, while 3.22 per cent. were held by persons or companies which, it was common ground, were to be treated as supporting the defendants. W. Ltd., a company not under the control of either the plaintiffs or the defendants, held 19.66 per cent. of the shares in F. Ltd. and was opposed to the continuance of the plaintiffs' action.

H

On a motion by the chairman and F. Ltd. to strike out the plaintiffs' action under R.S.C., Ord. 18, r. 19 or under the inherent jurisdiction as vexatious, frivolous or an abuse of process:—

¹ Companies Act 1981, s. 42: see post, p. 440c–E.

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[1987]

Held, (1) that the defendants' application raised the issue whether the plaintiffs could proceed with their minority shareholders' action and, although that raised difficult questions of law, the defendants, by invoking the procedure under R.S.C., Ord. 18, r. 9 rather than the procedure for determining a preliminary issue of law under R.S.C., Ord. 33, r. 3, had not adopted such an inherently defective procedure that the court should not proceed to determine the issues raised; and that since the effect of the court deciding those issues against the plaintiffs would be determinative of the action, the court would entertain the application and consider whether *prima facie* the company was entitled to the relief claimed in the action and whether the action was within the exception to the rule in *Foss v. Harbottle* (post, pp. 418C-D, F-H, 421G-422A, H-423A).

Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) [1982] Ch. 204, C.A. and *Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.* [1986] A.C. 368, H.L.(E.) considered.

(2) That although excessive remuneration paid to directors might be an abuse of power, where the power to decide remuneration was vested in the board, it could not be *ultra vires* the company; and that in view of the uncontradicted evidence about the specialised field in which the company operated and the high levels of remuneration obtaining there it was more likely that the plaintiffs would fail than succeed on the issue of quantum; that likewise no *prima facie* case had been shown that the executive directors' expenses were excessive; and that, *prima facie*, the payments to associated companies were not *ultra vires* since payments at the request of an executive director to an outside entity were capable of being payments in respect of services rendered by the executive director, save that there was a *prima facie* case of irregularity regarding certain payments not fully cured by subsequent adoption of the accounts at the annual general meetings at which those payments should have been disclosed; that since the admitted payments of £33,000 to associated companies had not been shown to be reasonably necessary for the purpose of providing for amounts likely to be incurred by way of directors' remuneration there was a *prima facie* case of infringement of section 42 of the Companies Act 1981 (post, pp. 436A-F, G, 439F-440C, 441D-442A).

In re George Newman & Co. [1895] 1 Ch. 674, C.A. and *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation* [1986] Ch. 246, C.A. applied.

(3) That although a minority shareholder had *locus standi* to bring an action on behalf of a company to recover property or money transferred or paid away in an *ultra vires* transaction, he did not have an indefeasible right to prosecute such an action on the company's behalf; that it was proper to have regard to the views of the independent shareholders, and their votes should be disregarded only if the court was satisfied that they would be cast in favour of the defendant directors in order to support them rather than for the benefit of the company, or if there was a substantial risk of that happening; that there was no evidence to suggest that the votes of W. Ltd. would be cast otherwise than for reasons genuinely thought to be for the company's advantage; and that, accordingly, since the majority of the independent shareholders' votes, including those of W. Ltd., would be cast against allowing the action to proceed, the statement of claim should be struck out (post, pp. 445H-446A, 452E-F, 459G-460D, 461B-C, 463G-H).

Foss v. Harbottle (1843) 2 Hare 461 considered.

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- A The following cases are referred to in the judgment of 13 November ruling that the defendants could proceed with their application to strike out:

Foss v. Harbottle (1843) 2 Hare 461

Lawrance v. Lord Norreys (1890) 15 App.Cas. 210, H.L.(E.)

Prudential Assurance Co. Ltd. v. Newman Industries Ltd. [1981] Ch. 229; [1980] 2 W.L.R. 339; [1979] 3 All E.R. 507

- B *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204; [1982] 2 W.L.R. 31; [1982] 1 All E.R. 354, C.A.

Smith v. Croft [1986] 1 W.L.R. 580; [1986] 2 All E.R. 551

Wallersteiner v. Moir (No. 2) [1975] Q.B. 373; [1975] 2 W.L.R. 389; [1975] 1 All E.R. 849, C.A.

Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C.A.

- C *Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.* [1986] A.C. 368; [1986] 2 W.L.R. 24; [1986] 1 All E.R. 129, H.L.(E.)

Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd. [1961] Ch. 375; [1961] 2 W.L.R. 196; [1961] 1 All E.R. 277, C.A.

- D The following additional cases were cited in argument on the question whether the defendants should be permitted to proceed with their application:

Bagshaw v. Eastern Union Railway Co. (1849) 7 Hare 114

Carter v. Commissioner of Police of the Metropolis [1975] 1 W.L.R. 507; [1975] 2 All E.R. 33, C.A.

City of London Corporation v. Horner (1914) 111 L.T. 512, C.A.

- E *Daniels v. Daniels* [1978] Ch. 406; [1978] 2 W.L.R. 73; [1978] 2 All E.R. 89
Electrical Development Co. of Ontario v. Attorney-General for Ontario [1919] A.C. 687, P.C.

Estmanco (Kilner House) Ltd. v. Greater London Council [1982] 1 W.L.R. 2; [1982] 1 All E.R. 437

Goodson v. Grierson [1908] 1 K.B. 761, C.A.

- F *Isaacs (M) and Sons Ltd. v. Cook* [1925] 2 K.B. 391
Morris v. Sanders Universal Products [1954] 1 W.L.R. 67; [1954] 1 All E.R. 47, C.A.

National Real Estate and Finance Co. Ltd. v. Hassan [1939] 2 K.B. 61; [1939] 1 All E.R. 712, C.A.

Nissan v. Attorney-General [1970] A.C. 179; [1969] 2 W.L.R. 926; [1969] 1 All E.R. 629, H.L.(E.)

- G *Radstock Co-operative and Industrial Society Ltd. v. Norton-Radstock Urban District Council* [1968] Ch. 605; [1968] 2 W.L.R. 1214; [1968] 2 All E.R. 59, C.A.

Richards v. Naum [1967] 1 Q.B. 620; [1966] 3 W.L.R. 1113; [1966] 3 All E.R. 812, C.A.

- H *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation* [1986] Ch. 246; [1985] 2 W.L.R. 908; [1985] 3 All E.R. 52, C.A.

Russell v. Wakefield Waterworks Co. (1875) L.R. 20 Eq. 474

Salomons v. Laing (1850) 12 Beav. 377

Tilling v. Whiteman [1980] A.C. 1; [1979] 2 W.L.R. 401; [1979] 1 All E.R. 737, H.L.(E.)

Western Steamship Co. Ltd. v. Amaral Sutherland & Co. Ltd. [1914] 3 K.B. 55, C.A.

Smith v. Croft (No. 2) (Ch.D.)

[1987]

The following cases are referred to in the judgment of 19 December:

- Allen v. Gold Reefs of West Africa Ltd.* [1900] 1 Ch. 656, C.A. A
Bagshaw v. Eastern Union Railway Co. (1849) 7 Hare 114
Baillie v. Oriental Telephone and Electric Co. Ltd. [1915] 1 Ch. 503, C.A.
Bamford v. Bamford [1970] Ch. 212; [1969] 2 W.L.R. 1107; [1969] 1 All E.R. 969, C.A.
Birch v. Sullivan [1957] 1 W.L.R. 1247; [1958] 1 All E.R. 56
Brown v. British Abrasive Wheel Co. Ltd. [1919] 1 Ch. 290 B
Burland v. Earle [1902] A.C. 83, P.C.
Clinch v. Financial Corporation (1868) L.R. 5 Eq. 450; L.R. 4 Ch.App. 117
Daniels v. Daniels [1978] Ch. 406; [1978] 2 W.L.R. 73; [1978] 2 All E.R. 89
Edwards v. Halliwell [1950] 2 All E.R. 1064, C.A.
Estmanco (Kilner House) Ltd. v. Greater London Council [1982] 1 W.L.R. 2; [1982] 1 All E.R. 437
Foss v. Harbottle (1843) 2 Hare 461 C
Gray v. Lewis (1873) L.R. 8 Ch.App. 1035
Halt Garage (1964) Ltd., In re [1982] 3 All E.R. 1016
Hellenic & General Trust Ltd., In re [1976] 1 W.L.R. 123; [1975] 3 All E.R. 382
Hogg v. Cramphorn Ltd. [1967] Ch. 254; [1966] 3 W.L.R. 995; [1966] 3 All E.R. 420
MacDougall v. Gardiner (1875) 1 Ch.D. 13, C.A.
Mason v. Harris (1879) 11 Ch.D. 97, Malins V.-C. and C.A. D
Mozley v. Alston (1847) 1 Ph. 790
Newman (George) & Co., In re [1895] 1 Ch. 674, C.A.
Pavlidis v. Jensen [1956] Ch. 565; [1956] 3 W.L.R. 224; [1956] 2 All E.R. 518
Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) [1982] Ch. 204; [1982] 2 W.L.R. 31; [1982] 1 All E.R. 354, C.A.
Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation [1986] Ch. 246; [1985] 2 W.L.R. 908; [1985] 3 All E.R. 52, C.A. E
Russell v. Wakefield Waterworks Co. (1875) L.R. 20 Eq. 474
Salomons v. Laing (1850) 12 Beav. 377
Seaton v. Grant (1867) L.R. 2 Ch.App. 459
Sidebottom v. Kershaw, Leese & Co. Ltd. [1920] 1 Ch. 154, C.A.
Simpson v. Westminster Palace Hotel Co. (1860) 8 H.L.Cas. 712, H.L.(E.)
Smith v. Croft [1986] 1 W.L.R. 580; [1986] 2 All E.R. 551 F
Taylor v. National Union of Mineworkers (Derbyshire Area) [1985] B.C.L.C. 237
Towers v. African Tug Co. [1904] 1 Ch. 558, C.A.
Viscount of the Royal Courts of Jersey v. Shelton [1986] 1 W.L.R. 985, P.C.
Wallersteiner v. Moir (No. 2) [1975] Q.B. 373; [1975] 2 W.L.R. 389; [1975] 1 All E.R. 849, C.A.

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The following additional cases were cited in argument:

- Alexander v. Automatic Telephone Co.* [1900] 2 Ch. 56, C.A.
Atwool v. Merryweather (1867) L.R. 5 Eq. 464n
Australian Coal & Shale Employees' Federation v. Smith (1937) 38 N.S.W.R. 48
Barron v. Potter [1914] 1 Ch. 895
Bromley v. Smith (1826) 1 Sim. 8
Budge v. Budge (1849) 12 Beav. 385
Burt v. British Nation Life Assurance Association (1859) 4 De G. & J. 158
Carter v. Commissioner of Police of the Metropolis [1975] 1 W.L.R. 507; [1975] 2 All E.R. 33, C.A.
City of London Corporation v. Horner (1914) 111 L.T. 512, C.A.
Clemens v. Clemens Bros. Ltd. [1976] 2 All E.R. 268
Const v. Harris (1824) Turn. & R. 496

H

3 W.L.R.

Smith v. Croft (No. 2) (Ch.D.)

- A *Cook v. Deeks* [1916] 1 A.C. 554, P.C.
Cotter v. National Union of Seamen [1929] 2 Ch. 58, C.A.
Cullerne v. London and Suburban General Permanent Building Society (1890) 25 Q.B.D. 485, C.A.
Davidson v. Tulloch (1860) 3 Macq. 783, H.L.(Sc.)
Devlin v. Slough Estates Ltd. [1983] B.C.L.C. 497
- B *Dominion Cotton Mills Co. Ltd. v. George E. Amyot* [1912] A.C. 546, P.C.
Electrical Development Co. of Ontario v. Attorney-General for Ontario [1919] A.C. 687, P.C.
Fargo Ltd. v. Godfroy [1986] 1 W.L.R. 1134; [1986] 3 All E.R. 279
Foster v. Foster [1916] 1 Ch. 532
Goodson v. Grierson [1908] 1 K.B. 761, C.A.
Gray v. Lewis (1869) L.R. 8 Eq. 526
Greenhalgh v. Aderne Cinemas Ltd. [1951] Ch. 286; [1950] 2 All E.R. 1120, C.A.
- C *Gregory v. Patchett* (1864) 33 Beav. 595
Heyting v. Dupont [1963] 1 W.L.R. 1192; [1963] 3 All E.R. 97; [1964] 1 W.L.R. 843; [1964] 2 All E.R. 273, C.A.
Hichens v. Congreve (1828) 4 Russ. 562
Hoole v. Great Western Railway Co. (1867) L.R. 3 Ch.App. 262
Horsley & Weight Ltd., In re [1982] Ch. 442; [1982] 3 W.L.R. 431; [1982] 3 All E.R. 1045, C.A.
- D *Isaacs (M.) and Sons Ltd. v. Cook* [1925] 2 K.B. 391
Jenkins v. Harbour View Courts Ltd. [1966] N.Z.L.R. 1
Kellaway v. Bury (1892) 66 L.T. 599, C.A.
Kemsley v. Foot [1951] 2 K.B. 34; [1951] 1 All E.R. 331, C.A.
Lawrance v. Lord Norreys (1890) 15 App.Cas. 210, H.L.(E.)
London Financial Association v. Kelk (1884) 26 Ch.D. 107
- E *Lord v. Governor and Company of Copper Miners* (1848) 2 Ph. 740
MacDougall v. Gardiner (1875) L.R. 20 Eq. 383
Marshall's Valve Gear Co. Ltd. v. Manning, Wardle & Co. Ltd. [1909] 1 Ch. 267
Menier v. Hooper's Telegraph Works (1874) L.R. 9 Ch.App. 350
Morris v. Sanders Universal Products [1954] 1 W.L.R. 67; [1954] 1 All E.R. 47, C.A.
- F *Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd.* [1983] Ch. 258; [1983] 3 W.L.R. 492; [1983] 3 All E.R. 563, C.A.
National Real Estate and Finance Co. Ltd. v. Hassan [1939] 2 K.B. 61; [1939] 1 All E.R. 712, C.A.
Nissan v. Attorney-General [1970] A.C. 179; [1969] 2 W.L.R. 926; [1969] 1 All E.R. 629, H.L.(E.)
- G *North-West Transportation Co. Ltd. v. Beatty* (1887) 12 App.Cas. 589, H.L.(E.)
Payne v. Cork Co. Ltd. [1900] 1 Ch. 308
Peel v. London and North Western Railway Co. [1907] 1 Ch. 5, C.A.
Pender v. Lushington (1877) 6 Ch.D. 70
Pickering v. Stephenson (1872) L.R. 14 Eq. 322
Prudential Assurance Co. Ltd. v. Newman Industries Ltd. [1981] Ch. 229; [1980] 2 W.L.R. 339; [1979] 3 All E.R. 507
- H *Punt v. Symons & Co. Ltd.* [1903] 2 Ch. 506
Quin & Axtens Ltd. v. Salmon [1909] A.C. 442, H.L.(E.)
Radstock Co-operative and Industrial Society Ltd. v. Norton-Radstock Urban District Council [1968] Ch. 605; [1968] 2 W.L.R. 1214; [1968] 2 All E.R. 59, C.A.
Richards v. Naum [1967] 1 Q.B. 620; [1966] 3 W.L.R. 1113; [1966] 3 All E.R. 812, C.A.
Salomon v. Salomon & Co. Ltd. [1897] A.C. 22, H.L.(E.)

Shuttleworth v. Cox Brothers & Co. (Maidenhead) Ltd. [1927] 2 K.B. 9, C.A. A

Silber Light Co. v. Silber (1879) 12 Ch.D. 717

Sovereign Life Assurance Co. v. Dodd [1892] 2 Q.B. 573, C.A.

Spokes v. Grosvenor and West End Railways Terminus Hotel Co. Ltd. [1897] 2 Q.B. 124, C.A.

Studdert v. Grosvenor (1886) 33 Ch.D. 528

Tilling v. Whiteman [1980] A.C. 1; [1979] 2 W.L.R. 401; [1979] 1 All E.R. 737, H.L.(E.) B

Turquand v. Marshall (1869) L.R. 4 Ch.App. 376

Wall v. London and Northern Assets Corporation [1898] 2 Ch. 469, C.A.

Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C.A.

Western Steamship Co. Ltd. v. Amaral Sutherland & Co. Ltd. [1914] 3 K.B. 55, C.A.

Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. [1986] A.C. 368; [1985] 3 W.L.R. 501; [1985] 2 All E.R. 208, Nourse J. and C.A. C

Willis v. Earl Howe [1893] 2 Ch. 545, C.A.

Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd. [1961] Ch. 375; [1961] 2 W.L.R. 196; [1961] 1 All E.R. 277, C.A.

Woodward v. Conebeer (1843) 2 Hare 506

Yorkshire Miners' Association v. Howden [1905] A.C. 256, H.L.(E.) D

MOTIONS

By a writ dated 7 February 1985, the plaintiffs, Nora Smith, Lucienne Crane, and the Right Honourable Felim O'Neill, Baron Rathcavan, in a specially endorsed writ claimed various sums of money to be paid by various defendants to the company, Film Finances Ltd., the ninth named defendant, upon whose behalf the plaintiffs claimed to sue, as being minority shareholders of the company. Those claims were based on allegations that the eighth defendant, Brindeel Ltd., an associated company controlled by the company's executive directors, William Alan Croft, Richard Martin Francis Soames and David Alexander Korda (the first to third defendants) had purchased 19,900 shares in the company, with money borrowed from a bank; that Brindeel Ltd. had been acquired by the executive directors on or about 11 June 1982 with a view to the purchase of the 19,900 shares; that each of three other associated companies controlled by the executive directors, Mannergrana Services Ltd., Cushingham Ltd., and Bellwedge Ltd. (the fifth to seventh defendants), had received £33,000 from the company in early August 1982, and had lent £28,000 to Brindeel Ltd. thereafter, and that these sums were used by Brindeel Ltd. to discharge its bank indebtedness. It was alleged that the payments by the company to the associated companies constituted financial assistance for the purchase of its shares within the meaning of section 42(2) of the Companies Act 1981. The writ claimed also a declaration that Brindeel Ltd. held the 19,900 shares on constructive trust for the company absolutely, and an order for the payment by Brindeel Ltd. to the company of £71,640, and for damages for conspiracy. There was also a claim against the majority shareholders and Michael Lewis Carr, the chairman and a non-executive director of the company (the fourth defendant), for interest under section 35A of the Supreme Court Act 1981, or under the court's inherent equitable jurisdiction. Further and other relief and costs were also claimed. E F G H

By a notice of motion dated 24 February 1986 the company applied for an order pursuant to R.S.C., Ord. 18, r. 19 or under the court's inherent jurisdiction, that the action be struck out as being frivolous,

3 W.L.R.

Smith v. Croft (No. 2) (Ch.D.)

- A vexatious or an abuse of process, on the grounds that the plaintiffs were not in fact entitled to bring or to continue the same, and that the plaintiffs do pay the defendants' costs of the action to be taxed. By a further notice of motion, dated 17 March 1986 the fourth defendant sought an order, pursuant to R.S.C., Ord. 18, r. 19 or the court's inherent jurisdiction, that the action be similarly struck out on the grounds that the plaintiffs were not in fact entitled to bring the same, or alternatively that the action was obviously unsustainable against him (the fourth defendant), and that the plaintiffs do pay the defendants' costs of the action to be taxed.
- B

The facts are stated in the ruling of 13 November 1986 and in the judgment of 19 December 1986.

- C *Robin Potts Q.C.* and *Daniel Serota* for the plaintiffs.
David Oliver Q.C. for the fourth defendant.
Charles Aldous Q.C. and *Caroline Hutton* for the company.

- 13 November 1986. KNOX J. I have to give a ruling in relation to two motions that are before me. The first is a motion by the ninth defendant, Film Finances Ltd. ("the company") for an order pursuant to R.S.C., Ord. 18, r. 19, or under the inherent jurisdiction of the court that this action be struck out as being frivolous or vexatious or an abuse of the process of the court on the ground that, the proceedings being purportedly brought by the plaintiffs on behalf of the ninth defendant, the plaintiffs are in fact not entitled to bring or continue the same. There is an application with regard to costs.
- D

- E The other notice of motion is one by the fourth defendant, Michael Lewis Carr, in terms very similar to the first motion, for an order pursuant to R.S.C., Ord. 18, r. 19 or under the inherent jurisdiction, that this action be struck out as being frivolous or vexatious or an abuse of the process of the court on the grounds that the proceedings being purportedly brought by the plaintiffs on behalf of the ninth defendant, the plaintiffs are in fact not entitled to bring or continue the same, and then there is an additional ground: "alternatively that the same is obviously unsustainable against the fourth defendant." I am not concerned, in relation to this ruling, with that second ground in the second notice of motion.
- F

- G The ruling which I have to make falls really into two parts. First, is the procedure, which it will be seen has been adopted by those two defendants, an application under R.S.C., Ord. 18, r. 19 and the inherent jurisdiction, appropriate at all to this type of proceeding? Secondly, if that question is answered in the affirmative, should these two applications be dismissed because the questions raised thereby do not have plain and obvious answers? It is not disputed but that difficult questions of law arise. If the right test to apply is that the applications should be dismissed unless the court is satisfied that the plaintiffs are bound to fail in the action without going in detail into the legal issues raised, then it is not disputed but that that test is not satisfied. It is common ground between the parties, and those familiar with the complications of the rule in *Foss v. Harbottle* (1843) 2 Hare 461 will not find this a matter of surprise, that difficult questions do arise.
- H

I have not heard full argument from the respondents to the notices of motion, the plaintiffs in the action, on these issues of law, or on the issue of fact which I will mention in a moment. In those circumstances I

do not propose to say anything about such preliminary views as I may have formed regarding those issues, whether of law or of fact. The action is one brought by the three plaintiffs, who are minority shareholders in the company, in respect of payments that have been made out of the company's funds and which, for a variety of reasons, the plaintiffs claim were improperly paid, and should be recouped to the company. The action has in fact been before the court already, and was the subject of a decision by Walton J. on 27 January 1986: see *Smith v. Croft* [1986] 1 W.L.R. 580. By that decision Walton J. discharged some earlier orders that were made by Master Chamberlain. The first of those earlier orders authorised the plaintiffs to bring these proceedings, down to the conclusion of discovery and inspection of documents, on terms that the company should indemnify the plaintiffs against the costs, putting it shortly. The master's later order was ancillary to that earlier one, and authorised the plaintiffs to have periodic taxation, and for a payment to them of the proportion of the costs thereby certified by the taxing master. Those orders were made on the authority of the Court of Appeal's decision in *Wallersteiner v. Moir* (No. 2) [1975] Q.B. 373.

On 3 July 1986 leave to appeal from Walton J.'s order was granted by a single judge of the Court of Appeal, May L.J., who said:

"I think I had better direct that this appeal [should] not be heard until after the application to strike out,"—which is the application before me—"because if it is struck out then, as I have said, the question does not arise, and this appeal falls naturally by the wayside. To the extent that it is struck out [it] may affect the exercise of the Court of Appeal's discretion if they come to the conclusion that the judge below exercised his discretion wrongly so that they have the opportunity of exercising their own."

It is, therefore, necessary that this application be disposed of, at least unless there is some serious delay for external reasons, before the appeal, which is pending in the Court of Appeal from that decision of Walton J., is heard.

The issues in the action need not be analysed in any detail for the purposes of this application, but it is desirable that I should state briefly what seem to me to be the issues that arise in the application to strike out, assuming of course that it proceeds. There are two issues of law and one of fact. The first issue of law can perhaps be stated in this way. Are actions to recover money paid away ultra vires by a company altogether outside the rule in *Foss v. Harbottle*, 2 Hare 461, so that even one shareholder can bring such actions? I interpose to mention that it is not disputed but that actions to restrain threatened ultra vires acts do fall within that category of cases outside the rule in *Foss v. Harbottle*. But the issue that arises between the parties is how far that state of affairs obtains in relation to past and completed transactions.

The second issue arises if the first is answered in the negative, and it can be stated in this way. Should the views of an independent majority of shareholders, on the question whether the action should proceed, prevail, if all the votes, either controlled or exercised or influenced by those accused of wrongdoing, are excluded from the computation, so that only independent votes are counted? If that question is answered in the affirmative then a question of fact would appear to arise, namely whether the votes of one particular shareholder, Wren Trust Ltd., should be treated as being independent for the purposes of that exercise.

A The procedure which has been sought to be followed by the two
 defendants who issued notices of motion, is based firmly, and indeed I
 think exclusively, on what fell from the Court of Appeal in *Prudential*
Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) [1982] Ch. 204. I
 do not propose to read the very lengthy headnote in that case, which
 was also concerned with the rule in *Foss v. Harbottle*, but which was in
 B fact concerned with a case where there was quite clearly no voting
 control. That is different from this case, where equally clearly the
 defendants in these proceedings do have voting control. Also it was a
 case where there was no allegation of ultra vires as such, as a principal
 issue in the action. But the Court of Appeal, after an examination of
 what the rule in *Foss v. Harbottle* was about, said, at p. 219:

C “It is commonly said that an exception to the rule in *Foss v.*
Harbottle arises if the corporation is ‘controlled’ by persons
 implicated in the fraud complained of, who will not permit the
 name of the company to be used as plaintiffs in the suit: see *Russell*
v. Wakefield Waterworks Co. (1875) L.R. 20 Eq. 474, 482. But this
 proposition leaves two questions at large, first, what is meant by
 D ‘control,’ which embraces a broad spectrum extending from an
 overall absolute majority of votes at one end, to a majority of votes
 at the other end, made up of those likely to be cast by the
 delinquent himself plus those voting with him as a result of influence
 or apathy. Secondly, what course is to be taken by the court if, as
 happened in *Foss v. Harbottle*, in the *East Pant Du* case (1864) 2
 Hem. & M. 254 and in the instant case, but did not happen in
 E *Atwool v. Merryweather* (1867) L.R. 5 Eq. 464n, the court is
 confronted by a motion on the part of the delinquent or by the
 company, seeking to strike out the action? For at the time of the
 application the existence of the fraud is unproved. It is at this point
 that a dilemma emerges. If, upon such an application, the plaintiff
 can require the court to assume as a fact every allegation in the
 statement of claim, as in a true demurrer, the plaintiff will frequently
 F be able to outmanoeuvre the primary purpose of the rule in *Foss v.*
Harbottle by alleging fraud and ‘control’ by the fraudster. If on the
 other hand the plaintiff has to prove fraud and ‘control’ before he
 can establish his title to prosecute his action, then the action may
 need to be fought to a conclusion before the court can decide
 whether or not the plaintiff should be permitted to prosecute it. In
 G the latter case the purpose of the rule in *Foss v. Harbottle*
 disappears. Either the fraud has not been proved, so cadit quaestio;
 or the fraud has been proved and the delinquent is accountable
 unless there is a valid decision of the board or a valid decision of
 the company in general meeting, reached without impropriety or
 unfairness, to condone the fraud.

H “We think that this brief look at the authorities is sufficient for
 present purposes. For it so happens that this court cannot properly
 on this appeal decide the scope of the exception to the rule in *Foss*
v. Harbottle.”

And then the Court of Appeal goes on to explain the reason why that
 was so, which is special to that case, and put quite briefly it was that the
 company decided to adopt the action at the end of the day. Passing over
 those two paragraphs I pick it up at p. 220:

"It was in the light of these considerations that we declined to hear any argument from Mr. Caplan and Mr. Curry on the topic of *Foss v. Harbottle*. However desirable it might be in the public interest that we should express our conclusions on Vinelott J.'s analysis of the rule in *Foss v. Harbottle* and what he saw as the exception to it, it was necessary for us to bear in mind that the rule had ceased to be of the slightest relevance to the case. It would have been a grave injustice to all parties to increase the already horrendous costs of this litigation by allowing time for argument on an interesting but irrelevant point. Such consideration of the law as appears in this judgment is, apart from a few submissions made by Mr. Bartlett, merely a reflection of our own thoughts without the benefit of sustained argument.

"In the result it would be improper for us to express any concluded view on the proper scope of the exception or exceptions to the rule in *Foss v. Harbottle*. We desire, however, to say two things. First, as we have already said, we have no doubt whatever that Vinelott J. erred in dismissing the summons of 10 May 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in *Foss v. Harbottle* and sanctions the very mischief that the rule is designed to prevent. By the time a derivative action is concluded, the rule in *Foss v. Harbottle* can have little, if any, role to play. Either the wrong is proved, thereby establishing conclusively the rights of the company; or the wrong is not proved, so *cadit quaesio*. In the present case a board, of which all the directors save one were disinterested, with the benefit of the Schroder-Harman report, had reached the conclusion before the start of the action that the prosecution of the action was likely to do more harm than good. That might prove a sound or unsound assessment, but it was the commercial assessment of an apparently independent board. Obviously the board would not have expected at that stage to be as well informed about the affairs of the company as it might be after 36 days of evidence in court and an intense examination of some 60 files of documents. But the board clearly doubted whether there were sufficient reasons for supposing that the company would at the end of the day be in a position to count its blessings; and clearly feared, as counsel said, that it might be killed by kindness. Whether in the events which have happened Newman (more exactly the disinterested body of shareholders) will feel that it has all been well worth while, or must lick its wounds and render no thanks to those who have interfered in its affairs, is not a question which we can answer. But we think it is within the bounds of possibility that if the preliminary issue had been argued, a judge might have reached the considered view that the prosecution of this great action should be left to the decision of the board or of a specially convened meeting of the shareholders, albeit less well informed than a judge after a 72-day action.

"So much for the summons of 10 May. The second observation which we wish to make is merely a comment on Vinelott J.'s

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A decision that there is an exception to the rule in *Foss v. Harbottle* whenever the justice of the case so requires. We are not convinced that this is a practical test, particularly if it involves a full-dress trial before the test is applied. On the other hand we do not think that the right to bring a derivative action should be decided as a preliminary issue upon the hypothesis that all the allegations in the statement of claim of 'fraud' and 'control' are facts, as they would be on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle*. On the latter issue it may well be right for the judge trying the preliminary issue to grant a sufficient adjournment to enable a meeting of shareholders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting."

D There is there, of course, a reference to the summons of 10 May, and it appears from the report of the decisions at first instance, the first of the two, by Vinelott J., what the nature of that summons was. In the same case, *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* [1981] Ch. 229, 233, one finds:

E "In those circumstances"—that is the circumstances that obtained at the beginning of the proceedings—"the second and third defendants took out a summons asking for an order, under R.S.C., Ord. 33, r. 3, that it be determined as a preliminary issue whether as a matter of law the plaintiff was entitled to maintain the action against them. A similar application was made by T.P.G."

F There is therefore, as it seems to me, no doubt but that Mr. Potts is right in submitting that what was before the Court of Appeal was a summons under R.S.C., Ord. 33. There was in fact no appeal on that summons, but it was that summons that they were concerned with in making the references to preliminary issue so far as those proceedings were concerned.

G Mr. Potts further submitted that the fact that the onus of proof is clearly cast, in that passage which I have read from the Court of Appeal, on the plaintiffs of showing a prima facie case on those two matters indicates that it was a reference to the procedure under R.S.C., Ord. 33, r. 3 rather than that under R.S.C., Ord. 18, r. 19 that the Court of Appeal had in mind. R.S.C., Ord. 18, r. 19 reads:

H "(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—(a) it discloses no reasonable cause of action . . . or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be. (2) No evidence shall be admissible on an application under paragraph (1)(a)." That is, that it discloses no reasonable cause of action or defence as the case may be.

The whole of R.S.C., Ord. 33 is preceded by the heading "Place and mode of trial" and rule 3, under a heading "Time, etc. of trial of questions or issues," provides:

"The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

Mr. Aldous and Mr. Oliver have submitted to me that the proper procedure in such a case as this, where minority shareholders are seeking to bring an action to recover for the benefit of the company in which they are shareholders sums paid away and the defendants wish to challenge that on the basis that the rule in *Foss v. Harbottle*, 2 Hare 461 prevents such a proceeding, is for there to be an application by way of striking out, mainly on the ground that this is the appropriate relief in relation to a challenge to the locus standi of a plaintiff, and that it is the inevitable result if the application succeeds. Secondly they submit that the Court of Appeal has given clearly considered views of the procedure, which they submitted were not intended to refer to Ord. 33, r. 3. In reliance on that, they pointed to the reference to striking out in a passage which I have in fact read in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204, 219, the actual sentence being:

"Secondly, what course is to be taken by the court if, as happened in *Foss v. Harbottle*, in the *East Pant Du* case, 2 Hem. & M., 254 and in the instant case, but did not happen in *Atwood v. Merryweather*, L.R. 5 Eq. 464n the court is confronted by a motion on the part of the delinquent or by the company, seeking to strike out the action?"

And at that point they submitted that the Court of Appeal was clearly contemplating what must at its lowest be a possible form of procedure. Equally they pointed to an earlier passage which I have not read but which is quite short, which shows the sort of procedure that the Court of Appeal contemplated, at p. 212:

"The assertion by Newman's counsel that the independent board 'was powerless to prevent the Prudential from pursuing the action' may have been based on the supposition that the plaintiffs had on the facts alleged in the statement of claim a personal cause of action for damages against Mr. Bartlett and Mr. Laughton independently of Newman's cause of action for damages. This supposition, if it existed, was erroneous for reasons which we explain later. It would have been open to Newman to have issued its own summons before the trial in order to test the right of the Prudential to pursue a derivative action, and to have supported it with evidence proving the objectiveness of the board's view and explaining the potential injury to Newman which would be caused by the proceedings."

That, they say, indicates the sort of procedure which the Court of Appeal envisaged as a possibility.

There has been a decision of the House of Lords, in connection with the interrelationship between R.S.C., Ord. 33, r. 3 and R.S.C., Ord. 18,

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A r. 19. The decision is *Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.* [1986] A.C. 368, and there is a passage in the speech of Lord Templeman, at p. 435:

B “In *Hubbuck & Sons Ltd. v. Wilkinson* [1899] 1 Q.B. 86 Sir Nathaniel Lindley M.R. pointed out the distinction between Ord. 18, r. 19 (then Ord. xxv, r. 4), which dealt with striking out and

C Ord. 33, r. 3 (then Ord. xxv, r. 2), which enables a point of law to be set down and argued as a preliminary issue. He said, at p. 91: ‘Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Ord. xxv, r. 2; the other is to apply to strike out the statement of claim under Ord. xxv, r. 4. The first method is

D appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks.’ The observations of Lindley M.R. directed to striking out a statement of claim apply equally to applications to strike out a defence or part of a defence. There has been recently a difference of judicial approach to the construction of Ord. 18, r. 19. In *McKay v. Essex Area Health Authority* [1982] Q.B. 1166, the majority of the Court of Appeal (Stephenson and Ackner L.JJ.) cited with approval the observations of Sir Gordon Willmer in *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688, 700 where he said:

E ‘The question whether a point is plain and obvious does not depend upon the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result.’ On the other hand, Griffiths L.J. dissented on the point in *McKay v. Essex Area Health Authority* [1982] Q.B. 1166 and said, at p. 1191: ‘If on an application to strike out as disclosing no cause of action a judge realises that he cannot brush aside the argument, and can only decide the question after a prolonged and serious legal argument, he should refuse to embark upon that argument and should dismiss the application unless there is a real benefit to the parties in determining the point at that stage. For example, where striking out the cause of action will put an end to the litigation a judge may well be disposed to embark on a substantial hearing because of the possibility of finally disposing of the action. But even in such a case the judge must be on his guard that the facts as they emerge at the trial may not make it easier to resolve the legal question.’ My Lords, if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself. In the present case, the general rule would seem to require a refusal by the judge to embark on the problems of international law involved in the present appeal, leaving those problems to be solved at the trial if they become material. If at the trial the appellants were cleared of

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any impropriety in their management of the affairs of the Rumasa group, then the problems of international law would not arise. Moreover, even if those problems did arise I do not believe that the length of time, namely seven days, occupied by the judge in deciding to strike out the pleadings would have been added to the time required to decide other issues. But there are special circumstances which, in my view, made it right for the judge to proceed and to make the order which he made. If the appellants' pleadings and particulars had not been struck out, the appellants would have proceeded to demand discovery before trial and to lead evidence at the trial, harassing to the plaintiffs and embarrassing to the court and designed to support the allegations and insinuations of oppression and bad faith on the part of the Spanish authorities which appear in the amended defences and particulars. These allegations are irrelevant to the trade marks action and the banks' action and are inadmissible as a matter of law and comity and were rightly disposed of at the first opportunity."

In my judgment it appears from what fell from Lord Templeman in that case, that even in the type of case where the issue in the preliminary application is one of the issues in the action, there may be circumstances which overall justify the use of Ord. 18, r. 19 where equally Ord. 33, r. 3 might serve. It depends in my judgment on the particular facts of the particular case.

A further point which was relied upon by Mr. Aldous and Mr. Oliver was that the parties were in this case armed and prepared both with leading counsel and a multitude of books to argue the issues which were clear to them some time before the proceedings came before me, and that it was only at the last moment that an objection to the form of procedure was made. I do not regard that as a determinant factor in any sense since either the point is a good one or it is not, and the lateness with which it was in fact taken does not impinge on that. On the other hand, it is capable of being relevant that the issues were sufficiently defined for the parties to prepare themselves, and that the matter was organised for trial by earlier applications on the notices of motion when the time of trial was estimated without doubts being raised as to the propriety of the procedure.

I am satisfied that the statements which I have read in the Court of Appeal as to the procedure to be adopted in these matters, although plainly obiter as was in fact conceded, should be regarded by me as a guide to be followed as faithfully as possible. In my judgment, as a matter of procedural law, either Ord. 18, r. 19 or Ord. 33, r. 3 is a potentially possible vehicle for such an application as is involved in the present case to decide whether a plaintiff minority shareholder has the necessary locus standi. But for present purposes it is sufficient for my decision to hold, as I do, that the procedure under Ord. 18, r. 19 is not of itself an impossible procedure which leads to an application, made under that rule or under the inherent jurisdiction, to be struck out as being evidently improper. It seems to me that although the Court of Appeal undoubtedly had Order 33 procedure before it in the form of the summons in relation to which they were discussing the propriety of what had happened below, their guidance was intended to be general in relation to minority shareholders' actions, and on that basis I find that the procedure is not inherently defective.

A That leads me to the second of the two issues with which I am faced, and that is the effect of the answer to the problems that are raised not being plain or obvious. Mr. Potts has relied on two separate lines of very well established authority, one on Ord. 18, r. 19, which is summarised conveniently at p. 305 of *The Supreme Court Practice 1985* under the rubric "Exercise of powers under this rule," the note being numbered 18/19/3, where the text reads:

B "It is only in plain and obvious cases that recourse should be had to the summary process under this rule . . . The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' . . . The summary remedy under this rule is only to be implied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable . . . It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action . . ."

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As a typical example of this type of authority he cited, along with other cases, the decision in *Wenlock v. Moloney* [1965] 1 W.L.R. 1238, where the headnote reads:

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"By his writ and statement of claim the plaintiff claimed damages against the three defendants for conspiring to oust him from the business of a company. His original statement of claim was a long, inartistic and wandering document to which the defendants refused to plead. He, accordingly, remodelled it and delivered a second statement of claim in which he alleged the conspiracy and set out four stages of the conspiracy at various times between January 1961 and January 1964 as a result of which he alleged, inter alia, that he had been deprived of his shares and interest in the company. The defendants delivered defences denying the allegations made against them in the statement of claim, and sought further and better particulars of the statement of claim which the plaintiff gave. After the pleadings were closed the plaintiff issued a summons for directions in the ordinary way, but before it was heard the defendants applied to the master under R.S.C., Ord. 18, r. 19, alternatively under the inherent jurisdiction of the court, to strike out the pleadings and dismiss the action on the grounds that the pleadings disclosed no reasonable cause of action, were frivolous and vexatious, and an abuse of the process of the court. On the hearing of the applications to strike out, ten affidavits were filed, five by the defendants in support of the applications and five by the plaintiff in opposition thereto. The master read the affidavits, the documents exhibited thereto, and considered the issues of fact raised by the affidavits in a four-day hearing. There was no cross-examination on the affidavits or oral evidence. In his reserved judgment, which occupied 22 pages, the master held that the plaintiff's action was most unlikely to succeed and he, accordingly, struck out the pleadings and the action. The plaintiff appealed to the judge in chambers, who dismissed his appeal.

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"On appeal to the Court of Appeal, which refused to look at the affidavits:—

"Held, allowing the appeal, that the trial by the master of issues of fact on affidavits to ascertain whether the plaintiff had a case was

a usurpation of the functions of the trial judge and was a wholly improper procedure . . . and that since the pleadings on their face disclosed a reasonable cause of action and raised issues of fact which required to be determined on oral evidence by a judge, the action would not be struck out but would proceed to trial.” A

Danckwerts L.J. said, at p. 1243:

“The practice under R.S.C., Ord. 25, r. 4, and under the inherent jurisdiction of the court was well settled. Under the rule it had to appear on the face of the plaintiff’s pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed. In the case of the inherent power of the court to prevent abuse of its procedure by frivolous or vexatious proceedings or proceedings which were shown to be an abuse of the process of the court, an affidavit could be filed to show why the action was objectionable. The commonest case was where a plaintiff was seeking to bring an action on a point which had already been decided or was obviously wholly imaginary. An example of that is *Willis v. Earl Howe* [1893] 2 Ch. 545. But, as the procedure was of a summary nature, the party was not to be deprived of his right to have his case tried by a proper trial, unless the matter was clear.” B C D

And he went on to quote Lord Herschell in *Lawrance v. Lord Norreys* (1890) 15 App.Cas. 210, 219 where he said:

“It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases.” E

That was one line of authority on which Mr. Potts relied. The other line of authority is concerned with the trial of preliminary issues, but Mr. Potts relied on that as being equally applicable, and in that context I cite again, as an example of the numerous cases that were cited, the decision of *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd.* [1961] Ch. 375. I need not read the headnote, but Lord Evershed M.R. summed up the principle involved at the end of his judgment, saying, at p. 396: F

“For the reasons that I have stated, I conclude that the answer to this case is that on the assumptions of fact which I have indicated—which can be determined only in the action—this instrument would be capable of being a writing as contemplated by the debenture taking effect on the date (28 February) when it was in fact, according to the defendants, passed over to Greenwood after a demand had been made by Inkin with the authority of the debenture holders. I would, therefore, order accordingly, and set aside the judgment of Cross J., though, as I say, I do not express any view upon the matter with which he expressly dealt, namely, whether the document took effect in the circumstances (or was capable of taking effect) as a deed. I repeat what I said at the beginning, that the course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom—save in very exceptional cases—of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round.” G H

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A Harman L.J. said, at p. 396:

"I concur, and find myself doing so with particular heartiness with reference to the last observations my Lord has made. The number of conditions he has found it necessary to use to fence in the expression of this court's opinion shows at once the undesirability of this kind of procedure. It is highly undesirable that the court should be constrained to tie itself in so many knots, and in the end merely say: 'Well, if this was thus, then that was so.' "

That highlights, in a typically trenchant way, the proposition that it is often profoundly unsatisfactory for a court to give a decision as a preliminary matter in an action on an individual issue on various hypothetical bases of fact. The plain objection being that the hypothetical bases may prove not to be bases and illusory, and in those circumstances the decision of the court is so much air.

Both those lines of authority were distinguished by Mr. Aldous and Mr. Oliver on one single basis, and that is that they were without exception concerned with the interlocutory disposal of an issue which was going to form part of the issues in the action, and they submit that that is a piecemeal way of carrying on which is inherently open to the objections both under the inherent jurisdiction and under Ord. 18, r. 19 where there has to be a very obvious case before the issues can in effect be short-circuited, and to the preliminary trial of issues on assumed facts under Ord. 33, r. 3. In the present case they submit we have a fundamentally different situation, namely one where what has to be done is not to decide an issue in the action itself but an issue which the Court of Appeal has described in the way which I have read, namely whether a prima facie case on those two points has in fact been established by the plaintiff, and it is at least possible, and in many cases probable—and they would submit in this case near certain—that the issue there is not one which would occupy the court at the final trial of the action.

They support their submissions by further submissions that it is plain from the passage which I read from Danckwerts L.J.'s decision in the *Windsor Refrigerator* case [1961] Ch. 375, 396, and indeed from many other passages, that questions of fact can be gone into under Ord. 18, r. 19, and in exceptional cases cross-examination can be permitted on affidavits. In this particular case the principal affidavit on which the defendants rely in relation to the issue of fact which I have mentioned as the third of the potential issues in these applications is one sworn by Mr. Baldock and cross-examination was in fact offered during the course of the hearing on a number of different occasions but never applied for by Mr. Potts, and it would not be in accordance with the practice of this court to direct a cross-examination without an application for it. But my conclusion is that it is the question stated by the Court of Appeal as a preliminary matter that has to be decided, that it is a special form of procedure concerned with giving sensible operation to the rule in *Foss v. Harbottle*, 2 Hare 461 and which was concerned with avoiding the Scylla and Charybdis, on the one hand of having a preliminary issue which effectively requires one to try the whole action where the rule serves no useful purpose, and on the other side of the strait, of assuming that everything that the plaintiffs allege is necessarily correct as a matter of fact, which is of course the technique the court adopts when it has what was called a strict demurrer. The Court of Appeal, it seems to me, has

laid down a halfway house for this very special type of case, one in which the legal issues in this particular case are sufficiently well defined for the parties to be able to argue them. Further, I am satisfied that they will determine the result of the action completely if answered in one particular way—not if answered in the other way, but that is seldom obtainable.

As regards the factual issue which I have sought to outline, that is to say the independence of Wren Trust Ltd., in my judgment that lies within a sufficiently small compass and is sufficiently independent of what I take to be the issues in the action itself for it to fall outside the lines of authority that Mr. Potts has cited and whose validity inside their scope is unchallenged. I do not propose to analyse the evidence in relation to the independence or otherwise of Wren Trust Ltd., it would be both impracticable and undesirable for me to do so not having had the benefit of submissions from Mr. Potts in relation to the evidence that is at present before the court. I therefore confine my observations exclusively to the question whether the existence of that issue of fact is a fatal obstacle to the adoption of the procedure which has in fact been chosen by the two defendants who have moved these motions before me, and to that extent I am not satisfied that there is any such fatal objection. Although, therefore, I view with mounting apprehension the escalation of authority which seems inevitably attendant on the difficult questions that arise in this case, I have reached the firm conclusion that it would not be right for me to stop these applications at this stage, and I so rule.

*Order accordingly.
Costs reserved.*

The hearing of the motions to strike out was then continued.

Cur. adv. vult.

19 December. KNOX J. read the following judgment. I have before me two notices of motion. The first is on behalf of the ninth defendant for an order pursuant to R.S.C., Ord. 18, r. 19, or under the inherent jurisdiction of the court that this action be struck out as being frivolous or vexatious or an abuse of the process of the court on the grounds that being purportedly brought by the plaintiffs on behalf of the ninth defendant the plaintiffs are in fact not entitled to bring or continue the same. The second is on behalf of the fourth defendant for an order in similar terms, with an alternative ground, “alternatively that [the action] is obviously unsustainable against the fourth defendant.” I have earlier ruled that the procedure thus adopted is not so defective that the application should in any event fail.

In the course of giving that ruling I expressed the view that the task for the court was to seek to follow the guidance given by the Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (No. 2) [1982] Ch. 204, 221, where the following passage from the judgment of the court appears:

“In our view, whatever may be the properly defined boundaries of the exception to [the rule in *Foss v. Harbottle* (1843) 2 Hare 461] the plaintiff ought at least to be required before proceeding with his

- A action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle*.”

That I now proceed to attempt to assess.

- B Much of the factual background to these proceedings is not in issue and the dispute is far more concerned with the mental element in what was done and the manner in which it was done than with what happened.

- C The present voting position among the single class of ordinary shareholders is as follows. The three plaintiffs, Nora Smith, Lucienne Crane and Lord Rathcavan, are the holders of 13,400, 1,000 and 4,000 shares respectively in the ninth defendant, Film Finances Ltd. (“the company”) out of the issued share capital of 155,100 fully paid shares. Together they therefore hold 18,400 shares which is 11·86 per cent. of the voting rights. The defendants against whom claims are made in the statement of claim are between them the holders of 97,000 shares, i.e. 62·54 per cent. of the voting rights. These defendants fall into three groups. The first, second and third defendants, William Alan Croft, Richard Martin Francis Soames and David Alexander Korda (“the executive directors”), form one group. It is against them primarily that charges are brought. The fifth, sixth, seventh and eighth defendants, Mannergrand Services Ltd. (“Mannergrand”), Cushingham Ltd. (“Cushingham”), Bellwedge Ltd. (“Bellwedge”) and Brindeel Ltd. (“Brindeel”), form the second group. I shall refer to them together as “the associated companies.” They are controlled or closely associated with one or more of the executive directors, Mannergrand with Mr. Croft, Cushingham with Mr. Soames, Bellwedge with Mr. Korda and Brindeel with all three of the executive directors. Finally there is the fourth defendant, Michael Lewis Carr. He is the chairman and a non-executive director of the company. He is a director of Wren Trust Ltd. and nominated by it to the board of the company. That leaves 39,700 shares unaccounted for which fall into the following groups:

- F (i) 4,000 are held by Messel Nominees Ltd., a company whose shares are owned by another company, Defester Ltd., the shares in which are owned by Stephen Richard Hill and Peter Welsford, both of whom have been active in promoting the plaintiffs’ claims. The votes attached to these shares are clearly in the plaintiffs’ camp, bringing up their voting strength to 22,400 or 14·44 per cent. of the whole.

- G (ii) Two other shareholders, Georgian Investments Ltd., who hold 2,000 shares, and Sir Reginald Sheffield, who owns 50 shares, are not under the control of or closely associated with the defendants against whom claims are made and have unequivocally stated their opposition to the further prosecution of this action. They account for 1·32 per cent. of the voting rights.

- H (iii) Film Finances Pension Fund holds 2,950 shares or 1·9 per cent. of the voting rights. It is common ground that it is under the control of Mr. Soames and Mr. Korda and is to be treated for present purposes as on a par with the executive directors so far as voting is concerned.

(iv) Wren Trust Ltd. (“Wren Trust”) holds 30,500 shares, i.e. 19·66 per cent. of the votes in the company. This company is a wholly owned subsidiary of Gresham Trust Plc., which is a member of the Eagle Star Group of companies. Wren Trust is thus owned and controlled by a large outside financial institution. One of the issues canvassed before me

has been whether it should be regarded for the purposes of this application as independent or disinterested so far as the question whether or not these proceedings should continue is concerned. The boards of Wren Trust and of Gresham Trust Plc. have both expressed the view that the proceedings should not continue.

(v) Finally there are two holders of 100 shares each who have not committed themselves. This shareholding is so small as not to be of practical significance.

The following conclusions can be drawn from these shareholdings: (1) The executive directors with the associated companies have overall voting control. (2) If one excludes the votes of the executive directors, the associated companies and Film Finances Pension Fund, then the votes of Georgian Investments Ltd., Sir Reginald Sheffield and Wren Trust totalling 32,550 (or almost 20.99 per cent. of the whole) comfortably exceed those of the plaintiffs and the Messel Nominees, totalling 22,400 (14.44 per cent. of the whole) but not so comfortably as to give a 75 per cent. majority of the votes excluding those mentioned above. The majority is in fact about 59.24 per cent. Such a majority can carry an ordinary but not a special resolution. (3) If the votes of Wren Trust are excluded as well as those of the executive directors, the associated companies and Film Finance Pensions Fund, then the plaintiffs and Messel Nominees with 22,400 votes have a very large majority over Georgian Investments Ltd. and Sir Reginald Sheffield, with 2,050 votes. That majority would be one of 91.62 per cent. and sufficient to pass either an ordinary or a special resolution.

The factual background is as follows. It will be appreciated that I am not making findings of fact at the end of an action and I am therefore limiting this account of the facts to that which seems to me necessary to explain the reason for my decision on the questions I have to answer and which appear from the quotation at the outset of this judgment from the Court of Appeal decision in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204.

The company was incorporated on 24 February 1950 with an initial paid up capital of £7,500. Throughout its history its trade has been the unusual one (it appears its only significant competitors are overseas companies) of guaranteeing the completion of films on time and within budget. It is obvious that this is a specialised business requiring for its successful operation both wide contacts in the film making world and skill and experience in the production of films. It is also a business which requires a very small number of highly skilled personnel. The number of executives has not exceeded ten. It is the absolute antithesis of mass production.

The founder of the business retired in 1959, and Robert Garrett became chairman and managing director. He had for a number of years a joint managing director, Bernard Smith, who died in 1977. The first plaintiff is his widow. Mr. Soames, the second defendant, joined the company as an employee in 1971, became a director in 1975 and managing director in 1977 in place of Bernard Smith and Robert Garrett, who continued as chairman. Mr. Croft, the first defendant, has been a director since well before October 1979. He is a chartered accountant and deals with the financial side of the business such as investments. This is very important more especially as it is from the income from premiums received by the company and invested that its profit is largely derived. In this it resembles many insurance companies

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A which suffer underwriting losses but remain profitable because of their
invested income. A Mr. Aikin, a solicitor, became an executive director
in 1978 but resigned in September 1981 and Mr. Carr, the fourth
defendant, was appointed director in October 1979 as the nominee of
Wren Trust. Mr. Korda, the third defendant, became an executive
director in July 1981. He ceased to be an executive director in January
B 1985 when he became managing director of R.K.O. Film Group
International at a very large salary but remained a non-executive director
of the company. So from October 1979 until October 1982 Mr. Garrett
was chairman, the directors who were executives were Mr. Croft, Mr.
Soames and Mr. Aikin or Mr. Korda, there being a short period in 1981
when both were on the board, and Mr. Carr was a non-executive
director.

C At the beginning of 1982 the executive directors only had shares
carrying about 20 per cent. of the voting rights and the associated
companies had none, but Mr. Aikin who had resigned by September
1981 had 7.5 per cent. of the voting rights. During the course of 1982
the executive directors and the associated companies acquired enough
shares to give them, together with Wren Trust, overall voting control.
Those acquisitions include transactions which the plaintiffs seek to
D impeach in these proceedings as having been effected by means of
financial assistance from the company in breach of section 42 of the
Companies Act 1981. Specifically Bellwedge bought 2,400 shares,
Mannergrand bought 3,050 shares, as did Cushingam, and Brindeel
bought 19,900. Bellwedge's purchase is not challenged in the statement
of claim while those of Mannergrand, Cushingam and Brindeel are, but
E it was the latter that Mr. Potts, for the plaintiffs, placed in the forefront
of his argument on section 42 of the Companies Act 1981.

The purchase of 19,900 shares by Brindeel with money borrowed
from the bank, the fact that Brindeel was acquired by the executive
directors on or about 11 June 1982 with a view to the purchase of the
19,900 shares, that each of Mannergrand, Cushingam and Bellwedge
received £33,000 from the company in early August and lent £28,000 to
F Brindeel thereafter, and that these sums were used by Brindeel to
discharge its bank indebtedness are all admitted. What is denied is that
the payments by the company to those three associated companies
constituted financial assistance within section 42(2) of the Companies
Act 1981. The defendants contend that these payments were in
satisfaction of anticipated liabilities by way of salary or bonus payable to
the executive directors and that on that basis there was no reduction of
G the net assets of the company for the purposes of section 42(2). I shall
return to this later.

By 1982 there had been dissension for some time on the board of the
company between Mr. Garrett, the chairman, who had been involved
with the company from very early days and who was by then 70 years or
so old, and the executive directors who were younger and had adopted a
policy of expanding the company's business overseas, a project to which
H Mr. Garrett was opposed. Matters came to a head in 1982, when the
executive directors had completed their share purchases, which were not
revealed in advance to Mr. Garrett, and Mr. Garrett was forced to
resign as a director in October 1982 and received a £60,000 ex gratia
payment. This caused a good deal of bitterness. One consequence was
that Mr. Garrett consulted Mr. Hill to advise him about the executive
directors' and Mr. Carr's activities, and Mr. Garrett provided Mr. Hill

with a good deal of documentary material from the company's offices. This continued after Mr. Garrett's departure through Mr. Garrett's secretary, a Mrs. Byford, who clearly disapproved of the way Mr. Garrett was forced to resign and who continued, unbeknown to the executive directors for some time to provide Mr. Hill with documentary material from the company's offices. A

Armed with this material Mr. Hill launched a sustained campaign of criticism of the conduct of the affairs of the company by the executive directors, and Mr. Carr in particular, at the amounts drawn out of the company by the executive directors and the associated companies. Here again there is no dispute about the amounts drawn out. I ignore sickness benefits, pension scheme payments and small fixed directors' fees. In other respects payments were made as follows: B

	1980	1981	1982	1983	1984	
<i>Mr. Soames:</i>	£	£	£	£	£	C
Salary	42,000	50,000	53,333	67,500	70,000	
Bonus	29,800	40,000	40,000	70,000	100,000	
Cushingham Ltd.	15,000	18,500	61,000	—	—	
<i>Mr. Croft:</i>						
Salary	8,500	15,000	15,000	—	—	D
Bonus	24,300	20,600	10,000	—	—	
(Connected Companies)						
Billsons & Co.	5,650	15,150	15,150	15,150	55,150	
Mannergrand Services Ltd.	7,500	27,500	29,000	50,000	30,000	
<i>Mr. Korda:</i>						
Salary	—	8,751	—	—	—	E
Bonus	—	—	—	—	—	
Bellwedge Ltd.	—	—	76,169	93,750	131,867	
<i>Mr. Garrett:</i>						
Salary	21,000	25,000	25,000	8,333	—	F
Bonus	51,000	70,750	—	—	—	

The ex gratia payment of £60,000 mentioned above was also paid to him. Mr. Aikin's payments I need not detail. Finally in relation to Mr. Carr, there were payments of £1,500 made to Gresham Trust Plc. in the years 1980, 1981 and 1982 and £7,595 in 1983 and £5,028 in 1984.

Before the annual general meeting of the company called for 10 December 1982 Mr. Hill's solicitors wrote a letter dated 7 December 1982 to Mr. Carr: G

"Strictly private and confidential. Re: Film Finances Ltd. We are writing to you in your capacity as chairman and nominee of a minority shareholder in the above company. We are instructed by Mr. S. R. Hill, F.C.A., who has been appointed to act as adviser to a number of minority shareholders in the company holding in total over 40 per cent. of the issued share capital, including the executors of Patrick Garrett for whom we also act. H

"We understand that Mr. Hill informed you last week that: (1) The 1982 published accounts of the company are grossly misleading, indicating as they do a profit before tax of over £500,000 whereas compliance with current accounting standards and the usual statutory requirements would result in showing a loss of over £500,000. (2) The amounts proposed in the accounts as directors' remuneration

A are excessive, unreasonable and so out of all proportion as to cause
very considerable doubt as to the collective bona fides of the
executive directors. (3) There is firm evidence that the managing
director of the company earlier this year approached a merchant
bank (not your own of course) to seek advice on how to employ the
company's funds to enable the executive directors to obtain 100 per
cent. control of the company. It would appear that the advice given
B was based upon an incomplete explanation of the provisions of
sections 42 to 44 of the Companies Act 1981, which sections also
impose criminal penalties for failure to comply with their provisions.

"We understand that Mr. Hill did not inform you of this aspect
of item (3) above as he would have preferred to have told you this
in person and shown to you the evidence. However, Mr. Hill did
C inform you that there is evidence that the executive directors have
partially adopted this misleading advice in the current year, in that
there are accounting irregularities in respect of items passing through
the bank pass sheets not entered in the cash book of the company.
(Mr. Hill, of course, only has detailed information up to mid-
October when Mr. Garrett retired from chairmanship of the
company.) In view of the prima facie evidence of fraud, the
D minority shareholders' group requires that further investigations be
carried out to enable this evidence to be substantiated or refuted
and the available remedies pursued if necessary. It would be
preferable that you use your position as chairman of the company
to effect this, as the alternatives would be a Department of Industry
or fraud squad investigation which could result in very far-reaching
consequences including exposure damaging to the company. (4)
E There is evidence of other financial irregularities that are not of
such pressing importance as points (1) to (3) above and which may
be regulated in due course following the full and early investigation
that must be carried out into the affairs of the company. . . ."

F At the annual general meeting of the company on 10 December 1982
at which the accounts for the year ending 30 June 1982, approved by the
directors on 18 November 1982, were to be laid for approval, there were
angry scenes and allegations of accounts incorrect by £1 million. Mr.
Carr adjourned the meeting and forthwith instructed Messrs. Peat,
Marwick Mitchell & Co. to investigate and report upon Mr. Hill's
complaints. Initial instructions were by telephone but the formal
instruction was in a letter from Mr. Soames dated 14 December 1982. It
G is addressed to Peat, Marwick Mitchell & Co. for the attention of Tom
Allen, Esq. and reads:

"Dear Sirs, I write to confirm the board's instructions to you to
carry out an investigation of the affairs of this company in respect
of its accounting period to 30 June 1982, the following period and
any preceding period or periods you may think necessary in relation
H to the allegations set out in points (1) to (4) inclusive of the letter
from Wood Nash & Winters dated 7 December 1982 addressed to
Michael Carr."—That letter is the one which I have just read.—"In
view of the seriousness of the allegations you are requested to
commence and complete the investigation as soon as possible and
make a full report to the board at the earliest possible date.

"While the board's instructions are to investigate specific points
referred to, it is not their intention to prevent or restrict you from

extending the investigation where you believe it to be necessary in the cause of establishing the truth or in the event that other irregularities are revealed.

"I confirm that instructions have been given to all the executives and employees of the company and to its solicitors and auditors to co-operate with you to the fullest extent and to give you such information as you may require."

That is signed on behalf of Film Finances Ltd. by Mr. Soames.

Mr. Allen of Peat, Marwick Mitchell & Co. interviewed the company's staff and directors, met Mr. Hill and his helper Mr. Welsford twice, and had access to the company's books. His report ("the report") was produced on 11 March 1983. It contains the following passage, after having set out the circumstances of the investigation being instituted:

"We have decided that it would be appropriate for us to submit a report at this stage, which addresses the matters set out above and summarises our comments in relation to the work we have so far carried out. The directors will then be in a position, having considered this report and received any representations which shareholders think fit to make to them, to consider whether or not we should be asked to pursue any of the matters discussed, or any other matters."

The report is therefore not to be regarded as necessarily definitive. A substantial part of the report was concerned with criticisms made by Mr. Hill and set out in his solicitor's letter of 7 December 1982, which I have read, concerning the accountancy deficiencies in the preparation of the company's accounts. These criticisms were effectively rejected in the report. No claims are made in this action about this and I pass over that part of the report. [His Lordship read part of the report, headed "Directors remuneration and allied matters" and continued:] Then there are set out in tabular form figures for emoluments and payments to connected firms or companies which correspond, so far as the figures are concerned, with the figures in the statement of claim.

Two things appear from the extract of the report quoted above. The first is that it was Mr. Allen's view that the payments to Cushingham in the years ending 30 June 1980, 1981, 1982 of £15,000, £18,500 and £61,000 should have been disclosed as part of Mr. Soames' emoluments because in the circumstances they did fall within the requirements of section 196 of the Companies Act 1948. The inclusion in the note on directors' salaries of the £61,000 for 1982 in the revised 1982 accounts which were presented to and passed by the adjourned annual general meeting on 30 March 1983 and the inclusion therein of the £18,500 for 1981 in the comparative figures in those accounts constitute a major difference between those accounts and the original 1982 accounts which were approved by the directors on 18 November 1982 and laid or intended to be laid before the annual general meeting on 10 December 1982.

The second is that if the only basis upon which the payments to Mannergrand or Billsons and Bellwedge could be justified was that of remuneration for acting as a director or in connection with the management of the affairs of the company the same conclusion as that reached regarding Cushingham would have applied. But Mr. Allen took the view that these payments were for services rendered by the

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A organisations to which payments were made and were exempt from
disclosure under section 196 of the Companies Act 1948 because the
services could have been provided whether or not Mr. Croft and Mr.
Korda had been directors of the company. In relation to Mr. Korda
there is a later reference in the report to "the technicality that Mr.
Korda works for Bellwedge Ltd. which provides his services to the
company." The amounts involved are not limited to those mentioned for
B the year ending 30 June 1982 with which the report was primarily
concerned but also so far as Mr. Croft is concerned £13,150 and £42,650
for the years ending 30 June 1981 and 1982.

C The report went on to deal with some matters which I need not
discuss because they are not in issue in this action, such as Mr. Carr's
consultancy fees paid to Gresham Trust Plc., the taxation treatment of
directors' emoluments, the relevance of dividend waivers and continued:

D "Mr. Carr, who became chairman of the company in October 1982,
was previously a non-executive director and is now non-executive
chairman. Mr. Soames and Mr. Korda are both engaged full time in
working for the company (ignoring the technicality that Mr. Korda
works for Bellwedge Ltd. which provides his services to the
company). Mr. Croft is in practice as a chartered accountant, but
spends at least two full days a week at the company's offices and we
understand that he is available to the company at all times for such
other time as is needed.

E "The company operates in an industry where the risks and
rewards are high. The levels of remuneration, and standards of
living, enjoyed by prominent people in the industry are often high
in relation to those enjoyed by prominent people in many other
industries. In their business relationships with companies in the
industry, the directors are dealing with prominent people in the
companies concerned.

F "It has been indicated to us that the time devoted by Mr.
Garrett to the affairs of the company in recent years was substantially
less than full time. However, Mr. Garrett had, in the past, been
active in the company's affairs and continued to be identified with
the company as a prominent member of the industry.

G "In forming a view as to whether the level of emoluments and
charges paid or payable to the directors and/or the connected
companies is reasonable, there are no absolute yardsticks and, while
members will no doubt want to form their own views they may wish
to have regard to our general comments, as set out above.

H "The arrangements for the determination of the levels of
remuneration, and the acceptance of charges from connected
companies, would appear to have been conducted with very little
formality. We understand that the present directors do not have
service agreements. Mr. Garrett had a service agreement which was
not due to expire until 31 March 1985; this was terminated on his
resignation in October 1982. As a consequence of the termination
of his service contract, the company made an ex gratia payment of
£60,000 to Mr. Garrett and agreed to indemnify him against
liabilities arising out of claims or proceedings brought against the
company or himself relating to the term of his employment
(excluding liability for taxes for which Mr. Garrett might be
personally assessable).

"There is some reference in the minutes to agreed salary levels, but a substantial part of the total remuneration has been by way of bonus and, for the most part, it is not possible to point to specific memoranda or minutes of directors' meetings confirming the levels of remuneration and charges from connected companies.

"The view has probably been taken that, because of the very few people involved, the frequent overseas travel which is necessary (making formal meetings difficult to arrange) and the ability of the directors to deal with matters on an informal basis, there is no need for formal confirmation of matters discussed informally between the directors. In any event, it can be argued that the approval of the company's accounts by the directors for submission to members constitutes implicit approval of all the amounts included in the accounts. This is not, however, a company in which all the shares are owned by the directors, nor is it a company in which all the directors have been, or have remained, in agreement with one another. In our view it is most important that there should be a proper record of directors' meetings and confirmation of approval by the directors of their remuneration, amounts payable to companies with which they are connected and other significant matters. We do not think that the lack of formal confirmations affects the validity of the charges accepted by the company but, not least in the directors' own interests, we strongly recommend that in future these matters should be properly recorded."

Mr. Potts attacked the adequacy of the report, regarding payments thus dealt with, principally on the ground that Mr. Allen had failed entirely to address himself to the question of the characterisation of the disputed payments, and had not satisfied himself on the question whether there was or was not a contractual obligation on the company to the several associated companies, and whether the latter ever did actually render any services to the company.

[His Lordship read part of the report dealing with the directors' expenses incurred in travelling and promoting the company, stated that, in relation to the impeached share transactions and the complaints made under section 42 of the Companies Act 1981, the report first of all set out the transfers in question, then stated that the transfers were approved by a directors' meeting of 19 October 1982, that the payments for the three parcels of shares bought by Brindeel were made on 1 and 14 July and 7 September 1982 which was the date when the transfers were lodged for stamping with the Inland Revenue and that the approval of the accounts of the company, for submission to members by the directors, on 18 November 1982, effectively constituted implicit approval of all the items included in the accounts and the necessary formal approval of various charges relating to the directors and connected companies might be said to be implicit in the approval by the directors of the accounts of the company. That part of the report also criticised the lack of formal procedures for the approval of expenditure but concluded that the question of whether the payments made in August 1982 were properly made by the company depended on whether or not the charges from the companies in question were proper charges for the company to accept. His Lordship continued:] The report does not in terms say that the charges made by the associated companies were proper charges. That was in a sense left for shareholders to make up

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A their minds about in the light of the general considerations set out in the earlier passage in the report which I have already quoted.

B Here too Mr. Potts criticised the report on the following grounds. The reliance on the accounts for the year ending 30 June 1982 was, he submitted, misplaced, because those accounts, even in the first edition, were not approved by the directors until 18 November 1982 and were therefore not in existence in August 1982 when the three cheques for £33,000 plus V.A.T. were signed in favour of the associated companies. Everything hinged, he submitted, on whether there was at that date an obligation to pay, a question which was assumed rather than decided in the report. So far as the executive directors were concerned the only liability of the company was under such service contracts as existed.

C As to service contracts there is no dispute on the facts. Mr. Soames had a service agreement dated 27 May 1975 which by clause (4) provided for him to receive a fixed salary of £10,000 per annum with such bonuses as the directors might determine with a proviso that in no event should the said salary and bonus payable in any one year exceed £20,000. That agreement has not been terminated. Various resolutions have been passed by the board resolving that clause (4) of the service agreement should be varied by increasing Mr. Soames' salary to figures in excess of £20,000, or that his basic emoluments or salary should be increased to figures in excess of £20,000. With effect from 1 July 1980 the operative figure under the latest such resolution is £50,000. Mr. Korda too had a letter dated 15 April 1981 setting out the terms of his employment as a full-time executive of the company at a salary of £35,000 per annum. So far as Mr. Croft is concerned there was no formal service contract but there have from time to time been board resolutions increasing his salary. The amounts paid to the executive directors and the associated companies in respect of services rendered have at all material times exceeded the amounts provided for by the relevant service agreement or board resolution and the justification for this is claimed to reside in the board's powers under the articles, and if necessary that of the company in general meeting.

F The relevant articles provide as follows. (I take the version exhibited to Mr. Croft's affidavit of 9 January 1986 as more up to date than that exhibited earlier by Mr. Hill. Only the numbering differs; the texts are the same so far as relevant.) Article 10 reads:

G "The first sentence of clause 76 of Part I of Table 'A' shall be deemed to be deleted. Each of the directors shall be paid out of the funds of the company by way of remuneration for his services as a director, at the rate of £150 per annum and the chairman shall also be paid additional remuneration for his services as chairman at the rate of £100 per annum. Such rates of remuneration may be increased by an ordinary resolution of the company."

Article 18 reads:

H "(A) The directors may from time to time appoint one or more of their body to be holder of any executive office, including the office of chairman, deputy chairman, managing or joint managing director or manager, on such terms and for such period as they may determine. . . . (C) A director appointed to any such office as is mentioned in sub-paragraph (A) of this article shall receive in addition to any remuneration to which he is or may become entitled under clause 76 of Part I of Table A hereof such additional

remuneration by way of salary, lump sum, commission or participation in profits as the directors may determine, and he or his dependants may receive from the company such pension or other gratuity benefit or retiring allowance as the directors shall think fit.” A

Article 76 of Table A provides:

“The remuneration of the directors shall from time to time be determined by the company in general meeting. Such remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.” B

I mention in passing that article 80 of Table A is not modified or excluded, and thus the business of the company is to be managed by the directors. C

Purely as a matter of construction it is in my judgment clear that the exclusion of the first sentence in article 76 of Table A contained in article 10 relates only to remuneration for activity as a director and does not operate to exclude the residual power of the company in general meeting to approve remuneration for executive services. Even on that basis, however, the actual right to remuneration, over and above what any relevant service agreement provided in relation to services rendered in the year ending 30 June 1982, would not have arisen, on any view, before the directors' meeting approving the accounts for that year in October 1982, and therefore after August 1982 when the impeached payments to the associated companies were made. So if Mr. Potts is right in his submission that only actual liabilities counted for the purpose of testing the propriety of a payment by a company in relation to section 42 of the Companies Act 1981, a breach of the section would be established at least *prima facie*. I shall return to this later. D E

Once the report was issued a revised version of the accounts for the year ending 30 June 1982 was prepared, and the annual general meeting, which had been adjourned on 10 December 1982 and once again later, was completed on 30 March 1983. At that meeting those accounts, as thus revised, were approved by a majority of the shareholders, but there is no undisputed evidence of how the majority was made up. There were many criticisms voiced at that meeting, mainly by Mr. Hill. In general terms they were principally directed either at accounting questions concerning the calculation of profits or at the level of remuneration which the executive directors were receiving. There were also criticisms, not only from Mr. Hill, of the payment of £61,000 to Cushingham Ltd. and its treatment in the accounts and in the report. It is not, however, now claimed in the action that any of the matters now complained of, regarding the year ending 30 June 1982, were not, at least in general terms, matters of which the ordinary shareholders were made aware, through the report and the revised accounts for that year. F G H

In the last two years in which there are payments which are impeached (the years ending 30 June 1983 and 1984) Mr. Soames received the whole of the payments made in connection with his services, and nothing was paid to Cushingham. On the other hand apart from the fixed director's fee of £150 and the relatively trivial payments for sickness insurance neither Mr. Croft nor Mr. Korda received salary or

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A bonus, but Billsons and Mannergrand between them received £65,150 in the first of those years and £85,150 in the second, while Bellwedge received £93,750 and £131,867 in those years respectively. There is no allegation that these sums were not revealed in the company's accounts for those years, and those accounts were passed at an annual general meeting of the company, as regards one year, with one dissentient voice (that of a representative of Messel Nominees) and, as regards the other, without dissent.

B During 1984 the company, in accordance with the relevant provision of the Companies Act 1981, purchased 44,900 issued shares, principally from members of the family of Mr. Garrett, who had died on Christmas Eve 1982, and the executive directors purchased other shareholdings from one or more of the vendors to the company totalling 12,350 shares at the same price of £9 per share. Other minority shareholders were offered the same price but, save for a Mr. Travis who sold 4,000 shares in July 1984 to Mr. Soames and Mr. Korda, again at £9 per share, no further shares changed hands, leaving the voting position as I described it at the outset.

C Over the years while the executive directors have had control of the management of the company the trend both of profits, net assets and dividends have all followed a general upward course. In the year ending 30 June 1977 there was a loss before taxation of £237,257, net current assets of £6,439 and no dividend was declared, while for the year ending 30 June 1984 the accounts show group profit on ordinary activities before taxation of £1,244,185, net current assets of £4,090,518 and a dividend of £1.50 per share was declared. On any view the business has expanded and is very substantial. This has been reflected by the trend in the price paid for shares in the company, which has risen from £3 in early 1982 to £9 in 1984. The plaintiffs' complaint is that the profits should have been larger still, if the executive directors had behaved with the same commercial enthusiasm so far as the company's earnings are concerned, but with greater legal and accountancy propriety and honesty so far as payments out by the company are concerned.

D The writ was issued on 7 February 1985 with the statement of claim endorsed upon it. The claims made in the very lengthy statement of claim can be placed in four categories.

E (1) There are claims of excessive remuneration in the strict sense of excessive payments to the person direct who is alleged to be overpaid. For example, paragraph 32 of the statement of claim avers that Mr. Soames was paid £170,239 in respect of the year ending 30 June 1984 in addition to his fixed £150 under the articles, that these payments purported to be by way of salary and bonus, that it is not admitted that any of these sums were duly paid to him, save in so far as they were authorised by his service agreement, and that at least to the extent to which £170,239 exceeded £93,543 (viz. what Mr. Soames was paid in the year ending 30 June 1982) that was in excess of a commercially fair, reasonable and proper remuneration. The conclusion is drawn that to the extent of not less than £76,696 there was an ultra vires gift by the company, that the executive directors and Mr. Carr, in procuring such payments, did not act in good faith or for the benefit of the company, but with a view to benefiting Mr. Soames, were in breach of their fiduciary duties and guilty of a fraud upon the minority shareholders, that those breaches were dishonest and that the executive directors and Mr. Carr were guilty of a conspiracy in so acting.

(2) The second category of claims made relates to payments made to one or other of the associated companies or Billsons which are claimed also to be in whole or in part payments not authorised by the board or otherwise and constituting an ultra vires gift by the company made otherwise than in good faith or for the benefit of the company but rather with a view to benefiting the executive director concerned and made in dishonest breach of fiduciary duties by way of fraud upon the minority shareholders and the product of conspiracy.

I take as an example a claim to a sum of £55,300 referred to in paragraph 31(iii) of the statement of claim. In relation to that it is pleaded by paragraph 31(i) that in respect of the financial year ending 30 June 1984 the executive directors and Mr. Carr procured the payment out of the company's funds of £85,150 to Mannergrand and/or Billson, that none of those payments was authorised by the company either by virtue of any resolution of its board of directors or otherwise, and that in relation to those payments to the extent of not less than £55,300 they were received by Mannergrand and/or Billson purportedly in respect of services allegedly rendered to the company by Mannergrand and/or Billson during that financial year but that in reality the company received no consideration or benefit of any kind for any of those payments to that extent but they amounted in substance to a gift out of the funds of the company and were ultra vires the company. That figure of £55,300, which is the part of the total of £85,150 paid out to Mannergrand and Billson, and is claimed to be thus vitiated, is arrived at by deducting from the total payments of £85,150 £29,850, which is what Mr. Croft received from the company in respect of the financial year ended 30 June 1983 and with regard to which the plaintiffs, while not admitting that they ever became payable to Mr. Croft except to the extent that a fixed salary was payable to Mr. Croft in accordance with the resolutions of the board, the last of which was for Mr. Croft's existing salary to be increased to £15,000 per annum, nevertheless do not raise a claim of an ultra vires gift or make a claim for repayment to the company. Similar claims are raised in relation to payments made to Bellwedge such as a claim to £86,868 in respect of the financial year ending 30 June 1984, being the excess over £45,000 described as the maximum total sum which Bellwedge was properly entitled to receive in respect of that year in respect of Mr. Korda's employment as a full-time executive of the company.

(3) The third category of claim is that based on infringements of section 42 of the Companies Act 1981, more especially in relation to Brindeel's purchase of 19,900 shares in the company.

(4) The fourth and last category of claim relates to expenses of the executive directors in respect of which it is alleged that the sums in question were not paid in respect of any expenses which the executive director concerned had ever incurred in rendering any services to the company. As regards those payments it is similarly alleged that they were in substance gifts, either to the executive director concerned or other persons, and therefore ultra vires the company and made by the executive directors concerned in fraudulent breach of fiduciary duties which constituted a fraud on the minority shareholders. Here again the issue is not whether the payment was made, for that is conceded, but whether it was a proper expense of the director concerned.

Finally as regards all the claims made the payments which it is sought to impeach were all made out of profits available for distribution. There

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A is no question raised at any stage of an improper return of capital or potential fraud on creditors.

There have been earlier proceedings in this court in this action. Walton J. on 27 June 1986 discharged orders made the previous year by Master Chamberlain, notably an order made on 28 March 1985 on an ex parte application by the plaintiffs whereby he gave liberty to the plaintiffs to continue the action until the conclusion of discovery and inspection of documents, on terms that the company should pay the plaintiffs' costs on a common fund basis down to that stage of the action and indemnify the plaintiffs against any liability for costs down to that stage. The decision of Walton J. is reported as *Smith v. Croft* [1986] 1 W.L.R. 580. It is primarily concerned with the costs aspects of the matter with which I am not concerned but Walton J. observed of the application before him, at p. 591:

"This is, of course, not an application to strike out the action on the grounds that it cannot be justified as a minority shareholders' action, but quite clearly the same kind of considerations apply."

Similarly it is my view that there is a very large degree of overlap in the material to be evaluated in the two applications.

D Both parties agreed in submitting to me that I was not in any way bound by Walton J.'s findings or his view of the matter in that decision, but not surprisingly the plaintiffs submitted that Walton J.'s approach was wrong and not one which I should follow, whereas the fourth and ninth defendants invited me to reach similar conclusions to those which he reached and for the same reasons. The situation is not simplified for me by the facts that Walton J. refused leave to appeal, and May L.J. subsequently gave leave to appeal on 3 July 1986, directing that the appeal be not heard until the application to strike out, that is the application before me, was dealt with. It would be wrong for me to liken the Court of Appeal to the deep blue sea and even more wrong for me to liken Walton J. to the devil, but there is very clearly rather more scope than usual for any view I express to be in conflict with more authoritative ones. However, I have come to the conclusion that I should express my own views.

I adopt the same four-fold classification as that which I have used above in setting out the nature of the claims made by the plaintiffs in the statement of claim. I emphasise that, in assessing whether or not the plaintiffs have established a prima facie case that the company is entitled to the relief claimed, I am not deciding anything conclusively. In these circumstances it is undesirable for me to say more than is strictly necessary to give my reasons for the view I have formed. In particular I propose to deal differently with the questions of law which are involved in the determination of the first question which I have to answer, namely whether the plaintiffs have established a prima facie case that the company is entitled to the relief claimed, from those which are involved in the determination of the second question which I have to answer, namely whether the plaintiffs have established a prima facie case that the action falls within the proper boundaries of the exceptions to the rule in *Foss v. Harbottle*, 2 Hare 461. The former are bound to arise in the action if it proceeds and are in some cases dependent on findings of fact to be made in the action. The latter are unlikely to arise in the action, and in so far as questions of fact arise they are collateral to the issues in the action. I therefore propose only to give my prima

facie view with regard to the former, but to decide the latter, more especially as they were very fully argued by counsel on both sides. A

I return to the four categories of claim.

(1) *Payments made to an executive director purportedly by way of remuneration*

No arguable ultra vires claim arises here in my view. I take as the fundamental rule in considering the scope of what is properly called ultra vires, by which I mean beyond the capacity of the company as opposed to that of its officers, the following passage in the judgment of Slade L.J. in *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation* [1986] Ch. 246, 295: B

“if a particular act . . . is of a category which, on the true construction of the company’s memorandum, is *capable* of being performed as reasonably incidental to the attainment or pursuit of its objects, it will not be rendered ultra vires the company merely because in a particular instance its directors, in performing the act in its name, are in truth doing so for purposes other than those set out in its memorandum. Subject to any express restrictions on the relevant power which may be contained in the memorandum, the state of mind or knowledge of the persons managing the company’s affairs or of the persons dealing with it is irrelevant in considering questions of corporate capacity.” C D

On that basis, whereas the excessive remuneration of a director may well be an abuse of power where, as here, the power to decide on remuneration is vested in the board, it cannot be ultra vires the company. *In re George Newman & Co.* [1895] 1 Ch. 674 in my judgment supports that view. E

Secondly, my impression on the evidence as to quantum is that the plaintiffs are more likely to fail than to succeed. In common with Walton J. I find the uncontradicted evidence of the very special field in which the company operates and the very high level of remuneration which obtains in that field very much more impressive than the statistics about general levels of professional remuneration which the plaintiffs adduced. I therefore do not find a prima facie case that the company is entitled to the relief claimed in this category of claim. F

(2) *Payments to associated companies or to Billson*

The question whether these transactions can properly be claimed to be ultra vires is less clear cut than in relation to payments made to an executive director purportedly by way of remuneration. But my prima facie view is that the question should be answered similarly, that is to say that this is not an ultra vires claim at all. G

On this aspect, the defendants’ case was primarily based on the necessity for a proper characterisation of the payments made to the associated company or Billson. The evidence of invoices having been rendered by the company or firm for “services rendered,” coupled with the absence of proper board resolutions of the company authorising such payments, and the absence of any evidence of a contractual link between the company and the relevant associated company or Billson, showed, it was argued, that there was no legal obligation whatever upon which the impeached payments could be based. In addition they were not shown H

A in the company's accounts as directors' remuneration. Therefore they
did not pass the characterisation test and qualify as remuneration, so as
to be intra vires the company, whether or not proper as to quantum.
Mr. Potts relied on *In re Halt Garage (1964) Ltd.* [1982] 3 All E.R.
1016. That was a case where a liquidator of a company compulsorily
wound up challenged the validity of payments purportedly by way of
B remuneration both to a husband and a wife, a Mr. and Mrs.
Charlesworth. The two of them were at all material times the only
shareholders and directors. The impeached drawings were mainly made
out of capital as opposed to profits and those in favour of the wife were
made when, because of illness, she took no active part at all in the
business. Oliver J. said in relation to the payments made to the husband,
at pp. 1038, 1039:

C "I accept entirely the submissions of counsel for the liquidator that
a gratuitous payment out of the company's capital to a member,
qua member, is unlawful and cannot stand, even if authorised by all
the shareholders. What I find difficulty in accepting is that, assuming
a sum to be genuinely paid to a director-shareholder as remuneration
under an express power, it becomes an illegal return of capital to
D him, qua member, if it does not satisfy some further test of being
paid for the benefit of the company as a corporate entity. If he
genuinely receives the money as a reward for his directorship, the
question whether the payment is beneficial to the company or not
cannot, as I see it, alter the capacity in which he receives it: see, for
instance, *Cyclists' Touring Club v. Hopkinson* [1910] 1 Ch. 179,
E 188. . . . What I think counsel's submission comes to is this, that
while the company has divisible profits remuneration may be paid
on any scale which the shareholders are prepared to sanction within
the limits of available profits, but that, as soon as there cease to be
divisible profits, it can only lawfully be paid on a scale which the
court, applying some objective standard of benefit to the company,
F considers to be reasonable. But assuming that the sum is bona fide
voted to be paid as remuneration, it seems to me that the amount,
whether it be mean or generous, must be a matter of management
for the company to determine in accordance with its constitution
which expressly authorises payment for directors' services. Share-
holders are required to be honest but, as counsel for the respondents
suggests, there is no requirement that they must be wise and it is
G not for the court to manage the company.

H "Counsel for the liquidator submits, however, that if this is right
it leads to the bizarre result that a meeting of stupid or deranged
but perfectly honest shareholders can, like Bowen L.J.'s lunatic
director, vote to themselves, qua directors, some perfectly outlandish
sum by way of remuneration and that in a subsequent winding up
the liquidator can do nothing to recover it. It seems to me that the
answer to this lies in the objective test which the court necessarily
applies. It assumes human beings to be rational and to apply
ordinary standards. In the postulated circumstances of a wholly
unreasonable payment, that might, no doubt, be prima facie
evidence of fraud, but it might also be evidence that what purported
to be remuneration was not remuneration at all but a dressed-up
gift to a shareholder out of capital, like the 'interest' payment in

[*Ridge Securities Ltd. v. Inland Revenue Commissioners* [1964] 1 W.L.R. 479] which bore no relation to the principal sums advanced. A

“This, as it seems to me, is the real question in a case such as the present. I do not think that in circumstances such as those in the instant case the authorities compel the application to the express power of a test of benefit to the company which, certainly construed as Plowman J. held that it should be construed, would be largely meaningless. The real test must, I think, be whether the transaction in question was a genuine exercise of the power. The motive is more important than the label. Those who deal with a limited company do so on the basis that its affairs will be conducted in accordance with its constitution, one of the express incidents of which is that the directors may be paid remuneration. Subject to that, they are entitled to have the capital kept intact. They have to accept the shareholders’ assessment of the scale of that remuneration, but they are entitled to assume that, whether liberal or illiberal, what is paid is genuinely remuneration and that the power is not used as a cloak for making payments out of capital to the shareholders as such.” B C

His conclusion on the facts as regards Mr. Charlesworth was as follows, at p. 1040: D

“Turning now to the facts of the instant case, it seems to me that the question which I have to determine is whether, on the evidence before me, I can say that the payments made to Mr. Charlesworth and to Mrs. Charlesworth were genuinely exercises of the company’s power to pay remuneration . . .” E

and he concluded that it was, and he said, at p. 1041:

“But I do not think that, in the absence of evidence that the payments made were patently excessive or unreasonable, the court can or should engage on a minute examination of whether it would have been more appropriate or beneficial to the company to fix the remuneration at £X rather than £Y, so long as it is satisfied that it was indeed drawn as remuneration. That is a matter left by the company’s constitution to its members. In my judgment, a general meeting was competent to sanction the payments which he”—that is Mr. Charlesworth—“in fact drew and the claim in misfeasance against Mr. Charlesworth under this head must fail.” F

And he said, in connection with Mrs. Charlesworth, the wife, at p. 1042: G

“But of course what the company’s articles authorise is the fixing of ‘remuneration,’ which I take to mean a reward for services rendered or to be rendered; and, whatever the terms of the resolutions passed and however described in the accounts or the company’s books, the real question seems to me to be whether the payments really were ‘directors’ remuneration’ or whether they were gratuitous distributions to a shareholder out of capital, dressed up as remuneration. H

“I do not think that it can be said that a director of a company cannot be rewarded as such merely because he is not active in the company’s business.”

and the rest of that paragraph was concerned with refuting that proposition. Going on at the foot of the page, he said, at pp. 1042–1043:

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A "The difficulty that I felt about this at first was that there is, in
relation to the misfeasance claim, which is the only claim with
B which I am concerned, no allegation of fraud or mala fides in
relation to these payments. The liquidator's case has been argued
throughout on the footing that they were payments of remuneration
but were also payments which could not be sanctioned by a general
meeting because it was not for the benefit of the company to
C resolve on payments on this scale. For the reasons which I have
endeavoured to state, I think that in circumstances such as exist in
this case, where payments are made under the authority of a
general meeting acting pursuant to an express power, the matter
falls to be tested by reference to the genuineness and honesty of the
transaction rather than by reference to some abstract standard of
D benefit. I do not, however, think that bona fides (in the sense of
absence of fraudulent intention) and genuineness are necessarily the
same thing. It is not suggested here that there was any intent to
defraud, but that cannot be conclusive. As Jessel M.R. remarked in
In re National Funds Assurance Co. (1878) 10 Ch.D. 118, 128, to
say that something is done bona fide is not the same thing as merely
to say that the actor had no intention to commit a fraud. The real
question is, were these payments genuinely director's remuneration?
If your intention is to make a gift out of the capital of the company,
you do not alter the nature of that by giving it another label and
calling it 'remuneration'."

E As a matter of fact he concluded that the payments to Mrs. Charlesworth
were not genuine exercises of the power to remunerate at all. He said,
at p. 1043:

"I find it really impossible on the facts to hold that the whole of
these sums, amounting to £1,500 per annum, drawn during the
years 1968-69 and 1969-70, can be treated as genuine director's
remuneration in any real sense of the term."

F On the question whether the plaintiffs establish a prima facie case that
these payments are ultra vires the company my finding is that they do
not. For the reasons already given I state my reasons shortly. First, I am
far from convinced that payments at the request of an executive director
to an outside entity such as one of the associated companies or Billson is
not capable of being a payment in respect of services physically rendered
G by the executive director concerned within the meaning of the test
quoted above from the judgment of Slade L.J. in *Rolled Steel Products
(Holdings) Ltd. v. British Steel Corporation* [1986] Ch. 246. Secondly,
the fact that in some instances part only of a series of payments is
attacked as ultra vires by the plaintiffs seems to me to lend strong
support to this view. There are formidable difficulties in classifying any
transaction as partly ultra vires. The analogy with the curate's egg seems
H to me compelling.

Thirdly, *In re Halt Garage (1964) Ltd.* [1982] 3 All E.R. 1016, was
concerned with remuneration out of capital and not with the principle to
be found in *In re George Newman & Co.* [1895] 1 Ch. 674, but in any
event it is to be noted that the payments which were found to be ultra
vires, those to Mrs. Charlesworth, were all ultra vires, and there could
scarcely have been, on Oliver J.'s reasoning, a finding that payments to
Mr. Charlesworth were partly ultra vires. Finally, if the payments to the

associated companies are found to be shams, as Mr. Potts contends, the reality thus discovered is one of the executive directors drawing remuneration for themselves or at their direction, and although that is perfectly capable of being excessive and improper it is not in itself ultra vires. In short Mr. Potts' argument in my judgment places far too much weight on the label attached to the transaction for characterisation purposes. A

As to quantum the same considerations apply as to the claims about direct remuneration, which I dealt with earlier, but there is no doubt but that the plaintiffs are on stronger ground in criticising the mechanics of what was done. In particular, as regards the payments to Cushingham in the years ending 30 June 1981 and 1982, I find there was a prima facie case shown of irregularity not fully cured by the subsequent adoption of the accounts by the annual general meeting, at which the accounts, which should have disclosed those payments, were adopted. B C

(3) *Claims under section 42 of the Companies Act 1981*

Section 42 provides:

"(1) Subject to the following provisions of this section and sections 43 and 44 of this Act, where a person is acquiring or is proposing to acquire any shares in a company it shall not be lawful for the company or any of its subsidiaries to give financial assistance directly or indirectly for the purpose of that acquisition before or at the same time as the acquisition takes place. (2) Subject to the following provisions of this section and sections 43 and 44 of this Act, where a person has acquired any shares in a company and any liability has been incurred (by that or any other person) for the purpose of that acquisition it shall not be lawful for the company or any of its subsidiaries to give any financial assistance directly or indirectly for the purpose of reducing or discharging the liability so incurred." D E

It is in relation to the latter subsection that it is claimed that financial assistance was given to Brindeel to the extent of the £28,000 loans made by associated companies to it. Financial assistance is defined by subsection (8): F

"In this section 'financial assistance' means—(a) financial assistance given by way of gift; . . . (d) any other financial assistance given by a company the net assets of which are thereby reduced to a material extent or which has no net assets. In this subsection 'net assets' has the same meaning as it has for the purposes of the 1980 Act." G

The references to the purposes of the Companies Act 1980 is something of a trap for the unwary because it is a reference to the purposes of the Act of 1980 as amended by the Act of 1981. Section 87(4) of the Act of 1980 as originally enacted and so far as relevant read:

"For the purposes of this Act—. . . (c) the net assets of a company are the aggregate of its assets less the aggregate of its liabilities; and in paragraph (c) above 'liabilities' includes any provision (within the meaning of Schedule 8 to the 1948 Act) except to the extent that that provision is taken into account in calculating the value of any asset of the company." H

But paragraph 62(b) of Schedule 3 to the Companies Act 1981 provided for the substitution for the words from "(within the meaning of" to the

A end of section 87(4) the words “for liabilities or charges (within the meaning of paragraph 88 of Schedule 8 to the 1948 Act).” It will come as no surprise that Schedule 8 of the Act of 1948 only acquired a paragraph 88 at all by the operation of the Companies Act 1981, itself (see section 1(2) and Schedule 1), but if one assembles all the pieces of the jigsaw the result is I think as follows:

B “For the purposes of this Act (c) the net assets of a company are the aggregate of its assets less the aggregate of its liabilities and in paragraph (c) above liabilities includes any amount retained as reasonably necessary for the purpose of providing for any liability or loss which is either likely to be incurred or certain to be incurred but uncertain as to amount or as to the date on which it will arise.”

C There was some discussion in argument why this circuitous definition of “liabilities” was adopted in preference to the apparently identical definition of “liabilities” in section 42(11) which only applies for the limited purposes of section 42(7). It appears that the difference between the two subsections (8) and (11) in relation to net assets resides in the different definitions to which they lead as regards “net assets” rather than “liabilities,” but I am not directly concerned with that, there being
D no doubt but that section 42(7), which only applies to public companies, is irrelevant to the company here.

The question which therefore emerges is whether the admitted payments to the associated companies of £33,000 plus V.A.T. thereon were payments of amounts retained as reasonably necessary for the purpose of providing for a liability likely to be incurred, that is to say the remuneration of the relevant executive director. The time at which
E this has to be assessed is early August. That was after the end of the financial year in relation to which it is claimed that the remuneration was paid (viz. that ending 30 June 1982) so that the general financial picture of the result of the previous year’s activities would be available but well before the accounts for that year were drawn up, let alone approved by the directors, an event which in relation to the first edition
F of these accounts did not occur until November 1982. I find that a prima facie case of infringement of section 42 of the Companies Act 1981 is established primarily because it does not seem to me to be shown that these were amounts retained as reasonably necessary for the purpose of providing for the liability likely to be incurred of paying directors’ remuneration. I say no more than that because I am not deciding the point.

G On that footing there is no doubt that the claim is one in respect of an ultra vires transaction, for it is conceded that a transaction in breach of section 42 of the Companies Act 1981 is ultra vires as well as illegal and not capable of ratification.

(4) *Claims in relation to directors’ expenses*

H I do not consider that there is an ultra vires claim established prima facie here. My reasons are similar to those in relation to direct remuneration, the first category, and as to quantum I regard the report as rebutting a prima facie case in relation to matters arising before the date of the report, for in this instance, unlike the claims under section 42 of the Companies Act 1981, the report does seem to me to state a definite opinion which is based on wide experience and which I am content to adopt for the purposes of a prima facie view. For that limited

purpose I would also be prepared to regard the report as a general guide, even as regards expenses incurred after the time covered by the report itself. A

The question now arises, more especially in relation to claims under section 42 of the Companies Act 1981 whether the plaintiffs have established a prima facie case that the action falls within the proper boundaries of the exceptions to the rule in *Foss v. Harbottle*, 2 Hare 461. The same question would arise if the view I have expressed regarding the other three categories of claim is wrong. B

In my judgment the arguments addressed to me on this aspect of the case raise two questions of law and one of mixed law and fact before an answer that the action does not fall within the proper boundaries of the exception to the rule in *Foss v. Harbottle* could be given. The questions of law can be formulated as follows. C

(1) Is a minority shareholder always entitled as of right to bring and prosecute an action for the company to recover money paid away in the course of a transaction which was ultra vires the company or is the prosecution of such an action susceptible of coming within the rule in *Foss v. Harbottle* so that there can be circumstances in which the court will not allow it to continue. D

(2) If the latter view is the correct one in relation to those categories of claims based on ultra vires transactions, and also in all cases of minority shareholders' actions to recover money for the company in respect of acts which constitute a fraud on the minority, will the court pay regard to the views of the majority of shareholders who are independent of the defendants to the action on the question whether the action should proceed? E

This process of ascertaining the views of the shareholders who are independent of the defendants to the action was described by Mr. Potts as a secondary counting of heads, an expression which did not much commend itself to Mr. Aldous but goes some way towards explaining what is involved. In terms of the present case the question is whether the court should have regard to the views of Wren Trust, Georgian Investments and Sir Reginald Sheffield, who do not want the action to continue, or is it conclusive that the defendants have voting control so that if the plaintiffs show a prima facie case of fraud on the minority they have a right to prosecute to the end an action for the company to recover in respect of the loss it has suffered, regardless of the views of the rest of the minority. Another way of putting the question is to ask whether if a minority has been the victim of a fraud entitling the company in which they are shareholders to financial redress, the majority within that minority can prevent the minority within that minority from prosecuting the action for redress. The usual reason in practice for wanting to abandon such an action is that there is far more to lose financially by prosecuting the right to redress than by abandoning or not pursuing it, and that view will be reinforced in the minds of those who wish to abandon the claim if their opinion is that it is a bad claim anyway. F G H

The third question which arises is whether in this case Wren Trust should be treated as independent, if the views of an independent majority are relevant? That is a question of fact. But it involves a question of law, namely what constitutes independence for this purpose?

Upon the first question of law which arises, in my judgment the solution is to be found by a correct analysis of the rights which the

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A minority shareholder is seeking to exercise or enforce in relation to the result of an ultra vires transaction. There was no dispute before me but that any individual shareholder, be he in a minority or not, has a personal right to apply to the court to restrain a threatened action which if carried out would be ultra vires. Neither the right to object to such an action nor the shareholder's locus standi to bring proceedings admits of any doubt. The rule in *Foss v. Harbottle* poses no obstacle, because neither of the two bases for the rule is applicable, that is to say the matter is not, by definition, a mere question of internal management nor is the transaction capable of ratification by or on behalf of the company. I was referred to two general statements of the rule. The first is in *Burland v. Earle* [1902] A.C. 83, where Lord Davey said, at p. 93:

"It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well known cases of *Foss v. Harbottle*, 2 Hare 461 and *Mozley v. Alston* (1847) 1 Ph. 790, and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraph Works* (1874) L.R. 9 Ch.App. 350. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L.J. in *MacDougall v. Gardiner* (1875) 1 Ch.D. 13, 25.

"There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject matter of the vote. This is shown by the case before this board of the *North-West Transportation Co.*

Ltd. v. Beatty (1887) 12 App.Cas. 589. In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid, notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained."

A

The other general statement is in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (No. 2) [1982] Ch. 204, 210 where a slightly condensed version of a passage from Jenkins L.J.'s judgment in *Edwards v. Halliwell* [1950] 2 All E.R. 1064, 1066 reads:

B

"The classic definition of the rule in *Foss v. Harbottle* is stated in the judgment of Jenkins L.J. in *Edwards v. Halliwell* [1950] 2 All E.R. 1064 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, *cadit quaestio*; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is *ultra vires* the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

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I was also referred by both sides to two articles by Mr. Wedderburn on "Shareholders' rights and the rule in *Foss v. Harbottle*" [1957] C.L.J. 194, and [1958] C.L.J. 93, to which I should like to acknowledge my indebtedness.

I should also say at this stage that I have not in this judgment used the expressions "derivative" or "corporate" actions, terms which are often used to describe certain categories of minority shareholders' actions. There seemed to me to be a risk of apparent prejudging of issues by the use of such terminology.

G

The difficulty arises in this case when one considers not the restraint of an illegal or *ultra vires* transaction but the recovery on behalf of the company of money or property which the company is entitled to claim as the result of the *ultra vires* transaction. The submissions made to me were as follows: Mr. Aldous, with Mr. Oliver's support, drew a distinction on behalf of the fourth and ninth defendants between those cases, on the one hand, where individual shareholders, despite the rule in *Foss v. Harbottle*, can bring a personal or representative action to enforce contractual rights that the memorandum and articles be observed,

H

- A such rights not being removable by simple majority votes, and, on the other hand, those cases where what is sought to be done is to bring an action in respect of loss already sustained by a company where the right of action is vested in the company, and an individual shareholder has, it is submitted, no personal right of action at all but can start an action on behalf of the company if, but only if, he can bring himself within one or other of two well established exceptions to the rule in *Foss v. Harbottle*.
- B These are (1) Where the loss is attributable to an illegal or ultra vires act, and (2) Where the transaction complained of constitutes a fraud on the minority shareholders.

- They further submitted that even where there is a right to start an action to enforce a right of the company because one or other of the exceptions to the rule in *Foss v. Harbottle* is applicable, a company acting either through an independent board of directors or pursuant to a resolution passed by a majority of independent shareholders can always compromise or waive the cause of action vested in it so long as the decision in question to compromise or waive is taken by the persons concerned bona fide and for reasons genuinely believed to be in the best interests of the company. If such a decision is taken any action started on behalf of the company by a minority shareholder should not be
- C
- D allowed to proceed.

- Mr. Potts, on the other hand, drew a distinction between those cases where the minority shareholder on behalf of the company was seeking to rescind a transaction carried out ultra vires and those where, without seeking to rescind the ultra vires transaction, the minority shareholder was seeking to recover damages or other compensation on behalf of the company. In the former Mr. Potts submitted the minority shareholder was entirely outside the rule in *Foss v. Harbottle* and had an indefeasible right to bring and prosecute the proceedings. There was, he submitted, no difference in principle between his right to bring such proceedings for rescission and recoupment and his right to restrain a threatened ultra vires transaction: both were personal rights vested in the individual shareholder which it was entirely within his power to bring or not. He
- E
- F also added that in cases where the plaintiffs rely on ultra vires transactions it is not necessary to prove that the defendants have control of the company.

- This latter point I can dispose of at once by accepting it. By itself, it does not advance the matter much. Mr. Potts did not contend that it was never possible for a company validly to abandon, compromise or decide temporarily not to pursue a right of action for damages vested in it as a result of an ultra vires transaction effected on its behalf, but he submitted that the arguments advanced by the defendants involved denying the ultra vires doctrine altogether and that exactly the same wrong was involved in relation to a past ultra vires transaction as in relation to a prospective one, so that if the defendants' arguments based on a company's ability to release its cause of action in respect of a past ultra vires transaction were well founded, the same arguments would
- G
- H apply to a prospective ultra vires transaction, where it is common ground the minority shareholder has a right of action which the company cannot control.

Treating the matter as a question of principle for the moment, when a minority shareholder seeks to enforce a right of the company to claim compensation for a past ultra vires transaction there are two quite separate rights involved. First, there is the minority shareholder's right

to bring proceedings at all and secondly, there is the right of recovery which belongs to the company but is permitted to be asserted on its behalf by the minority shareholder. The passage I have quoted from Lord Davey's speech in *Burland v. Earle* [1902] A.C. 83, 93 makes it clear that the bringing of an action in the name of the company is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress. That is an echo of what was said in one of the two cases often cited as the foundation for these doctrines, namely *Mozley v. Alston* (1847) 1 Ph. 790, 801, where Lord Cottenham L.C. said of a bill alleging that a large majority of the shareholders were of the same opinion as the plaintiffs:

"to allow, under such circumstances, a bill to be filed by some shareholders on behalf of themselves and others, would be to admit a form of pleading which was originally introduced on the ground of necessity alone, to a case in which no such necessity exists."

True it is the Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (No. 2) [1982] Ch. 204, 221 said that they were not convinced that it was a practical test to adopt to hold, as Vinelott J. had done at first instance, that there was an exception to the rule in *Foss v. Harbottle* wherever the justice of the case so requires. But the fact that such a yardstick would or might be unsatisfactory because it does not give a practical guide to the limits of the rule and its exceptions does not detract from the fact that the whole doctrine whereby a minority shareholder is permitted to assert claims on behalf of the company is rooted in a procedural expedient and adopted to prevent a wrong going without redress. Where what is sought is compensation for the company for loss caused by ultra vires transactions the wrong, in my judgment, is a wrong to the company, which has the substantive right to redress. Where the minority shareholder is seeking to prevent an ultra vires transaction or otherwise seeking to enforce his personal substantive rights, the wrong which needs redress is the minority shareholder's wrong.

The peculiar status of the minority shareholder in such actions is also illustrated by the judgments in the Court of Appeal in *Towers v. African Tug Co.* [1904] 1 Ch. 558, where a company had declared and paid illegally a dividend out of capital and two shareholders who had themselves received their portion of the illegal dividend were held to be disentitled to bring an action on behalf of the company for repayment by the directors. Vaughan Williams L.J. said, at p. 566:

"In that state of things, what ought to be done with this action? There is no doubt that the payment of this interim dividend was an ultra vires payment. I start with the assumption one is bound to make, that if an act is done by a company which is ultra vires, no confirmation by shareholders—not even by every member of the company—can convert that which was ultra vires into something intra vires: it always must be ultra vires. As is pointed out in one or two of the cases, the result of that is that if the company are plaintiffs, no amount of acquiescence or resolutions by the shareholders can form an answer to the action by the company for the reinstatement of things in the position in which they would have been but for the ultra vires act complained of. But, to my mind, it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. I am assuming this case to

A be one of those in which the facts have been such that an individual
shareholder ought to be able to sue in a representative action for
the purpose of preventing acts being done in reference to the
company in which the shareholders are interested, and which might
damnify the company by reason of those acts being ultra vires. I
assume that an action not only to prevent ultra vires acts in the
future but also to remedy acts that have been done ultra vires is an
B action which can be brought in the form in which this action is
brought. But although that is so, my own opinion is that this is a
kind of action which has to be brought by a plaintiff personally. It is
an action which he cannot bring unless he has an interest; it is an
action which a stranger could not bring."

C Stirling L.J. said, at p. 569:

"It is proved beyond all contradiction by documents under the hand
of Mr. Towers that he was perfectly well aware of the circumstances
in which the dividend was paid. It is true that Mr. Wedlake was not
in the same position as Mr. Towers; but I think, having regard to
the admissions which he made by not denying the allegation in the
counterclaim—that he received his dividend 'with full notice of all
D the facts relating thereto'—and to the fact of his having submitted
to judgment against himself on that footing, and also having regard
to the high probabilities of the case, that, inasmuch as he did not
choose to go into the box and deny it, we ought to assume that he,
like his partner Mr. Towers, knew the circumstances in which the
dividend was declared.

E "Now the action is one by the plaintiffs on behalf of themselves
and all other shareholders against the company; originally all the
shareholders were not made parties, but the other shareholders
were afterwards, at their own request, made defendants, so that
now we have here all the shareholders of the company. I think this
is a form of action which in certain circumstances may be maintained.
That a shareholder who had received a dividend, without knowing
F anything of the illegality of it, might maintain such an action I do
not doubt. Whether in some circumstances a shareholder so suing
ought not to return what he had received in respect of dividend is
another question. Why is it that this form of action is allowed?
Prima facie the proper plaintiff, where it is sought to bring back the
property of the company into its own coffers, is the company itself.
G But there are exceptions to that rule; and what is the reason of the
exceptions? Sir George Jessel M.R. in the case which has been
referred to of *Russell v. Wakefield Waterworks Co.* (1875) L.R. 20
Eq. 474, 480, says this: 'The exceptions turn very much on the
necessity of the case; that is, the necessity for the court doing
justice.'"

H Cozens-Hardy L.J. said, at p. 571:

"An action in respect of or arising out of an ultra vires transaction
ought properly to be brought by the company; but it has long been
well established that there are cases in which such an action may be
maintained by a shareholder suing on behalf of himself and all other
shareholders against the company as defendants. I will not pause to
consider under what particular circumstances such an action may be
maintained, but I assume that this is one of those cases in which

such an action may be maintained—I mean in point of form. But I think it is equally clear that the action cannot be maintained by a common informer. A plaintiff in an action in this form must be a person who is really interested. When you get that fact clearly established it seems to me impossible to avoid taking the next step—that all personal objections against the individual plaintiff must be gone into and considered before relief can be granted.”

That decision illustrates the dual nature of the rights involved. The minority shareholder's locus standi as someone with a real interest greater than that of a common informer is defeasible by showing a personal disability to sue such as was present in *Towers v. African Tug Co.* But as Lord Davey said in *Burland v. Earle* [1902] A.C. 83, 93 the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff. And from that it follows in my judgment that if there is a valid reason why the company should not sue it will equally prevent the minority shareholder from suing on its behalf. He is therefore liable to be defeated on two points, first by any ground preventing him from exercising his procedural remedy, and secondly by any ground preventing the company from exercising its substantive right. Conversely, however, he is able to assert a cause of action which arose before he became a shareholder because it is the company's and not his substantive right that is being enforced: *Seaton v. Grant* (1867) L.R. 2 Ch.App. 459.

Where ultra vires transactions are involved the number of grounds upon which the company can be debarred from suing is limited. In particular it was not argued that ratification of the ultra vires transaction, by however large a majority of shareholders, could prevent the company from suing. There is, however, a clear difference in principle between ratifying what has been invalidly done in the past and abandoning, compromising or not pursuing rights of action arising out of a past ultra vires transaction, and I see no reason in principle why in appropriate circumstances the latter should not intervene to prevent the prosecution of a suit on behalf of the company in relation to such rights of action.

Conversely I am not persuaded of the validity of the criterion suggested by Mr. Potts for separating actions brought by minority shareholders to recover property for the company into those where it is sought to rescind the relevant ultra vires transaction or otherwise have it set aside, on the one hand, and those where that transaction is not sought to be set aside but damages or other compensation is claimed, on the other hand. The former according to Mr. Potts' argument fall entirely outside the rule in *Foss v. Harbottle*, while the latter are, he accepts, within its potential ambit. This distinction in my judgment places too much emphasis on the nature of the remedy sought rather than the substantive right and the legal person in whom it is beneficially vested.

So much for the principles which seem to me to apply to the first legal question which falls for determination. Is there any authority which precludes me from giving effect to the view which I have expressed? I was referred to a very large number of authorities and I see no useful purpose in going through them all. There are certain discernible categories.

(1) One category is where articles of association require a particular type of majority such as a special resolution and it has been held that a

- A simple majority incapable of constituting such a majority cannot achieve indirectly what it is forbidden to achieve directly. An example is *Baillie v. Oriental Telephone and Electric Co. Ltd.* [1915] 1 Ch. 503, 511 where in the course of argument in relation to a submission by counsel that "If the majority wish an action to be brought and it is found that the special resolutions were improperly obtained, then they would be nullified," Swinfen Eady L.J. said: "It might be opposed by a bare majority, with the result that a bare majority might supersede the necessity for a special resolution."

In his judgment he said, at p. 518:

"It was then contended that the plaintiff is not entitled to sue. The plaintiff's counsel urged that if this as a special resolution was invalidly passed, how is it to be impeached if the plaintiff cannot sue; how can the question of illegality be raised? Suppose he called a meeting and the majority of the shareholders were to say 'We are content with the present position, and we will not raise any question,' can it be said that by a side wind, as it were, not being able to pass a valid special resolution, they could pass an invalid one and then by a bare majority say we will not allow any proceedings to be taken? In my opinion they cannot do that."

That type of case is concerned with preventing the indirect achievement of an unlawful object which raises different considerations from the recovery of compensation for past illegalities.

(2) Another category consists of cases on demurrer, mostly in the middle and last part of the 19th century but including *Birch v. Sullivan* [1957] 1 W.L.R. 1247, although that case was concerned with misfeasance rather than ultra vires. Cases on demurrer are necessarily concerned with the locus standi of the plaintiff to bring the proceedings in question rather than the question whether a properly constituted action should be allowed to proceed. The cases principally relied on by Mr. Potts in this category included *Foss v. Harbottle*, 2 Hare 461 itself, where there were in fact two complaints made by the plaintiffs, one based on improper intra vires acts and the other on ultra vires activities described by Wigram V.-C., at p. 493, as mortgaging in a manner not authorised by the powers of the Act, and of which he said,

"This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissenting voice is raised against it."

The first complaint is the context for the very famous statement of basic principle which has given the name of the case to the rule which has been applied on innumerable subsequent occasions.

Mr. Potts relied on this decision as supporting his submission that where there is no claim for rescission of an ultra vires transaction a minority shareholder may be debarred from bringing an action on behalf of the company and that Wigram V.-C. did not deal with what his position would have been had such a claim been made. I accept that submission which seems to me substantiated by the passage, 2 Hare 461, 504, 505:

"The case made with regard to these mortgages or incumbrances is, that they were executed in violation of the provisions of the Act. The mortgagees are not defendants to the bill, nor does the bill seek to avoid the security itself, if it could be avoided, on which I give no opinion. The bill prays inquiries with a view to proceedings

being taken aliunde to set aside these transactions against the mortgagees. The object of this bill against the defendants is to make them individually and personally responsible to the extent of the injury alleged to have been received by the corporation, from the making of the mortgages. Whatever the case might be, if the object of the suit was to rescind these transactions, and the allegations in the bill showed that justice could not be done to the shareholders without allowing two to sue on behalf of themselves and others, very different considerations arise in a case like the present, in which the consequences only of the alleged illegal acts are sought to be visited personally upon the directors. The money forming the consideration for the mortgages was received, and was expended in, or partly in, the transactions which are the subject of the first ground of complaint. Upon this, one question appears to me to be, whether the company could confirm the former transactions, take the benefit of the money that has been raised, and yet, as against the directors personally, complain of the acts which they have done, by means whereof the company obtains that benefit which I suppose to have been admitted and adopted by such confirmation. I think it would not be open to the company to do this; and my opinion already expressed on the first point is, that the transactions which constitute the first ground of complaint may possibly be beneficial to the company, and may be so regarded by the proprietors, and admit of confirmation. I am of opinion that this question,—the question of confirmation or avoidance,—cannot properly be litigated upon this record, regard being had to the existing state and powers of the corporation, and that therefore that part of the bill which seeks to visit the directors personally with the consequences of the impeached mortgages and charges, the benefit of which the company enjoys, is in the same predicament as that which relates to the other subjects of complaint. Both questions stand on the same ground, and, for the reasons which I stated in considering the former point, these demurrers must be allowed.”

The decision shows quite clearly that similar considerations are capable of applying to an action based on an ultra vires transaction as to a claim based on breach of duty so that the rule in *Foss v. Harbottle* can apply to the former. It is not in any way conclusive on the nature of the minority shareholder's right to bring proceedings in respect of compensation for an ultra vires transaction.

In *Salomons v. Laing* (1850) 12 Beav. 377 the side note reads:

“The directors of one incorporated railway company paid over its funds to another railway company, for purposes wholly unauthorised; and the latter received them with knowledge of the breach of trust. *Held*, on demurrer, that the second company were properly made parties to a suit to bring back the fund; and, secondly, that, in such a case, an individual shareholder in the first company might sue the second company ‘on behalf’ etc., without alleging that the corporation of which he was a member had refused to sue.”

The plaintiff's right to sue the directors and the South Coast Co., the first company referred to, was conceded and the only matters on which issue was joined on demurrer was whether the Portsmouth company, the second company referred to, could properly be joined as defendant and

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A whether the plaintiff could sue them direct without proving that he had previously attempted to get the concurrence of the South Coast company to sue, both of which were answered in the affirmative. At its highest the case proves no more than that a minority shareholder has a locus standi to bring an action for recovery of property paid out of a company in an ultra vires transaction and is not obliged to prove that an unsuccessful attempt to get the company to sue has been made. Neither

B of these is disputed.

Bagshaw v. Eastern Union Railway Co. (1849) 7 Hare 114 was another case on demurrer but, contrary to the side note, was concerned not only with a threatened ultra vires application of funds but also with a past misapplication. Here again though, in my judgment, all that was decided was the plaintiff's locus standi to sue in respect of both past and threatened ultra vires activities. Wigram V.-C. said, at p. 129:

C "No majority of the shareholders, however large, could sanction the misapplication of this portion of the capital. A single dissenting voice would frustrate the wishes of the majority. Indeed, in strictness, even unanimity would not make the act lawful. This appears to me to take it out of the case of *Foss v. Harbottle*, 2 Hare 461 to which I was referred. That case does not, I apprehend, upon

D this point, go further than this: that if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act, cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains."

E

Mr. Potts submitted that the passage showed that the rule in *Foss v. Harbottle* was not concerned with ultra vires transactions. That, in my judgment, is far too wide a proposition. In *Foss v. Harbottle* itself, as Mr. Potts rightly pointed out, Wigram V.-C. himself dealt in the same way with claims based both on intra vires but improper transactions and on ultra vires transactions. Certainly *Bagshaw's* case, 7 Hare 114 is authority for the proposition that a minority shareholder can in appropriate circumstances have a sufficient interest to bring an action for relief with regard to past as well as future apprehended ultra vires transactions. The fact that both past and future acts were involved might well constitute appropriate circumstances.

G *Russell v. Wakefield Waterworks Co.* (1875) L.R. 20 Eq. 474 was a decision of Sir George Jessel M.R. that was concerned with recovery of some £5,500 claimed by plaintiff minority shareholders to have been paid out ultra vires to the promoters of a competing undertaking to dissuade them from promoting a bill in Parliament in competition with the company's undertaking. In terms the decision allowed a demurrer on the grounds that ultra vires was inadequately pleaded and there was no sufficient allegation that there was a reason preventing the company itself from suing. Jessel M.R. also examined what he described as the exceptions to the rule laid down in *Foss v. Harbottle*, and said, at p. 480: "the exceptions depend very much on the necessity of the case, that is the necessity for the court doing justice."

H

He identified two such exceptions. One he described, at p. 481, as cases "in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something

which is beyond the powers of the corporation.” He went on to point out that this may involve the joinder of a non-corporator who is a party to the ultra vires transaction, and that in turn may lead to the action embracing the recovery from that third party of money paid under such an ultra vires agreement. He continued, at pp. 481–482:

“If the detainer or holder of the money or property, that is, the second corporation or other person, is already a party, and a necessary party, to the suit, it would be indeed a lame and halting conclusion if the court were to say it could [not] do justice in a suit so framed by ordering the money to be returned or the property restored.”—It is perfectly clear that the word “not” has dropped out between “could” and “do.” The judgment continues—“It is a necessary incident to the first part of the relief which can be obtained by individual corporators, and will do complete justice on each side, and that has always been the practice of the court. Therefore, in a case so framed there is no objection to a suit by an individual corporator to recover from another corporator, or from any other persons being strangers to this corporation, the money or property so improperly obtained. But that is not the only case. Any other case in which the claims of justice require it is within the exception.”

If anything that decision seems to me to assist the defendants, because in relation to the ultra vires aspect of the matter it emphasises the necessity of flexibility to attain justice rather than the imposition of hard and fast rules.

In my judgment the above cases on demurrer establish that a minority shareholder can, as Mr. Potts argued, have a locus standi to bring an action to recover on behalf of a company property or money transferred or paid in an ultra vires transaction and that it is not a necessary averment that control is vested in individual defendants so as to prevent the company from bringing the proceedings. I am not persuaded that it follows from that that the minority shareholder necessarily has an individual and indefeasible right to prosecute that action on the company’s behalf.

(3) A third category of case which I only mention to dispose of is made up of matters which the court concludes are mere matters of internal management. *MacDougall v. Gardiner* (1875) 1 Ch.D. 13 is an example. They are of no assistance to the present problem.

(4) A further category are those cases where an individual member either of a company or a trade union has been held to be entitled to restrain illegal activity by the company or association to which he belongs. That in itself is not a subject of dispute. *Simpson v. Westminster Palace Hotel Co.* (1860) 8 H.L.Cas. 712 is House of Lords authority if it be needed. Of more help, however, are some modern trade union cases. Thus in *Edwards v. Halliwell* [1950] 2 All E.R. 1064, from which I have already cited the general statement by Jenkins L.J. quoted by the Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (No. 2) [1982] Ch. 204 there is what seems to me a revealing contrast in the treatment by Jenkins L.J., at p. 1067, on the one hand, of acts complained of which are wholly ultra vires the company and therefore incapable of confirmation by a majority so that they constitute exceptions to the general ambit of the rule in *Foss v. Harbottle*, 2 Hare 461 and, on

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A the other hand, cases such as *Edwards v. Halliwell* [1950] 2 All E.R. 1064 itself as to which Jenkins L.J. said, at p. 1067:

B “In my judgment, this is a case of a kind which is not even within the general ambit of the rule. It is not a case where what is complained of is a wrong done to the union, a matter in respect of which the cause of action would primarily and properly belong to the union. It is a case in which certain members of a trade union complain that the union, acting through the delegate meeting and the executive council in breach of the rules by which the union and every member of the union are bound, has invaded the individual rights of the complainant members, who are entitled to maintain themselves in full membership with all the rights and privileges appertaining to that status so long as they pay contributions in accordance with the tables of contributions as they stood before the purported alterations of 1943, unless and until the scale of contributions is validly altered by the prescribed majority obtained on a ballot vote. Those rights, these members claim, have been invaded. The gist of the case is that the personal and individual rights of membership of each of them have been invaded by a purported, but invalid, alteration of the tables of contributions. In those circumstances, it seems to me the rule in *Foss v. Harbottle* has no application at all, for the individual members who are suing sue, not in the right of the union, but in their own right to protect from invasion their own individual rights as members.”

E The boundary there seems to me very clearly drawn between suits in the right of the union and suits to protect the individual rights of members. The former are capable of coming within the rule in *Foss v. Harbottle*; the latter are not.

F (5) Another category is to be found where the constitution of a corporation has been sought to be varied in a manner which is ultra vires, e.g. by amalgamation. *Clinch v. Financial Corporation* (1868) L.R. 5 Eq. 450, affirmed by the Court of Appeal at L.R. 4 Ch.App. 117, is an example of such a case, but the shareholder's right in such a case was described by Lord Cairns L.C., at p. 122, as a right to bring a suit to arrest a contract on the ground that it was in the eye of the court beneficial to all the shareholders to do so. Similarly *Wood V.-C.*, who heard the case at first instance as well as in the Court of Appeal, said that every shareholder is supposed to have a common interest with the plaintiff in varying any arrangement that may have been entered into ultra vires. The fact that even such ultra vires arrangements are capable of being within the ambit of the rule in *Foss v. Harbottle* is shown very clearly by *Gray v. Lewis* (1873) L.R. 8 Ch.App. 1035 chosen by the court in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204, 217–219, as a simple application of the first aspect of the rule in *Foss v. Harbottle*, viz. that a company is the proper plaintiff to sue for redress for moneys due to it.

H I turn now to a modern case from which I have derived much assistance. This is *Taylor v. National Union of Mineworkers (Derbyshire Area)* [1985] B.C.L.C. 237. The headnote reads:

“In September 1984 the plaintiffs, who were members of the Derbyshire Area of the National Union of Mineworkers (the Derbyshire union), were successful in obtaining, inter alia, a declaration that a strike called by their union (the Derbyshire

union) and the National Union of Mineworkers (N.U.M.) was unlawful. The plaintiffs sought in the present proceedings by way of summary judgment an order restraining the defendants, who were the Derbyshire union and some of its officers, from using the funds of the Derbyshire union for the purpose of a strike called by the N.U.M. and the Derbyshire union, and requiring those defendants who were officers of the Derbyshire union to restore to the union funds which had been used for this purpose.

“*Held*—Injunction granted: summary judgment on the monetary claim refused. Where a member of a union commenced an action on behalf of the union, the union would be treated as being analogous to a company and the member’s standing to bring the action would be determined on the same principles as those applicable to an action brought by a shareholder on behalf of a company. These principles did not prevent an individual member from maintaining an action on behalf of the union against its officers where it was clear that the officers had made an ultra vires application of the funds which could not be ratified by the members. In such an action by a member of the union against its officers for the ultra vires misapplication of the union’s funds, the court could order the officers responsible to restore the funds as such misapplication would constitute a breach of fiduciary duty. On the facts, it was clear that the Derbyshire union’s funds had been used to support the strike and there was no reasonably arguable case that this payment was authorised by the union’s rules or could be ratified by the members of the union. Accordingly, as a matter of principle, the plaintiffs were entitled to the order which they sought. However, although the making of the payment could not be ratified by the members of the union, the members could resolve to take no action to remedy the wrong done to the union provided that such resolution was made in good faith and for the benefit of the union. As there was evidence to suggest that the members might so resolve, and as the circumstances in this case were otherwise exceptional, the court would not grant summary judgment on the monetary claims.”

Then there is a statement that an injunction to prevent future misapplications was available to them. Vinelott J. said, at p. 241:

“The first question is whether the plaintiffs are in a position to maintain an action against the individual defendants in effect on behalf of the Derbyshire union whose members have not been consulted on the question whether proceedings should be brought against the individual defendants. A great wealth of authority has been cited on this issue. The position, in my view, is not open to serious doubt.”

He then proceeded to review the authorities, and said, at p. 246:

“The principles which emerge are, I think, clear. *Foss v. Harbottle* applies to a union but does not bar the right of an individual to maintain an action joining the union and its officers as defendants and claiming that a particular application by the officers was ultra vires and an injunction to restrain further application of the funds of the union for the same purposes and requiring the officers to make good the loss to the union. Being ultra vires the misapplication cannot be ratified by any majority of the members.

A “The central issue in this case is whether the payments, amounting to over £1.7 million, were misapplications of the funds of the union within the exception to the rule in *Foss v. Harbottle*.”

He answered that question, after a review of the authorities and facts, at p. 254:

B “If that is the right conclusion, then it seems to me that it must follow that any payment to a member on unofficial strike whether by way of weekly allowance or by way of intermittent payment or by meeting expenses directly or in any other way with a view to making good the wages lost by the member on unofficial strike must be equally impermissible. So also must payments to pickets be impermissible. . . . I find myself therefore driven to the conclusion, C uncomfortable though it is, that once it is accepted that the payments in question were made, as they admittedly were made, to pickets and otherwise in furtherance of the strike or for the relief of miners on unofficial strike from hardship caused by the stoppage of work and wages, the conclusions that follow inevitably are first that the payments were beyond the powers of the union; second, that D the two officers, the second and third defendants, who made or sanctioned the payments, are liable to reimburse the union; third, that the plaintiffs are entitled to maintain this action; and fourth, that the misapplication of the union’s fund cannot now be ratified by any majority of the members, however large. Should I therefore, make the order which is sought?

E “I have come to the conclusion that I should not. My reasons are shortly as follows. Although the misapplication of the funds of a corporate body (I include for this purpose funds belonging to a union) cannot be ratified by any majority of the members, however large, it is open to a majority of the members, if they think it is right in the interests of the corporate body to do so, to resolve that no action should be taken to remedy the wrong done to the corporate body and such a resolution, if made in good faith and in F what they considered to be for the benefit of the corporate body, will bind the minority. The majority of the members of a trading company, for instance, might properly take the view that the publicity, costs, and the inevitable loss, let us say, of the services of a managing director, who would be the defendant, would outweigh the benefit to the company of successfully prosecuting an action and might properly decide not to pursue it; although, of course, a G contractual release of the right of action, as compared with a decision simply not to institute proceedings, would require to be supported by some consideration.

H “In the instant case there is an impressive body of evidence filed on behalf of the defendants which is designed to establish that the overwhelming majority of members approves the expenditure in question. It must, I think, follow that they would most probably oppose proceedings for the recovery of the moneys misapplied.”

He then went on to deal with three particular reasons advanced by counsel for the plaintiffs against a refusal to give summary judgment. They are particular to the facts of that case and neither the reasons nor the basis for Vinelott J.’s rejection of them is directly material to this case. Vinelott J.’s conclusions were stated, at p. 256:

"In these circumstances I have come to the conclusion that the right course is not to make an order for summary judgment in the hope that the action will come on, if it does come on, after this dispute has been settled, and that the members will be able to work together in the future for their common benefit within the rules of the union. It will be said that this is a case where hard cases make bad law. My reply to that is that it sometimes happens that hard cases make good law, because they compel a radical re-examination of principles which, rigidly applied, would lead to a result which would be felt widely to be unjust. In particular, the boundary between ratifying a misapplication of a union's funds and resolving to take no action to recover funds innocently misapplied may not be easy to draw in the case of a union and this aspect of the case may, I think, merit further consideration when the union is properly represented."

That authority draws the distinction between impossibility of ratification and the possibility of not suing in respect of the consequences of ultra vires transactions very clearly and in my judgment lends strong support to the view in principle which I have expressed. Overall therefore, on the authorities cited to me, I conclude that there is some support for and no absolute bar on that conclusion.

Another consideration which tends in the same direction is that the plaintiffs have applied for, and until Walton J. discharged the master's order obtained, the benefit of an indemnity as to costs in respect of the action. There was never any suggestion that the plaintiffs were enforcing personal rights in respect of the claimed ultra vires transactions as opposed to the rights of the company. On the contrary, the whole basis of the decision on which reliance was placed—*Wallersteiner v. Moir* (No. 2) [1975] Q.B. 373—was that the minority shareholder was acting for the benefit of the company rather than asserting an individual right.

Reliance was also placed by Mr. Aldous on *Viscount of the Royal Courts of Jersey v. Shelton* [1986] 1 W.L.R. 985 as supporting the distinction between the impossibility of ratifying an ultra vires transaction and the possibility of a compromise or release of a right of action in respect of such a transaction. I accept Mr. Potts' submission that this authority is concerned with the rather different point how far articles of association can, outside this jurisdiction, which has a statutory prohibition, now contained in section 310 of the Companies Act 1985, confer an immunity from suit on directors who participate in breaches of their fiduciary duty. That is not to say that I regard the distinction drawn by Mr. Aldous as an invalid one.

Mr. Potts further submitted that there were three objections to any reliance on a release, or the equivalent of a release, of the claims against defendants in relation to ultra vires acts. The first was that the right in question was that of the minority shareholder and not of the company, so that neither the board nor the shareholders in general meeting could release it. That I have already dealt with.

Secondly, assuming it to be legally possible, he submitted first that the board had no available power to do so, and that, in the circumstances of the present case, is not in dispute; and secondly, that the company in general meeting could only do so by special resolution. The reason for this was that by article 80 of Table A which applies to the company the management of the business of the company is given to the directors. It

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A followed that the shareholders could only pass a valid resolution about the conduct of proceedings, which it is common ground is part of the business of the company, by a resolution capable of altering the articles, i.e. a special resolution. In support he cited the passage in *Buckley on the Companies Acts*, 14th ed. (1981), vol. 1, p. 989, under the heading "How far members may control directors:"

B "There is no provision in this Act corresponding with section 90 of
C the Companies Clauses Consolidation Act 1845, which provides that
D the exercise by the board of their powers shall be subject to the control of any general meeting specially convened for the purpose. And it appears now to be established that under an article in the present form, whatever effect is to be given to the words 'to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting', these words do not enable the shareholders, by resolution passed at a general meeting without altering the articles, to give directions to the directors as to how the company's affairs are to be managed, nor to overrule any decision come to by the directors in the conduct of its business, even as regards matters not expressly delegated to the directors by the articles."

Mr. Aldous countered this submission by drawing a distinction between shareholders in general meeting seeking to compel directors to do that which they declined to do and shareholders in general meeting authorising or ratifying a matter which the directors considered to need their authority or ratification. In the former case a special resolution is needed: in the latter an ordinary resolution will suffice. In my judgment that distinction is validly made and is supported by Buckley J.'s decision in *Hogg v. Cramphorn Ltd.* [1967] Ch. 254. Buckley J. said, at p. 269:

F "Mr. Instone says, no doubt rightly, that the company in general meeting could not by ordinary resolution control the directors in the exercise of the powers under article 10. He goes on to say, with less justification, that what they could not ordain a majority could not ratify. There is, however, a great difference between controlling the directors' exercise of a power vested in them and approving a proposed exercise by the directors of such a power, especially where the proposed exercise of the power is of a kind which might be assailed if it had not the manifest approval of the majority. Had the majority of the company in general meeting approved the issue of the 5,707 shares before it was made, even with the purported special voting rights attached (assuming that such rights could have been so attached conformably with the articles), I do not think that any member could have complained of the issue being made; for in these circumstances, the criticism that the directors were by the issue of the shares attempting to deprive the majority of their constitutional rights would have ceased to have any force. It follows that a majority in a general meeting of the company at which no votes were cast in respect of the 5,707 shares could ratify the issue of those shares. Before setting the allotment and issue of the 5,707 shares aside, therefore, I propose to allow the company an opportunity to decide in general meeting whether it approves or disapproves of the issue of these shares to the trustees."

That passage was cited with approval by Harman L.J. in *Bamford v. Bamford* [1970] Ch. 212, 240–241. In my judgment it would not be right in a case where the court declines to act on the views of the board as not sufficiently disinterested, to assume that the board was not merely disqualified but also opposed to a decision by the shareholders in general meeting. I see no difference in principle between directors referring a doubtful matter to shareholders in general meeting and the court taking into account the views of shareholders in general meeting where the directors are effectively disqualified from speaking for the company. On this aspect of the matter I accept Mr. Potts' submission that the Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (No. 2) [1982] Ch. 204, did not deal at all with the question what sort of resolution would have been needed regarding the non-prosecution of the action.

Mr. Potts' third point was that in any event Wren Trust's views should not be taken into account. I propose to deal with that later.

I turn now to the question whether it is right for the court to have regard to the views of the majority inside a minority which is, I assume for this purpose, in a position to bring an action to recover on behalf of the company in respect of breaches of duty by persons with overall control.

The fourth and ninth defendants claim that it is, the plaintiffs claim that it is not. On their view of the matter all that the court is concerned with, in cases where the exception to the rule in *Foss v. Harbottle*, 2 Hare 461 based on frauds on the minority applies, is the single question whether the defendants have control. The issue is highlighted by the conflicting interpretations placed by the parties on what the Court of Appeal said in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (No. 2) [1982] Ch. 204. Immediately after the formulation, at pp. 221–222, of the two matters which in the Court of Appeal's view a plaintiff ought at least to be required to show before proceeding with a minority shareholder's action there comes the following sentence:

“On the latter issue it may well be right for the judge trying the preliminary issue to grant a sufficient adjournment to enable a meeting of shareholders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting.”

Mr. Potts submitted that the purpose of that adjournment was to enable the courts to discern whether the defendants had control. I reject that submission. In my judgment the concern of the Court of Appeal in making that statement was to secure for the benefit of a judge deciding whether to allow a minority shareholder's action on behalf of a company to go forward what was described, at p. 221, as the commercial assessment whether the prosecution of the action was likely to do more harm than good or, as it was put originally by counsel for Newman Industries Ltd., kill the company by kindness. The whole tenor of the Court of Appeal's judgment was directed at securing that a realistic assessment of the practical desirability of the action going forward should be made and should be made by the organ that has the power and ability to take decisions on behalf of the company. Also the question of control pure and simple hardly admitted of any doubt in that particular case.

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A Mr. Potts submitted, in the alternative, that what the Court of Appeal said was obiter. This I accept, but it was clearly a carefully considered statement contrasting with the express acknowledgment that they had had little argument on the proper boundaries of the exception to the rule in *Foss v. Harbottle*, 2 Hare 461 and were therefore not making any definitive statement on that subject, and I propose to follow what I understand to be the true construction of this statement albeit obiter, unless there is other authority binding on me the other way.

B As to that Mr. Potts submitted that no reported authority held that in a case falling within the fraud on a minority exception to the rule in *Foss v. Harbottle* the court should go beyond seeing whether the wrongdoers are in control and count heads to see what the other shareholders, i.e. those other than the plaintiffs and the wrongdoers, think should be done. I accept that in many reported cases the court has not gone on to the second stage. *Mason v. Harris* (1879) 11 Ch.D. 97 is one such case, and there are modern examples too, such as *Pavlidis v. Jensen* [1956] Ch. 565 and *Daniels v. Daniels* [1978] Ch. 406. But the fact that such an investigation was not conducted is not conclusive that it could not be conducted, more especially in the absence of any argument on this precise point. An investigation for interlocutory purposes of the propriety of the exercise of voting power in connection with the proposed prosecution of a minority shareholder's action was conducted by Sir Robert Megarry V.-C. in *Estmanco (Kilner House) Ltd. v. Greater London Council* [1982] 1 W.L.R. 2. In that case he permitted the action to proceed, but Mr. Aldous submitted that the careful scrutiny to which the propriety of the shareholders' voting activities was subjected is of itself an indication of the significance that the court in a proper case will attach to it. This I accept.

E Another indication in the same direction is Walton J.'s reaction in the earlier proceedings in *Smith v. Croft* [1986] 1 W.L.R. 580 already referred to. He said, at p. 591:

F "This is, of course, not an application to strike out the action on the grounds that it cannot be justified as a minority shareholders' action, but quite clearly the same kind of considerations apply. If the majority of the independent shareholders do not wish the action to be continued, clearly the court will not sanction its continuance and certainly not at the expense of the company."

G I accept that this is only by way of obiter for that particular question was not argued at that stage or before Walton J. but it represents the reaction of a judge very experienced in this field. In my judgment the word "control" was deliberately placed in inverted commas by the Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204, 219 because it was recognised that voting control by the defendants was not necessarily the sole subject of investigation. Ultimately the question which has to be answered in order to determine whether the rule in *Foss v. Harbottle* applies to prevent a minority shareholder seeking relief as plaintiff for the benefit of the company is "Is the plaintiff being improperly prevented from bringing these proceedings on behalf of the company?" If it is an expression of the corporate will of the company by an appropriate independent organ that is preventing the plaintiff from prosecuting the action he is not improperly but properly prevented and so the answer to the question is "No." The appropriate independent organ will vary according to the

constitution of the company concerned and the identity of the defendants who will in most cases be disqualified from participating by voting in expressing the corporate will.

Finally on this aspect of the matter I remain unconvinced that a just result is achieved by a single minority shareholder having the right to involve a company in an action for recovery of compensation for the company if all the other minority shareholders are for disinterested reasons satisfied that the proceedings will be productive of more harm than good. If Mr. Potts' argument is well founded once control by the defendants is established the views of the rest of the minority as to the advisability of the prosecution of the suit are necessarily irrelevant. I find that hard to square with the concept of a form of pleading originally introduced on the ground of necessity alone in order to prevent a wrong going without redress.

I therefore conclude that it is proper to have regard to the views of independent shareholders. In this case it is common ground that there would be no useful purpose served by adjourning to enable a general meeting to be called. For all practical purposes it is quite clear how the votes would be cast, and that I described at the outset of this judgment. The questions therefore remain "What is the test of independence" and "Does Wren Trust pass it?"

Upon the former Mr. Potts submitted I should apply the test formulated in *In re Hellenic & General Trust Ltd.* [1976] 1 W.L.R. 123 by analogy. That decision was concerned with a scheme of arrangement and was accepted by Mr. Potts not to be direct authority, but he suggested that the passage in the judgment of Templeman J., at p. 125, provides appropriate guidance. He said:

"The question therefore is whether M.I.T. [Manchester Investment Trust Ltd.], a wholly owned subsidiary of Hambros, formed part of the same class as the other ordinary shareholders. What is an appropriate class must depend upon the circumstances but some general principles are to be found in the authorities. In *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q.B. 573, the Court of Appeal held that for the purposes of an arrangement affecting the policyholders of an assurance company the holders of policies which had matured were creditors and were a different class from policyholders whose policies had not matured. Lord Esher M.R. said, at p. 580: 'they must be divided into different classes . . . because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.' Bowen L.J. said, at p. 583: 'It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.' Vendors consulting together with a view to their common interest in an offer made by a purchaser would look askance at the presence among them of a wholly owned subsidiary of the purchaser."

Mr. Oliver, on the other hand, took me through a line of authority regarding the efficacy of resolutions passed by or with the help of votes

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A whose validity was impugned. From *Allen v. Gold Reefs of West Africa Ltd.* [1900] 1 Ch. 656 onwards there has been applied a test whether the votes in question were exercised bona fide for the benefit of the company as a whole. The generality of the test has led to differences of judicial opinion on the result of applying it to a particular set of facts, notably in that particular case. That is further illustrated by the different results reached on not very dissimilar facts in *Brown v. British Abrasive Wheel Co. Ltd.* [1919] 1 Ch. 290 and *Sidebottom v. Kershaw, Leese & Co. Ltd.* [1920] 1 Ch. 154. In my judgment in this case votes should be disregarded if, but only if, the court is satisfied either that the vote or its equivalent is actually cast with a view to supporting the defendants rather than securing benefit to the company, or that the situation of the person whose vote is considered is such that there is a substantial risk of that happening. The court should not substitute its own opinion but can, and in my view should, assess whether the decision making process is vitiated by being or being likely to be directed to an improper purpose.

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In general terms I would seek to apply the test applied by the Court of Appeal in *Allen v. Gold Reefs of West Africa Ltd.* [1900] 1 Ch. 656, but it seems to me possible to formulate a more particular one in the circumstances of this case. The analogy with schemes of arrangement and *In re Hellenic & General Trust Ltd.* [1976] 1 W.L.R. 123, is a good deal less compelling. Moreover the application of such a test as I have indicated should prevent any risk of the danger that Mr. Potts relied upon of the resolution which prevents proceedings being brought on behalf of the company being itself treated as a fraud on the minority.

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The question thus arises whether Wren Trust's decision, which is the equivalent of a vote, passes the test or is vitiated by being directed to an improper purpose. The evidence filed by the defendants on this issue consist of two affidavits by Mr. Carr and two by Mr. Baldock, who is the managing director of Gresham Trust Plc. and a director of Wren Trust, its subsidiary. Mr. Baldock deposed in an affidavit sworn on 1 July 1985:

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"(4) As a director of Gresham Trust and Wren Trust I am involved in making a number of investments in unquoted companies. I can say that, without doubt, the investment in Film Finances has been, both in terms of capital appreciation and income, a very successful investment. For the reasons set out in Mr. Carr's affidavit I am of the opinion that the remuneration which has been paid to Messrs. Soames, Korda and Croft is in all the circumstances reasonable.

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"(5) The present litigation is a source of some considerable concern to Gresham Trust and Wren Trust in that it jeopardises a valuable investment. My reasons for so stating are that, as a professional investor, I am of the view that Mr. Soames represents the principal asset of the company. The present proceedings, purportedly brought on behalf of the company, are thus a personal attack on the company's principal asset. Whilst Mr. Soames has a substantial equity stake in the company he is not bound to the company by a long term service contract. There is therefore no reason why if Mr. Soames became so disenchanted with the present litigation he could not either set up business on his account in this country or seek alternative employment in the same industry in the United States of America. I have no doubt that in view of the record of the company he would have little difficulty in either

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obtaining the necessary finance to commence business on his own account or to find alternative employment in the United States of America at the same or a higher salary.

“(6) If Mr. Soames were to leave the company the effect upon the investment of all the minority shareholders in the company would in my opinion be catastrophic and, even if it were possible to replace Mr. Soames, then I verily believe that the remuneration which would have to be paid for an appropriate replacement would be at the same level or in excess of that which Mr. Soames is already receiving.

“(7) The statement of claim in these proceedings alleges that the proceedings are brought for the benefit of all shareholders. Wren Trust as a minority shareholder holding some 19.66 per cent. of the issued share capital of the company is of the view: (i) that the remuneration which has been paid to the executive directors is in all the circumstances reasonable; (ii) that the present proceedings are not for the benefit of the minority shareholders; and (iii) that if the present proceedings continue they will put in jeopardy the value of the investment of all the minority shareholders.”

After the independence of Wren Trust had been challenged he swore a further affidavit on 18 March 1986 in which he said:

“(5) Wren Trust Ltd. is not a party to the present proceedings. However, it has been suggested that because the non-executive chairman of Film Finances Ltd., Mr. Carr, is a director of Wren Trust and Gresham Trust, Wren Trust cannot properly be said to be an independent shareholder. In this regard, the board of Gresham Trust and the board of Wren Trust have carefully considered the passage in the judgment of Walton J. . . .

“(6) The directors of Gresham Trust and the directors of Wren Trust have been advised that this Honourable Court would be entitled to disregard the views of Gresham Trust and Wren Trust in assessing whether a majority of the independent shareholders considers that the proceedings are for the benefit of Film Finances Ltd., if they are allowed their consideration of the merits of the present proceedings to be influenced by the fact that Mr. Carr is a defendant in the proceedings.

“(7) The directors of Gresham Trust and the directors of Wren Trust (excluding in each case Mr. Carr) have carefully considered the issues in the present action, the affidavits sworn herein and the judgment of Walton J. For the reasons already set out in my first affidavit . . . and in the affidavit of Mr. Carr . . . they have concluded that the present proceedings are not only of no benefit to Film Finances Ltd. but they put at risk the investment of Gresham Trust and Wren Trust in Film Finances Ltd. Accordingly, the directors of Gresham Trust and the directors of Wren Trust (excluding in each case Mr. Carr) have resolved to support the application by Film Finances Ltd. to strike out the present proceedings, and any application which Mr. Carr may be advised to make to strike out the present proceedings, and I have been authorised to swear this affidavit in support of such applications.”

Then he exhibits minutes of the relevant board meetings. That in relation to Wren Trust recorded that Mr. Scott, a solicitor, reported on

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A the present state of the proceedings which had been commenced by three minority shareholders in Film Finances Ltd. where Wren Trust Ltd. is a substantial minority shareholder, and then he refers to the application before Walton J. and the possibility of an appeal. There being no questions of a factual nature Mr. Carr then left the meeting, and the minute then said:

B "Mr. Scott explained to the meeting that in considering Film
Finances' application to dismiss the proceedings the court would
wish to have regard to the views of the independent shareholders.
In considering the merits of the proceedings and whether the board
considered that the prosecution of the proceedings was in the best
interests of Film Finances Ltd. the board must disregard the fact
that one of its number was the defendant in the proceedings. The
C directors should only have regard to the effect of the present
proceedings upon its investment in Film Finances Ltd. If, for the
reasons set out in the affidavits already sworn by Mr. Carr and Mr.
Baldock, the board considered that there were good commercial
reasons why the proceedings were not in the best interests of Film
Finances Ltd., then it should resolve to support Film Finances'
D application to dismiss the proceedings, and on the basis of Walton
J.'s judgment there was no reason why the court should not take
note of Wren Trust's view as to the merit of the proceedings."

And then the resolution is recorded.

E An attempt was made on behalf of the plaintiffs to adduce evidence
to show that Mr. Baldock as well as Mr. Carr was personally interested
but that attempt was not persisted in or relied upon at the hearing
before me. I need not therefore take up time dealing with it. But the
fact that it was made and that repeated offers to tender Mr. Baldock for
cross-examination on this issue of the independence of Wren Trust were
not taken up is, in my judgment, some indication of the weakness of the
plaintiff's case on that issue.

F Mr. Potts relied on evidence that showed that Wren Trust has been
described as an associate of the executive directors. I accept that there is
evidence that Wren Trust sided with the executive directors in the board
room tussle that resulted in Mr. Garrett's resignation as a director of the
company and could properly be described as associates in that context,
and that there is evidence that Gresham Trust itself was involved in the
share transactions leading up to Mr. Garrett's resignation. I nevertheless
G remain firmly of the view that there is no sufficient evidence that in
relation to the present question whether these proceedings should
continue Wren Trust has reached its conclusion on any grounds other
than reasons genuinely thought to advance the company's interests. It is
not for me to say whether the decision itself is right or wrong. It is for
me to say whether the process by which it was reached can be impugned
and I hold that it cannot. Nor do I consider that in the circumstances
H there is shown to have been a substantial risk of Wren Trust's vote
having been cast in order to support the defendants as opposed to
securing the benefit of the company.

That conclusion means that I accede to the fourth and ninth
defendants' motions and direct that the statement of claim be struck out.
Before parting with the case I should like to say a further word about
the procedure.

Mr. Potts at the end of his long and helpful addresses described the procedure as a shambles. Without going to those lengths I do agree that it had unsatisfactory features not least the length of time taken. The order of speeches did not in the event match the onus of proof and although I doubt whether in the course of his marathon Mr. Potts left any ground uncovered, nevertheless that was another unsatisfactory feature. It may very well be that the Court of Appeal will have an opportunity of elaborating what was said in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204.

For my part I would say three things. First, I consider there may well be a much stronger case for requiring a prospective plaintiff to have the onus of establishing that his case falls within the exceptions to the rule in *Foss v. Harbottle*, 2 Hare 461 or outside it altogether than there is for putting the same onus upon him to show that the company would be likely to succeed if it brought the action. Upon the latter it might well be appropriate to apply the usual test under R.S.C., Ord. 18, r. 19 and the inherent jurisdiction which puts the onus on the defendants to show the case is effectively unarguable.

Secondly, I consider it would be highly desirable for applications in respect of costs under *Wallersteiner v. Moir (No. 2)* [1975] Q.B. 373 procedure to be made at the same time as the plaintiff establishes whatever it is that he does have to establish. A great deal of expense has been caused in this case by the piecemeal way in which the matter has proceeded.

Thirdly I believe that it would be helpful for there to be specific procedure laid down, whether by way of rules of court or practice direction I know not, for the initiation and prosecution of actions by minority shareholders to recover on behalf of a company.

*Statement of claim struck out as
against fourth and ninth defendants
with costs on standard basis.
Leave to appeal.*

Solicitors: Gouldens; Herbert Smith & Co.; Harbottle & Lewis.

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A [COURT OF APPEAL]

UDALL v. CAPRI LIGHTING LTD.
(IN LIQUIDATION)1987 Feb. 9, 10, 11;
March 12

Kerr, Neill and Balcombe L.JJ.

B *Solicitor—Officer of court—Court's supervisory jurisdiction—Solicitor's undertaking to other side's solicitor to procure security from own clients for moneys due—Undertaking becoming incapable of performance—Clients incapable of providing security—Court's power to order compliance with undertaking—Whether other side entitled to be compensated*

C The plaintiff brought an action for payment by the defendant company of money for goods supplied to it by the plaintiff. During the course of the proceedings the defendant's solicitor gave an undertaking to the plaintiff's solicitors that the defendant's directors would provide security for its liabilities towards the plaintiff by creating second charges in the plaintiff's favour on their personal properties. On the plaintiff's application the judge ordered the solicitor to carry out his undertaking. The evidence subsequently adduced showed that the directors were unable to fulfil that commitment and thus the solicitor's undertaking could not be performed.

D On appeal by the solicitor and cross-appeal by the plaintiff:—

E *Held*, allowing the appeal and cross-appeal, that as the evidence established that the undertaking could not now be performed the court would not order performance because it would not make an order in vain nor, since disobedience of the court's order amounted to contempt of court punishable by imprisonment, would the court make an order knowing that it was incapable of performance and would put the solicitor at risk; but that where the solicitor's conduct was inexcusable and merited reproof, and the failure to implement an undertaking could be regarded as such, the court had the power to make a compensatory order which was of a disciplinary nature; and that, accordingly, the case ought to be remitted to the court below for it to investigate whether the solicitor's acts were such as to justify ordering compensation and whether the plaintiff had suffered any loss for which he should be compensated (post, pp. 471E–G, 472G–H, 473D–F, 474D–E, H, 478E–G, 479E–480A).

F *New Brunswick Co. etc. v. Muggeridge* (1859) 4 Drew. 686; *United Mining and Finance Corporation Ltd. v. Becher* [1910] 2 K.B. 296; *Myers v. Elman* [1940] A.C. 282, H.L.(E.); *R. & T. Thew Ltd. v. Reeves (No. 2) (Note)* [1982] Q.B. 1283 and *John Fox v. Bannister, King & Rigbeys (Note)* [1987] 3 W.L.R. 480, C.A. applied.

G Decision of Sir Neil Lawson, sitting as a judge of the Queen's Bench Division, reversed.

H The following cases are referred to in the judgments:

Fox (John) v. Bannister, King & Rigbeys (Note) [1987] 3 W.L.R. 480, C.A.
Greaves, In re (1827) 1 Cr. & J. 374n
Hughes, Ex parte (1822) 5 B. & Ald. 482
Marsh v. Joseph [1897] 1 Ch. 213, C.A.
Myers v. Elman [1940] A.C. 282, H.L.(E.)
New Brunswick Co. etc. v. Muggeridge (1859) 4 Drew. 686
Peart v. Bushell (1827) 2 Sim. 38
Seawell v. Webster (1859) 29 L.J. Ch. 71

Udall v. Capri Lighting Ltd. (C.A.)**[1987]**

- Silver (Geoffrey) & Drake v. Baines* [1971] 1 Q.B. 396; [1971] 2 W.L.R. 187; [1971] 1 All E.R. 473, C.A. A
- Solicitor (Lincoln), In re A* [1966] 1 W.L.R. 1604; [1966] 3 All E.R. 52
- Solicitors, In re* (1916) 11 W.W.R. 529
- Thew (R. & T.) Ltd. v. Reeves (No. 2) (Note)* [1982] Q.B. 1283; [1982] 3 W.L.R. 869; [1982] 3 All E.R. 1086, C.A.
- Tito v. Waddell (No. 2)* [1977] Ch. 106; [1977] 2 W.L.R. 496; [1977] 3 All E.R. 129; (Note) [1977] 3 W.L.R. 972
- United Mining and Finance Corporation Ltd. v. Becher* [1910] 2 K.B. 296 B

The following additional cases were cited in argument:

- Bayley, Ex parte* (1829) 9 B. & C. 691
- Burnett v. Proois* (1870) 22 L.T. 543
- Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48; [1984] 2 W.L.R. 291; [1984] 1 All E.R. 321, C.A. C
- Dixon v. Wilkinson* (1859) 4 De G. & J. 508
- Ferns v. Carr* (1885) 28 Ch.D. 409
- Gregg, In re. In re Prance* (1869) L.R. 9 Eq. 137
- Grey (H.A.), In re* [1892] 2 Q.B. 440, C.A.
- Hilliard, In re* (1845) 2 Dow. & L. 919
- Morris v. James* (1838) 6 Dow. 514
- Orchard v. South Eastern Electricity Board* [1987] 2 W.L.R. 102; [1987] 1 All E.R. 95, C.A. D
- Solicitor, In re A* (1918) 53 I.L.T. 51

APPEAL from Sir Neil Lawson, sitting as a judge of the Queen's Bench Division.

The plaintiff, Robert Alan Udall (trading as Udall Sheet Metal and Co.), issued in May 1983 specially indorsed writs claiming payment for goods sold and delivered to the defendant company, Capri Lighting Ltd. Mr. Roe and Mr. Gowing were the defendant's directors. Messrs. Rutter & Rutter were the defendant's solicitors and the partner handling the defendant's matters was Mr. Richard Oxley Whiting. E

On 6 July there were a number of telephone conversations between Mr. Whiting and Mr. Timothy Grant Readman, of Messrs. Readman & Co., the solicitors for the plaintiff. Mr. Readman conveyed to Mr. Whiting that the plaintiff was only prepared to agree to an adjournment to proceedings under R.S.C., Ord. 14, if Mr. Roe and Mr. Gowing were to give second charges on their private residences or on life assurance policies having a surrender value. Subsequently, Mr. Whiting conveyed the agreement of Mr. Roe and Mr. Gowing with the proposal and gave his personal undertaking as a solicitor to procure those charges. F

Subsequently, in both actions judgments were entered in default of defence. The judgments remained unsatisfied and the defendant went into liquidation. The plaintiff issued summonses in both the actions seeking orders that Mr. Whiting should procure the second charges in accordance with his undertaking. After some earlier proceedings the matter came before Sir Neil Lawson who ordered Mr. Whiting to procure within 28 days second charges on the properties of Mr. Roe and Mr. Gowing. The judge disallowed Mr. Whiting's application to adduce evidence that the undertaking had become impossible of performance. G

By a notice of appeal dated 7 January 1986 Mr. Whiting appealed on the grounds that (1) it was not within his power to procure either of the charges; (2)(a) having heard evidence and argument in relation to the questions (i) as to whether or not Mr. Whiting had ever given the H

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Udall v. Capri Lighting Ltd. (C.A.)

- A undertaking and (ii) as to what form of order there was jurisdiction in the court to grant in the event of a finding that the undertaking had been given and (b) having ruled (i) that Mr. Whiting had given the undertaking and (ii) that the only form of order which could be made was an order that Mr. Whiting should perform his undertaking, the judge (a) refused to permit Mr. Whiting to adduce such evidence as to the possibility of his being able to comply with the order as was then available and (b) refused to grant Mr. Whiting an adjournment for the purpose of adducing further such evidence.
- B

- C The plaintiff gave a notice of cross-appeal seeking, inter alia, an order requiring Mr. Whiting to pay such damages in lieu of the undertaking as the court deemed necessary. Alternatively, such compensation was sought as was required to make good all losses occasioned by Mr. Whiting's breach of duty to perform the undertaking. The grounds of cross-appeal were that, if the judge ought to have considered on 11 December 1985 the additional issue of whether it was possible for Mr. Whiting to procure either of the second charges, he was empowered and/or entitled to and ought to have then concluded and ordered (a) that the undertaking found to have been given by Mr. Whiting was one which was capable of performance on the date the same was given and accordingly required to be complied with, (b) that the undertaking was not incapable of performance as it was possible for Mr. Whiting to purchase the dwellings in question or dwellings of like value and proffer the charges required and accordingly the undertaking required to be complied with within a reasonable period, (c) that the undertaking was an undertaking given by an officer of the court, had been accepted as such, that it had secured a benefit to Mr. Whiting's clients and accordingly it required to be enforced to ensure honourable conduct by a solicitor and (d) that had Mr. Whiting acted properly and/or honourably by forthwith acknowledging that he had given an undertaking in the terms found the court would have been possessed of sufficient powers to secure the consent of Mr. Whiting's clients to create the charges, alternatively to secure the charges and that accordingly Mr. Whiting should be ordered to compensate the plaintiff for all losses sustained.
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- E
- F

The facts are stated in the judgment of Balcombe L.J.

James Munby for Mr. Whiting.

J. G. Ross for the plaintiff.

- G The defendant took no part in the appeal.

Cur. adv. vult.

12 March. The following judgments were handed down.

- H BALCOMBE L.J. This appeal and cross-appeal from an order dated 11 December 1985 made by Sir Neil Lawson (sitting as a judge of the High Court) raise the question of the exercise by the court of its discretionary jurisdiction to control solicitors as its officers.

In May 1983 the plaintiff, Mr. Robert Alan Udall (trading as Udall Sheet Metal & Co.), issued specially indorsed writs against the defendant, Capri Lighting Ltd., of which company a Mr. Roe and a Mr. Gowing were directors. Both writs were in respect of goods sold and delivered by the plaintiff to the defendant; the first writ claimed £20,215, the

second £5,509, in each case together with interest. Messrs. Rutter & Rutter, solicitors of Shaftesbury, Dorset, acknowledged service of these writs on behalf of the defendant. The plaintiff then took out summonses under R.S.C., Ord. 14 in both actions, the return date being 7 July 1983 in each case.

On 6 July 1983 a number of telephone conversations took place between Mr. Timothy Grant Readman, the principal of Messrs. Readman & Co., solicitors for the plaintiff, and Mr. Richard Oxley Whiting, a partner in Messrs. Rutter & Rutter. In the course of one of these conversations Mr. Readman said that the plaintiff was only prepared to agree to an adjournment of the Order 14 summonses on the following day if Mr. Roe and Mr. Gowing were prepared to give second charges on their private residences or on life assurance policies having a surrender value. In the course of a subsequent telephone conversation on the same day Mr. Whiting told Mr. Readman that both Mr. Roe and Mr. Gowing were prepared to give second charges on their properties, which were then identified. The judge found that in the course of this conversation Mr. Whiting gave his personal undertaking as a solicitor to procure these charges; the precise form of the undertaking as found being to

“procure second charges on the security of the residence of one Gowing, namely 54 Church Street, Tisbury in the county of Wiltshire and (on the residence of) one Rowe [sic] namely The Cottage, Dennis Lane, Ludwell, Shaftesbury in the county of Dorset . . .”

There has been no appeal against this finding by the judge.

The hearing of the Order 14 summonses was adjourned, but on 26 July Messrs. Rutter & Rutter wrote to Messrs. Readman & Co. to say that the defendant would submit to judgment. This evinced a reply from Messrs. Readman & Co. on the following day expressing astonishment and asserting that in the telephone conversation of 6 July Mr. Whiting had given Mr. Readman a specific personal undertaking that Mr. Roe and Mr. Gowing would give second charges on the security of their respective private residences. On 28 July 1983 Messrs. Rutter & Rutter wrote saying that no undertaking had been given by Mr. Whiting. Thus the scene was set for these proceedings.

In due course judgments were entered in default of defence in both actions but these judgments remain unsatisfied. The defendant has since gone into liquidation. So the plaintiff decided to enforce Mr. Whiting's personal undertaking. It is common ground that the plaintiff has a right of action in contract against Mr. Whiting on his undertaking, but it is also common ground that Mr. Whiting could and would plead by way of defence that there is no note or memorandum of the undertaking so as to satisfy section 4 of the Statute of Frauds or section 40 of the Law of Property Act 1925. Whether or not such a defence would succeed is immaterial; the plaintiff realistically took the view that the probability of this defence being raised was a good reason why he should not pursue an action at law and he decided instead to invoke the court's inherent jurisdiction over solicitors.

So the plaintiff issued summonses in the two actions asking for orders that Mr. Whiting should procure the second charges pursuant to his undertaking. Since both summonses raised precisely the same issues, I shall treat them as one application, as they have been treated throughout. After various procedural vicissitudes the matter came before

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- A Judge Dobry Q.C., sitting as a High Court judge in chambers. Mr. Whiting then took the point that this was not a proper case for the invocation of the summary procedure, since it was not a clear case: *Geoffrey Silver & Drake v. Baines* [1971] 1 Q.B. 396. However, Judge Dobry rejected that contention, although he gave directions for pleadings and discovery and for the deponents to the affidavits to attend for cross-examination. Against that order there was no appeal. So it was that the plaintiff's application came on before Sir Neil Lawson for hearing on 4 and 5 December 1985.
- B

- C Before the judge the principal issue was whether Mr. Whiting gave his personal undertaking and the greater part of the two-day hearing and of the judgment was directed to this issue. Mr. Ross, who appeared for the plaintiff below as he did before us, opened the case on the basis that if the undertaking had been given then it should be enforced by the court, and, relying on *United Mining and Finance Corporation Ltd. v. Becher* [1910] 2 K.B. 296, he did not need, nor did he seek, then to allege dishonourable or discreditable conduct on the part of Mr. Whiting. Although the practicability of enforcing the undertaking was canvassed in argument before the judge, there was then no evidence that the enforcement of the undertaking, i.e. the procurement of the two second charges, was impossible.
- D

- E Having decided that the undertaking had been given, the judge went on to consider whether it was enforceable by the court in the exercise of its summary jurisdiction over solicitors. On this aspect of the case he considered three points: (1) Was it a clear case? He answered this question in the affirmative. (2) Could the court enforce a solicitor's undertaking to secure a third party to do an act, or execute a document? This question also he answered in the affirmative, in reliance on *Ex parte Hughes* (1822) 5 B. & Ald. 482 and the Canadian case of *In re Solicitors* (1916) 11 W.W.R. 529. (3) Was the undertaking one which it was impossible to perform? On this the judge said:

- F "I find it difficult to conceive of a solicitor giving an undertaking which it is impossible to carry out. But there is a point to that effect in . . . *Peart v. Bushell* (1827) 2 Sim. 38."

After pointing out that Hamilton J. had questioned the authority of the report and refused to follow *Peart v. Bushell* in *United Mining and Finance Corporation Ltd. v. Becher* [1910] 2 K.B. 296, the judge continued:

- G "But let it be assumed that that authority is still good support for the proposition that if an undertaking is impossible of performance the court will not enforce it (and, of course, that is a common sense point of view), I have absolutely no evidence at all that this undertaking, when it was given, was not possible to be performed. Nor have I any evidence before me at this stage that it is not possible to perform. It may be unlikely or difficult, but that is not the same thing as impossible. Here the case is to be distinguished from *In re A Solicitor* [1966] 1 W.L.R. 1604, because there Pennycuik J. refused to enforce an undertaking given by a solicitor to hand over a lease which not only had been lost but had also been forfeited. He questioned the evidence of the solicitor that the lease could not be found, so he obviously had evidence which satisfied him that it was, at the time when he was asked to make the order,
- H

impossible of performance. But there is no evidence to that effect here. A

“Finally I come to consider what order to make in the exercise of the jurisdiction. I am quite satisfied that at this stage I have no jurisdiction to make any order other than an order that the undertaking be performed. If it is not performed, then the question will arise as to what should be done about it. *In re Solicitors* (1916) 11 W.W.R. 529, the Canadian case to which I have referred, seems to me good authority for the proposition that that is all the court can do in the enforcement of a summary jurisdiction. If one looks at *The Supreme Court Practice* 1985, vol. 2, p. 1026, notes, there is no case in which it has been suggested that the court can, in the exercise of this jurisdiction, do anything other than to order the solicitor to do that which he undertook. Therefore that is the order I make.” B C

The judgment was a reserved judgment, delivered some six days after the end of the hearing. and after it had been delivered Mr. Munby, for Mr. Whiting, applied for an adjournment to enable him to adduce evidence that it was impossible to perform the undertaking. This the judge refused. Accordingly an order was drawn up requiring Mr. Whiting within 28 days to procure second charges on the security of 54, Church Street, Tisbury and The Cottage, Dennis Lane, Ludwell, Shaftesbury, ordering him to pay the plaintiff's costs and refusing a stay of execution. D

From that order Mr. Whiting has appealed. By his notice of appeal dated 7 January 1986 he asks that the order be set aside or alternatively be varied by requiring him only to use his best endeavours to procure the charges. The grounds of the appeal are (1) the impossibility of performing the undertaking, and (2) the judge's refusal to allow evidence of impossibility to be adduced after judgment. E

The appeal first came before this court on 16 April 1986. At that stage there was still no evidence properly before the court as to the impossibility of performing the undertaking, so the appeal was stood over. Mr. Whiting was given leave to file evidence and the plaintiff was given leave to file evidence in reply; he was also given leave to file a respondent's notice by way of cross-appeal. F

Pursuant to that leave, both Mr. Whiting and Mr. Readman have filed evidence. I do not propose to refer to that evidence in detail, as it is of inordinate volume, but I am satisfied that it is now, and was in December 1985, impossible for Mr. Whiting to perform his undertaking. I can summarise the relevant facts quite shortly. G

No. 54 Church Street, Tisbury. The legal estate to this property was vested in Mr. Gowing and his wife. The property was subject to a first mortgage in favour of a building society, and to a second charge, dated 10 September 1979, in favour of a bank. Mr. Gowing was adjudicated bankrupt on 5 October 1984 and he is now in Australia. The property was sold in September 1984 for some £50,000 of which the greater part went to the building society and the bank (as first and second mortgagees), some £8,300 to the official receiver acting in Mr. Gowing's bankruptcy, and a similar sum to a bank in respect of Mrs. Gowing's share in the property pursuant to a guarantee she had given. There was no surplus, and a considerable deficiency still remains in Mr. Gowing's bankruptcy. H

A *The Cottage, Dennis Lane, Ludwell.* The legal estate to this property was vested in Mr. Roe alone, although it is possible that his wife had a beneficial interest. The property was subject to a first mortgage in favour of a building society and to a second charge, dated 29 September 1978, in favour of a bank. In December 1985, Mr. Roe was in hospital suffering from a terminal illness; he died on 24 February 1986. After the hearing at first instance Mr. Whiting asked Mr. Roe to execute a charge on the property, but he died without having done so.

B The plaintiff also served a notice of cross-appeal asking that the order of 11 December 1985 be varied in a number of respects, of which the only one now material is (3):

C “So as to require [Mr. Whiting] to pay damages in lieu of the said undertaking, alternatively such compensation as was/is required to make good all losses occasioned by his breach of duty to perform the said undertaking.”

D I can deal quite briefly with the appeal. There is a short answer to the second ground of appeal, i.e. the judge's refusal to allow evidence of impossibility to be adduced after judgment. It was for Mr. Whiting to adduce evidence of impossibility if he wished to rely on impossibility as an answer to the claim for enforcement of his undertaking. He did not do so at the appropriate time, and it was clearly within the judge's discretion to refuse him leave to adduce such evidence after judgment. However, on the first ground of appeal, i.e. impossibility of performance, the appeal must succeed. I do not say that the judge was wrong in making the order he did, since at that time he had no evidence as to impossibility and in those circumstances he was justified in ordering performance: compare *In re A Solicitor* [1966] 1 W.L.R. 1604. However, we did have evidence of impossibility and, as an appeal is by way of re-hearing—see Ord. 59, r. 3 (1)—we must of course take account of that evidence. It is old and trite law that the “court will not make any order in vain”: see, e.g. *New Brunswick Co. etc. v. Muggeridge* (1859) 4 Drew. 686, 699, cited and applied by Sir Robert Megarry V.-C. in *Tito v. Waddell* (No. 2) [1977] Ch. 106, 326. The proposition is so self-evident that it requires no elaboration. There is the further point that disobedience to the court's order is a contempt, and contempt is punishable with imprisonment. It is unthinkable that a court should put a man at risk of imprisonment by making an order which it knows, at the time of making the order, is impossible of performance. As

F Kindersley V.-C. said in *Seawell v. Webster* (1859) 29 L.J. Ch. 71, 73:

G “Put the extreme case of a vendor burning a title deed: the court could not make a decree that he should deliver it up, and be imprisoned if he does not.”

H Mr. Ross was constrained to accept that, in the light of the further evidence, he could not realistically expect successfully to resist the appeal and in the event the argument before us turned wholly on the cross-appeal. In opening his case, Mr. Munby submitted that there are two different jurisdictions which the court exercises in dealing summarily with solicitors:

(1) The jurisdiction to enforce undertakings. This is exercisable whether or not there were any proceedings pending in court and whether or not the undertaking was given in the course of legal proceedings. The

jurisdiction is exercisable although the solicitor has not been guilty of dishonourable or discreditable conduct. A

(2) The jurisdiction to award compensation. This jurisdiction is exercisable only where the solicitor had the conduct or prosecution of some cause or matter before the court. The jurisdiction is dependent upon proof of serious misconduct.

However, during the course of the hearing of the appeal we were provided with a transcript of the judgments of this court (Sir John Donaldson M.R. and Nicholls L.J.) in *John Fox v. Bannister, King & Rigbeys* delivered on 19 December 1986, post, p. 480. In the light of those judgments Mr. Munby was constrained to concede that the compensatory jurisdiction was not limited to undertakings given in the course of proceedings; however, as the undertaking in the present case was given in the course of proceedings, this did not matter. However, he maintained his submission that the compensatory jurisdiction is only exercisable upon proof of serious misconduct, and he relied on the fact that no allegation of moral turpitude was made against Mr. Whiting in the plaintiff's points of claim, nor in the way in which the case was opened and presented before the judge. It was, he submitted, now too late for the plaintiff to allege misconduct on the part of Mr. Whiting of a kind sufficient to enable him (the plaintiff) to claim compensation for breach of the undertaking. B C D

In my judgment the true position is as follows. There are three ways in which a party who seeks to force a professional undertaking given by a solicitor can proceed:

(1) By an action at law, if there is a cause of action.

(2) By an application to the court to exercise its inherent supervisory jurisdiction. E

(3) By an application to The Law Society. In the Professional Conduct of Solicitors (The Law Society, 1986) it is stated in paragraph 15.02:

"A solicitor who fails to honour the terms of a professional undertaking is prima facie guilty of professional misconduct. Consequently, the council will require its implementation as a matter of conduct." F

However,

"Neither the council nor the tribunal have power to order payment of compensation or to procure the specific performance of an undertaking if a solicitor declines to implement it. The only step open to the council is to take disciplinary action for failure to honour the undertaking." G

It is the second of these methods with which this case is concerned, and I turn now to consider this jurisdiction. I should say at once that I do not accept Mr. Munby's submission that the enforcement of undertakings is in some way separate and distinct from the general question of professional misconduct. The true position is as follows. H

(1) The nature of the summary jurisdiction is explained in the following passage from the speech of Lord Wright in *Myers v. Elman* [1940] A.C. 282, 319:

"The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat

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A justice in the very cause in which he is engaged professionally, as
 was said by Abinger C.B. in *Stephens v. Hill* (1842) 10 M. & W. 28.
 The matter complained of need not be criminal. It need not involve
 speculation or dishonesty. A mere mistake or error of judgment is
 not generally sufficient, but a gross neglect or inaccuracy in a matter
 which it is a solicitor's duty to ascertain with accuracy may suffice.
 B Thus, a solicitor may be held bound in certain events to satisfy
 himself that he has a retainer to act, or as to the accuracy of an
 affidavit which his client swears. It is impossible to enumerate the
 various contingencies which may call into operation the exercise of
 this jurisdiction. It need not involve personal obliquity. The term
 professional misconduct has often been used to describe the ground
 on which the court acts. It would perhaps be more accurate to
 C describe it as conduct which involves a failure on the part of a
 solicitor to fulfil his duty to the court and to realise his duty to aid
 in promoting in his own sphere the cause of justice. This summary
 procedure may often be invoked to save the expense of an action.
 Thus it may in proper cases take the place of an action for
 negligence, or an action for breach of warranty of authority brought
 by the person named as defendant in the writ. The jurisdiction is
 D not merely punitive but compensatory. The order is for payment of
 costs thrown away or lost because of the conduct complained of. It
 is frequently, as in this case, exercised in order to compensate the
 opposite party in the action."

E (2) Although the jurisdiction is compensatory and not punitive, it
 still retains a disciplinary slant. It is only available where the conduct of
 the solicitor is inexcusable and such as to merit reproof: *R. & T. Thew*
Ltd. v. Reeves (No. 2) (Note) [1982] Q.B. 1283, 1286.

(3) If the misconduct of the solicitor leads to a person suffering loss,
 then the court has power to order the solicitor to make good the loss
 occasioned by his breach of duty: *Marsh v. Joseph* [1897] 1 Ch. 213,
 244–245, *per* Lord Russell of Killowen C.J.

F (4) Failure to implement a solicitor's undertaking is *prima facie* to be
 regarded as misconduct on his part, and this is so even though he has
 not been guilty of dishonourable conduct: see *United Mining and Finance*
Corporation Ltd. v. Becher [1910] 2 K.B. 296, and in particular the
 argument of the successful applicants, at p. 301; *John Fox v. Bannister,*
King & Rigbys, *post*, p. 480. However, exceptionally, the solicitor may
 G be able to give an explanation for his failure to honour his undertaking
 which may enable the court to say that there has been no misconduct in
 the particular case: see *Fox's case*, *post*, p. 485F–H.

(5) Neither the fact that the undertaking was that a third party
 should do an act, nor the fact that the solicitor may have a defence to
 an action at law (e.g. the Statute of Frauds), precludes the court from
 exercising its supervisory jurisdiction: see *Ex parte Hughes*, 5 B. & Ald.
 482; *In re Greaves* (1827) 1 Cr. & J. 374. However, these are factors
 which the court may take into account in deciding whether or not to
 exercise its discretion and, if so, in what manner.

H (6) The summary jurisdiction involves a discretion as to the relief to
 be granted: *per* Lord Wright in *Myers v. Elman* [1940] A.C. 282, 318. In
 the case of an undertaking, where there is no evidence that it is
 impossible to perform, the order will usually be to require the solicitor

to do that which he had undertaken to do: see *In re A Solicitor* [1966] 1 W.L.R. 1604. A

(7) Where it is inappropriate for the court to make an order requiring the solicitor to perform his undertaking, e.g. on the grounds of impossibility, the court *may* exercise the power referred to in paragraph (3) above and order the solicitor to compensate a person who has suffered loss in consequence of his failure to implement his undertaking: see *John Fox v. Bannister, King & Rigbys*. It is stated in the text books (see *Cordery on The Law Relating to Solicitors*, 7th ed. (1981), p. 122; *Halsbury's Laws of England*, 4th ed., vol. 44 (1983), para. 255, pp. 193–194) that the court will not enforce an undertaking which is incapable of being performed ab initio. If this statement means no more than that the court will make no order in vain, then I would not quarrel with it. If, however, it is intended to suggest that the court will not order compensation for breach of an undertaking which is ab initio incapable of performance, then it is difficult to understand the principle on which it is based and I doubt whether it is an accurate statement of the law. It appears to depend on the authority of *Peart v. Bushell*, 2 Sim. 38, and I agree with the criticism of that case made by Hamilton J. in *United Mining and Finance Corporation Ltd. v. Becher* [1910] 2 K.B. 296, 306. However, the point does not arise in the present case and I need not consider it further. B C D

It follows that, in my judgment, the judge was wrong in thinking that he would have no jurisdiction to make any order other than an order that the undertaking be performed; the cross-appeal must be allowed and the matter remitted to the court below for consideration whether to make an order requiring Mr. Whiting to pay compensation to the plaintiff. In deciding whether or not to exercise its discretion the court will have to take into account a number of factors, including those mentioned below (the list is not intended to be exhaustive). E

(a) Whether Mr. Whiting's action in giving his undertaking and then failing to implement it is conduct of such a nature as to justify the exercise of the jurisdiction. The principles to be applied in the exercise of this discretion are those set out above. F

(b) Depending on the answer to point (a) above, whether the plaintiff can show that he has suffered loss in consequence of his not having had the benefit of the second charges which he would have had if the undertaking had been performed according to its terms. This must depend on a number of factors, including the value of the properties at the relevant date (whatever that may be) and the extent of the security afforded by any charges taking priority to the "second charges" in question. The evidence before us is insufficient to enable me to say whether the plaintiff can establish a *prima facie* case of loss and it may be that even the judge will find it necessary to order an inquiry, as was done in *John Fox v. Bannister, King & Rigbys*, post, p. 480. G

I would therefore allow both the appeal and the cross-appeal and remit the case to the court below, to be heard by Sir Neil Lawson, if available. H

NEILL L.J. I agree that the appeal and the cross-appeal should be allowed for the reasons given by Kerr and Balcombe L.JJ.

KERR L.J. I agree that the appeal of Mr. Whiting should be allowed for the reasons stated in the judgment of Balcombe L.J. I also agree

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A that the plaintiff's cross-appeal be allowed on the grounds which I set out below, without implying any disagreement with anything stated in that judgment.

B This case has a number of unusual features. The first is the nature of the undertaking which Mr. Whiting has been held to have given to Mr. Readman. Solicitors' undertakings are normally concerned with matters within the solicitors' own control, such as to deliver up or not to part with documents in their possession, to pay moneys in certain events, to discharge a mortgage after completion, etc. In the present case, however, the undertaking was to procure for the plaintiff second charges on the residences of Mr. Gowing and Mr. Roe. That undertaking could not be honoured by Mr. Whiting without their co-operation. Its performance did not lie within Mr. Whiting's sole control, as in the case of the usual kinds of undertaking given by solicitors. In effect, the nature of the undertaking was that Mr. Whiting guaranteed that these two persons would provide second charges on their homes in favour of the plaintiff. If they failed to do so, for whatever reason, then the undertaking was broken. It is against that unusual background that I would like to add some comments to the judgment of Balcombe L.J.

D As he has pointed out, the fact that a solicitor has undertaken that a third party will do or refrain from doing something does not in itself affect the nature of the undertaking. The court has the same powers in relation to a solicitor who is alleged to have given an undertaking of this nature as in the case of any other undertaking. But the manner in which the court will exercise its powers in such cases may well be different from the more straightforward type of case. To give an undertaking that a third party will do or refrain from doing something may obviously be risky and indeed unwise. When there is a conflict as to whether or not an oral undertaking of the kind was in fact given, then the court may well conclude that the case is insufficiently clear to justify the application of its inherent summary supervisory jurisdiction over solicitors and that the matter should be left to proceed by action. But Judge Dobry Q.C. rejected that submission, albeit subject to the safeguard of ordering pleadings and discovery. There was no appeal against his decision and the matter then proceeded like an action, with oral evidence and full cross-examination. In this connection it should also be mentioned that it was rightly not suggested on behalf of Mr. Whiting that his inability to rely on the Statute of Frauds or on section 40 of the Law of Property Act 1925 was any reason against the use of the court's summary jurisdiction over solicitors. This is in line with the authorities which show that lawyers must accept responsibility for, and be able to rely upon, any oral undertaking given in the course of their profession. But these do not appear to have been cases where there was any conflict of evidence about the undertaking having been given. In such cases a high degree of proof should be required, and most solicitors would no doubt agree that, as a matter of normal good practice, oral undertakings should be confirmed in writing forthwith by the recipient. Thus, one surprising feature of the present case was that there was no reference to the undertaking held to have been given on 6 July in any correspondence across the line until a letter from Mr. Readman of 27 July. However, Sir Neil Lawson heard the evidence and will no doubt have made allowance for all these matters, and in any event there has equally been no appeal against his finding that the undertaking was in fact given. In the upshot, therefore, although this appears to me to be a very unusual case, there

then remains nothing save to decide whether, and if so in what manner, the court's undoubted inherent jurisdiction over Mr. Whiting should be exercised. A

Before returning to this point I wish to add something about another unusual feature of this case. This is that by the time when it had been established to the satisfaction of the court that Mr. Whiting had given the undertaking in question, it had in any event become impossible for him to carry it out. While this may be unusual, it is perhaps hardly surprising in the circumstances. As I have said, the undertaking was held to have been given on 6 July 1983, but the hearing before Sir Neil Lawson did not take place until 11 December 1985, nearly two and a half years later. The possibility of changed circumstances concerning the two properties in question must have been obvious, and I find it astonishing that an order for what was effectively specific performance of the undertaking was made without prior investigation of the practicalities. B C

However, there were two reasons for this course of events. First, there appears to have been a misunderstanding between Mr. Munby and the judge, though I think that Mr. Munby must accept responsibility for it. The bulk of the two days' hearing had been taken up with the acute conflict of evidence as to whether or not the undertaking had in fact been given. At the end of it Mr. Munby assumed that the judgment would be limited to this issue, and that there would then be argument about the nature of the order which should be made in the event of it being held, as it was, that the undertaking had been given. It was therefore only at that stage that Mr. Munby proposed to deploy the evidence showing that performance of the undertaking had become impossible. In my view this was not a satisfactory way of dealing with the matter. Having regard to the passage of time and the nature of this undertaking it seems to me that it should have been ensured by all concerned that no order for the enforcement of the undertaking was considered, let alone made, without a prior investigation of the practicalities. If that had happened, then it is clear that it would quickly have become apparent that enforcement was out of the question, and the earlier appeal to this court for the admission of this and other evidence would have been avoided. Indeed, putting the matter quite generally, it seems to me that except in straightforward cases, enforcement of an undertaking should never be ordered without some consideration of the practical implications which will ensue from the order. D E F

But there was also another reason which appears to have affected the course of events below. Quite understandably on the authorities as they then stood, it seems clear that both counsel and Sir Neil Lawson were under the impression that in relation to unperformed undertakings, as opposed to other matters which could give rise to the court's supervisory jurisdiction over solicitors, the court's powers were restricted to ordering the solicitor to perform the undertaking, and that no order for compensation for non-performance could be made unless the circumstances also showed that the solicitor had acted dishonourably. This was not suggested by Mr. Ross on behalf of the plaintiff in the present case, since we were told that he opened the case against Mr. Whiting expressly on the basis that the nature of his conduct was irrelevant; what mattered was that the undertaking had been given but not performed. All this explains the passage from the judgment which G H

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A Balcombe L.J. has cited. Indeed, for the first day or so of the hearing of
 the appeal before us matters took a similar course. Mr. Munby's
 citations of authorities and text books had virtually convinced me that if
 an undertaking has become impossible of performance, as in the present
 case, then there was either no jurisdiction, or at any rate it was not the
 practice of the court, to make any order for compensation. Admittedly,
 B I found this proposition surprising, and it was assumed rather than
 stated expressly in Mr. Munby's citations. But it is now unnecessary to
 go over this ground again, since the decision of this court in *John Fox v.*
Bannister, King & Rigbeys (Note), post, p. 480 then came to light. We
 had heard, more or less by chance, that there had been a recent decision
 on this question. When Mr. Razi, one of the law reporters, learned
 about this, he helped us to trace the transcript, which had only reached
 C the Supreme Court Library a day or two earlier.

D The decision in *John Fox v. Bannister, King & Rigbeys* is of course
 binding upon us and it changed the course of this appeal. Mr. Munby
 was at one time inclined to submit that it had been decided per incuriam
 because the arguments and citation of authorities may have been more
 restricted than before us, but he rightly did not persist in this submission.
 It seems to me, with respect, that the decision is precisely in line with
 what I would expect the law to be. But it is clearly important to
 consider carefully what the case in fact decided.

E The plaintiff's solicitor, Mr. Fox, had for some time been acting for a
 Mr. Geoffrey Watts and was owed substantial fees. The defendants'
 solicitor, Mr. Bannister, had previously acted for Mr. Watts. He knew
 about Mr. Fox's concern about his fees and had received a written
 authority from Mr. Watts to give an undertaking to account to Mr. Fox
 for the balance of certain proceeds due to be received from the sale of a
 property. Having received these proceeds, Mr. Bannister paid some of
 them to Mr. Fox, but this left a balance of £18,000 in relation to which
 there appears to have been some disagreement between Mr. Fox and
 Mr. Watts. It was therefore agreed that Mr. Bannister would retain this
 sum for the time being. On 30 September 1982 Mr. Bannister accordingly
 F wrote to Mr. Fox and informed him that Mr. Watts had asked him to
 retain this sum and then added, at p. 482D:

"no doubt you and [Mr. Watts] will sort out as to the £18,000 which
 is still in my account and which of course I shall retain until you
 have sorted everything out."

G In the event, without going into the facts in further detail, Mr. Watts
 did not resolve the problems between him and Mr. Fox and asked Mr.
 Bannister to remit the £18,000 to him, which Mr. Bannister did without
 further reference to Mr. Fox. The latter thereupon issued an originating
 summons against Bannisters for an order for payment of the sum of
 £18,000 wrongfully released or alternatively for breach of the undertaking.
 Judge Tibber, sitting as a judge of the High Court, held that the letter
 H of 30 September 1982 contained an undertaking to Mr. Fox which had
 been broken, and although the £18,000 had meanwhile been released to
 Mr. Watts, he ordered Bannisters to put Mr. Fox in the same position
 as if the undertaking had been honoured. He therefore ordered that the
 sum should be paid into court or into a joint account "to the credit of
 Mr. Watts" (see p. 483B) and granted a stay pending appeal.

The appeal was heard by Sir John Donaldson M.R. and Nicholls
 L.J., and the latter gave the leading judgment. [His Lordship set out the

passage in the judgment of Nicholls L.J., at p. 483C-E which became crucial for the plaintiff's cross-appeal in the present case for compensation for breach of Mr. Whiting's undertaking, and continued:] Nicholls L.J. then held that the letter of 30 September contained an undertaking given by Mr. Bannister in his capacity as a solicitor to Mr. Fox; that it was irrelevant whether Mr. Bannister had Mr. Watts's authority to give it although there was no evidence to the contrary; but that, if Mr. Bannister had had no such authority and Mr. Fox had known this, then "this might well have affected the attitude which the court would adopt to the undertaking in these proceedings:" see p. 484B. This is important, because it shows that even in cases of unperformed undertakings the court retains a discretion. He then dealt with the decision of Pennycuik J. in *In re A Solicitor* [1966] 1 W.L.R. 1604 and held, at p. 484H that the case was

"no authority for the proposition now being advanced, to the effect that if a solicitor undertakes not to part with a fund and then in breach of his undertaking does so, the court is powerless to take any steps to require the solicitor to make good his default, but must leave the party to whom the undertaking was given to his remedy, if any, at law."

He then went on to note that the case was not straightforward, because the breach of the undertaking had occurred over four years earlier and the parties' positions had changed a great deal, in particular since Mr. Watts had meanwhile gone bankrupt. Moreover, the judge's order that Bannisters should re-create and hold the fund of £18,000 to the credit of Mr. Watts could not be upheld in any event, since it was clear that neither Mr. Watts nor his trustee in bankruptcy could have any claim to the fund. But, on the other hand, Mr. Fox had not necessarily lost £18,000 but only the opportunity of taking such steps as were then open to him to stop this sum from being paid over to Mr. Watts and thereafter to have recourse to it to meet his bill. In these circumstances he proposed, and Sir John Donaldson M.R. agreed, that the court should order an inquiry as to what loss, if any, Mr. Fox had suffered by reason of the breach of the undertaking.

That was the outcome of the appeal, and to that extent the case is clear authority for the proposition that where a solicitor's undertaking has become impossible of performance, or where an order for its specific enforcement would be impracticable, then the court has power in its inherent jurisdiction to make an order for compensation instead. But that leaves the question as to the circumstances in which the court will exercise its discretion to make such an order. I have already referred to one brief passage in which Nicholls L.J. made it clear that the court's attitude in that regard may be flexible. I then come to the main passages in the judgments where this point was discussed. It was dealt with in connection with the submission that the situation in that case had not been sufficiently clear to justify the application of this summary procedure in the first place. This was the issue decided by Judge Dobry in the present case, which has not been appealed. And, since in consequence of his order there were pleadings, discovery and full oral evidence in the present case, so that the character of the procedure was in effect no more summary than if the matter had proceeded by action, I do not cite the passages from the judgments in *Fox's* case which deal with the importance of ensuring that solicitors are not prejudiced from

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A defending themselves by the summary character of the supervisory
procedure. The important passages for present purposes are those which
refer to the standard of conduct of solicitors, in the context of
unperformed undertakings, which will justify intervention by the court.
[His Lordship set out the passages in the judgments of Nicholls L.J., at
p. 485D–H, and Sir John Donaldson M.R., at p. 486F–487A, and
continued:] What these passages show is that even in cases which are
B suitable for the application of this summary procedure, as opposed to
holding that the matter must proceed by action, and even where it has
been established that an undertaking has been given but not performed,
the court still retains a residual discretion about the order which is
appropriate in the circumstances. In cases where enforcement of an
undertaking by an order for its performance is still possible and
C practicable, such an order will no doubt be made more or less as a
matter of course. The reason is that the failure to perform an undertaking
which is still capable of being performed will generally amount to
professional misconduct or a serious dereliction of professional duty, to
use the expressions mentioned in the judgments. But these passages also
show, to use the language of Nicholls L.J., at p. 485G–H that “a solicitor
is not necessarily to be regarded as having misconducted himself by
D failing to honour an undertaking.” One of the examples which he gives
is the situation “where there was real scope for genuine misunderstanding
on what was said or meant by a solicitor on a particular occasion.”

Although, as I have said, these passages were clearly directed to the
question whether or not the application of the summary procedure was
in any event appropriate, it seems to me that the test which they lay
down for its application must also remain relevant to the order which
E the court will ultimately make in cases where the summary procedure
has been invoked, and where it has been established that an undertaking
had been given but not performed. Since the purpose of the procedure
is disciplinary, being designed to ensure a high standard of conduct on
the part of solicitors, an order for enforcement of the undertaking or for
compensation for its non-performance will not necessarily follow as a
F matter of course. Before making such an order the court will have to be
satisfied that by failing to perform the undertaking the solicitor had been
guilty of professional misconduct or a serious dereliction of professional
duty. If it is not satisfied about this, then it seems to me that it must still
be open to the court to decline to make any order, and to hold that the
matter must proceed by action, if at all, on the ground that the
G circumstances do not warrant an order of a disciplinary nature against an
officer of the court.

Where does that leave the present case? I agree with the order
proposed by Balcombe L.J. that the matter must be remitted for
decision whether any, and if so what, order should be made against Mr.
Whiting in all the circumstances. We have not seen any of the evidence
in this case and it would therefore be quite inappropriate to express any
H view about this. It is clear, of course, that specific enforcement of the
undertaking is out of the question and that the issue must be whether or
not it is appropriate to make a disciplinary order for compensation. But
in deciding this issue, which may not necessarily be easy in the unusual
circumstances of this case, one of the factors which it may be necessary
to take into account, as pointed out by Mr. Munby, is the legal
professional privilege of Mr. Whiting's clients, and the general principles
of confidentiality, which may hamper him in seeking to establish that he

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was not guilty of professional misconduct in this case. Thus, it is possible that these factors may prevent him from explaining fully what happened, and why the second charges were not provided. A

On these grounds I agree that the cross-appeal should be allowed, as well as the appeal; and I also agree with the terms of the order proposed by Balcombe L.J.

*Appeal and cross-appeal
allowed with costs.* B

Solicitors: Hancock & Willis; Halls for Readman & Co., Lancing.

A. R. C

NOTE

[COURT OF APPEAL]

JOHN FOX v. BANNISTER, KING & RIGBEYS E

1986 Dec. 15, 19

Sir John Donaldson M.R.
and Nicholls L.J.

Solicitor—Officer of court—Court's supervisory jurisdiction—Solicitors' undertaking to client's former solicitors—Undertaking not to release money until former solicitors' costs paid—Money released to client before costs paid—Summary proceedings requiring performance of undertaking—Whether breach of undertaking—Whether appropriate procedure F

APPEAL from Judge Tibber sitting as a judge of the Queen's Bench Division.

The plaintiffs, John Fox, a firm of solicitors, by originating summons dated 11 December 1984, sought against the defendants, Bannister, King & Rigbeys, also a firm of solicitors, an order for payment of £18,000 alleged to have been wrongfully released to a Mr. Watts, for whom both firms had acted at various times, in breach of an undertaking given by the defendants on 30 September 1982. On 4 October 1986 Judge Tibber, sitting as a judge of the Queen's Bench Division, ordered the defendants to pay £18,000 into a deposit account to the credit of Mr. Watts. G

The defendants appealed on the grounds, inter alia, that (1) there was no evidence on which the judge could find that the defendants had given an undertaking to the plaintiffs; (2) the judge had been wrong in law in holding that it was not necessary to look too nicely at the language of an undertaking if the intention of the parties was clear; (3) the judge should have held that to be enforceable the terms of an undertaking given by a solicitor had to be certain, clear and unambiguous; (4) the judge misdirected himself in concluding that the meaning of the alleged undertaking was that the defendants would retain £18,000 belonging to Mr. Watts as a fund against which the plaintiffs would be able to proceed in respect of their unpaid fees; (5) the judge misdirected himself in H

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A concluding that the matter was sufficiently clear to be decided on the hearing of an originating summons; and (6) there was no evidence on which the judge could have found a breach by the defendants of such an undertaking.

The facts are stated in the judgment of Nicholls L.J.

The following cases are referred to in the judgments:

Grey (H.A.), In re [1892] 2 Q.B. 440, C.A.

B *Marsh v. Joseph* [1897] 1 Ch. 213, C.A.

Silver (Geoffrey) & Drake v. Baines [1971] 1 Q.B. 396; [1971] 2 W.L.R. 187; [1971] 1 All E.R. 473, C.A.

Solicitor (Lincoln), In re A [1966] 1 W.L.R. 1604; [1966] 3 All E.R. 52

United Mining and Finance Corporation Ltd. v. Becher [1910] 2 K.B. 296

The following additional cases were cited in argument:

C *Gertrud, The* (1927) 138 L.T. 239

Solicitor, In re A, Ex parte Hales [1907] 2 K.B. 539

Roger Toulson Q.C. and *Iain Hughes* for the defendants.

Anthony Cripps Q.C. and *Susan Cooper* for the plaintiffs.

Cur. adv. vult.

D 19 December. NICHOLLS L.J. This is a dispute between two firms of solicitors, both of whom at various times acted for a Mr. Geoffrey Watts. The issue concerns a solicitor's undertaking said to have been given in 1982 by Mr. J. W. Bannister, a partner in the defendant firm, to Mr. John Fox, who is the senior partner of the plaintiff firm. Before the court is an appeal from a decision, given on 4 October 1985, of Judge Tibber sitting as a High Court judge.

E From about the middle of 1981 the plaintiff firm ("John Fox") acted as solicitors for Mr. Watts and companies of his in various pieces of litigation, all of which eventually were compromised in July 1982. A substantial amount of complicated legal work had been involved, and John Fox's taxed fees and disbursements, including value added tax, amounted to £59,311. Mr. Watts paid sums totalling £27,760 on account.

F Mr. Watts' previous solicitors had been the defendant firm ("Bannisters"). Mr. Watts had been a client of that firm for some time. When John Fox started to act for Mr. Watts they did not take over the conduct of all Mr. Watts' affairs, and it was Bannisters, and not John Fox, who acted for Mr. Watts in selling two properties of his. One of these was known as King Street Coach Station, Stourbridge. The other was 14, Cemetery Road, Lye, Stourbridge.

G Mr. Fox was very anxious about his lack of security for his firm's costs. His firm had incurred a substantial bank overdraft during the litigation. In February 1982 Mr. Fox obtained from Mr. and Mrs. Watts a charge over the Cemetery Road property, to secure his liabilities to John Fox, but that charge ranked behind a first charge granted to a bank, and it seems there was or will be no surplus remaining after discharging the liabilities to the bank. It seems that Mr. Fox also obtained a charge over the King Street property but that this was never registered.

H In 1982 the King Street property was sold, but part of the purchase price was retained by the purchaser pending the carrying out of demolition works on the site. In July 1982 Mr. Fox obtained from Mr. Watts a form of authority signed by him and addressed to Bannisters. It read:

"I hereby authorise and request you to give an undertaking to account to Messrs. John Fox, solicitors, of P.O. Box No. 2, Broadway, Worcestershire for the balance of the retention moneys in connection with the sale of the King Street Garage and also the balance proceeds of sale of the Cemetery Road property."

On 22 July 1982 John Fox sent that form of authority to Bannisters with a request for Bannisters' undertaking. Despite reminders from John Fox, the undertaking was not forthcoming.

By the end of September the demolition work was finished. On 29 September Mr. Fox spoke to Mr. Watts. Mr. Watts, it seems, had had second thoughts about applying the balance of the price of the King Street property in paying John Fox's costs and disbursements and was considering using the money as a deposit for the purchase of an airfield. On the same day Mr. Fox wrote an agitated letter to Mr. Watts, reminding him of how much was owing, and pointing out reasons why Mr. Watts could not embark on the purchase of the airfield. Mr. Fox insisted that no part of the balance of the sale price should be used for that purchase until his firm's costs had been paid, and he told Mr. Watts that he was asking Mr. Bannister to account to Mr. Fox for the proceeds "in accordance with the irrevocable authority he holds."

I now come to the crucial day, 30 September. According to the undisputed affidavit evidence, on that day Mr. Bannister met Mr. Fox and gave him a cheque for £11,500. Mr. Bannister retained £18,000, representing the balance of the proceeds after deducting Bannisters' own costs. Mr. Bannister retained that sum in accordance with instructions given to him by Mr. Watts. Mr. Bannister told Mr. Fox that he would not part with that sum of £18,000 without referring to Mr. Fox. When giving Mr. Fox the cheque for £11,500 Mr. Bannister also handed to Mr. Fox a letter on Bannisters' headed paper, the material part of which read:

"this leaves a balance in hand of £29,553.10 as I told you [Mr. Watts] wanted me to retain the £18,000 and I enclose a cheque for £11,500.00 in your favour. I see your letter of 29 September and no doubt you and [Mr. Watts] will sort out as to the £18,000 which is still in my account and which of course I shall retain until you have sorted everything out."

On the following day Mr. Fox wrote to Mr. Bannister thanking him for his efforts. He sent Mr. Bannister a copy of a further letter he had written to Mr. Watts, on 1 October, in which he had said that unless Mr. Watts authorised Mr. Bannister to pay over to Mr. Fox the £18,000, he (Mr. Fox) would do no further work for Mr. Watts or his companies and would commence proceedings to recover the balance due. Mr. Fox commented to Mr. Bannister that so far there had been no response from Mr. Watts, and added that he would be grateful if Mr. Bannister would kindly retain the £18,000 pending resolution of the problem.

Mr. Bannister's response to that letter, on 4 October, was to inform Mr. Fox that he had told Mr. Watts that he would not part with the £18,000 until Mr. Fox and Mr. Watts had "decided what to do about this."

Unfortunately Mr. Fox was unable to sort out the position with Mr. Watts. On 18 October Mr. Watts wrote to Mr. Bannister asking for payment of the £18,000, which he proposed to use as a deposit for the purchase of the airfield, and three days later this was followed by a further written demand, delivered by hand, from another firm of solicitors, Cove & Co., acting for Mr. Watts.

Meanwhile, on 19 October Mr. Fox had written to Mr. Bannister asking for the release of the money to him in view of the original authority given by Mr. Watts in July. On 21 October he followed this up with a letter asking Mr. Bannister under no circumstances to part with the £18,000.

By now Mr. Watts' financial problems had become more pressing: an auction sale held on 20 October of other properties belonging to Mr. Watts or his companies had been unsuccessful, and a winding up petition had been presented against one of his companies. Mr. Watts was threatening to hold Bannisters liable for the loss if they held on to the £18,000 and as a result his company was forced into liquidation.

Bannisters considered the matter and decided they had no alternative but to hand over the money to Mr. Watts. Whereupon, without reference to Mr. Fox, they did so.

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A John Fox then made efforts to recover their unpaid costs from Mr. Watts and his companies but without success. None of them has any money. Mr. Watts is now bankrupt.

B On 11 December 1984 John Fox issued an originating summons against Bannisters, seeking an order for payment of the sum of £18,000 wrongfully released in breach of an undertaking given on 30 September 1982 or, alternatively, damages for breach of the undertaking. This was supported by an affidavit sworn by Mr. Fox in December 1984, and a short further affidavit sworn in September 1985. Bannisters adduced no evidence.

C The judge decided that the letter of 30 September 1982 from Mr. Bannister to Mr. Fox contained an undertaking, which had subsequently been broken, and that Bannisters should now put John Fox in the same position as if the undertaking had been honoured. To achieve this he ordered that Bannisters should pay £18,000 into court or into a joint deposit account to the credit of Mr. Watts, that sum to remain there until further order of the court. He granted a stay pending appeal.

D The basic principles applicable in the present case are not in doubt. The jurisdiction being invoked here is the inherent jurisdiction which the Supreme Court has over solicitors, who are its officers. It is a jurisdiction which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the court's own officers: see *In re Grey (H.A.)* [1892] 2 Q.B. 440, 443, *per* Lord Esher M.R.

E One of the areas in which this principle falls to be applied is the enforcement of undertakings given by solicitors in their capacity as solicitors. As officers of the court solicitors are expected to abide by undertakings given by them professionally, and if they do not do so they may be called upon summarily to make good their defaults: see *United Mining and Finance Corporation Ltd. v. Becher* [1910] 2 K.B. 296, 305, *per* Hamilton J. Where a solicitor, directly or indirectly, still has it in his power to do the act which he undertook to do, the court may order him to do that act. Where the solicitor does not have it in his power, he may be ordered to make good the loss flowing from his failure to perform the undertaking, as loss flowing from a breach of duty committed by a solicitor as an officer of the court: see *Marsh v. Joseph* [1897] 1 Ch. 213, 245 *per* Lord Russell of Killowen C.J.

F So I turn to consider whether any undertaking was given in the present case by Mr. Bannister and, if it was, whether it was given by him in his capacity as a solicitor.

G In my view Mr. Bannister did give an undertaking to Mr. Fox. On 30 September 1982 Mr. Bannister had in his possession money belonging to his client Mr. Watts. He knew that in instructing him to retain £18,000 and not pay that amount to Mr. Fox, Mr. Watts was going back on the authority he had signed in July. Mr. Bannister also knew that this change of attitude was a matter of great concern to Mr. Fox, who had been hoping for some time that this sum would be the source from which part of his outstanding bill would be paid. When, in these circumstances, Mr. Bannister wrote to Mr. Fox in the terms of his letter of 30 September, he made to Mr. Fox a clear and unequivocal statement that he would not part with the sum of £18,000. I can see no reason why Mr. Fox was not entitled to rely on that as a commitment by Mr. Bannister. H Mr. Fox's evidence is that he did rely on that undertaking as the security for counsel's outstanding fees which amounted to over £23,000.

Moreover, that was a commitment given by Mr. Bannister in his capacity as a solicitor, for it was in that capacity he was holding the £18,000 in question.

For Bannisters it was pointed out that both firms of solicitors knew that Mr. Watts wished the sum of £18,000 to be retained so that the money could be used as a deposit for the airfield purchase. It was submitted that Mr. Bannister had no authority to give any undertaking regarding this sum and, moreover, that Mr. Fox knew this.

There are two separate points here. The first point is whether Mr. Bannister had authority from his client to give the undertaking and, if he did not, what is the consequence of that in these proceedings. As to this, there is no evidence that Mr. Bannister was acting without authority, but in any event, whether Mr. Bannister had authority from Mr. Watts is irrelevant to the question of whether he gave an undertaking to Mr. Fox. Mr. Bannister wrote the letter of 30 September. Whether his statement in that letter amounted to an undertaking is a question of construction of that letter in the light of the surrounding circumstances.

The second point is whether, even assuming Mr. Bannister lacked authority, Mr. Fox is to be taken as having known of this, and if so what would be the consequence of that in these proceedings. As to this, I accept that if the circumstances were that when the undertaking was given Mr. Fox was aware of Mr. Bannister's lack of authority, this might well have affected the attitude which the court would adopt to the undertaking in these proceedings. But on the affidavit evidence I do not think that any such knowledge is made out. Mr. Fox knew that Mr. Watts had countermanded his original instructions to pay the money to Mr. Fox, and that he had told Mr. Bannister to hold on to the money. Mr. Fox knew, too, of Mr. Watts' plans about the airfield deposit. But Mr. Fox also knew that Mr. Watts' plans in that regard were fraught with difficulties (and, indeed, the money was never used as a deposit on the airfield). All in all, I am not satisfied that from these facts it would be right to infer that Mr. Fox knew that Mr. Bannister was acting without authority in writing the letter of 30 September (if, indeed, that was the case).

Nor can I accept the further submission that the words relied upon were not sufficiently clear in their meaning to amount to a solicitor's undertaking. To my mind there is no material ambiguity. Mr. Bannister stated that he would hold on to the money until Mr. Fox had come to some arrangement regarding it with their mutual client. This did not mean, however, that if Mr. Fox was unable to come to some such arrangement, Mr. Bannister's obligation would have continued indefinitely. Mr. Bannister could have terminated his obligation on giving reasonable notice to Mr. Fox. So that if Mr. Watts sought payment, Mr. Bannister would have been at liberty to pay over the money to him but only after giving reasonable advance warning of this to Mr. Fox, thus affording Mr. Fox an opportunity to take whatever steps he wished to protect his position. In this way the object for which Mr. Bannister's undertaking was given, to provide Mr. Fox with some immediate protection against the dissipation of the £18,000, would have been achieved as intended at the time. (It will be recalled that at the same time as the cheque for £11,500 was handed over with the letter of 30 September, Mr. Bannister had said to Mr. Fox that he would not part with the balance, of £18,000, without referring to him.)

What, then, should now be done? The undertaking was broken. For Bannisters it was submitted that, since the £18,000 has gone, the undertaking is incapable of performance. It was submitted, in reliance on *In re A Solicitor* [1966] 1 W.L.R. 1604, that in general the court will not make a committal order against a solicitor without first ordering him to perform the undertaking, and that the court will not order a solicitor to perform an undertaking which it is impossible for him to perform. *In re A Solicitor* was a case where a solicitor was sought to be committed to prison for failing to comply with certain undertakings given by him. Pennyquick J. pointed out, at p. 1608, that in practice the court makes an order upon the solicitor to do the act which he has undertaken to do, and only if the solicitor disobeys that order would a committal order be made. But that case is no authority for the proposition now being advanced, to the effect that if a solicitor undertakes not to part with a fund and then in breach of his undertaking does so, the court is powerless to take any steps to require the solicitor to make good his default, but must leave the party to whom the undertaking was given to his remedy, if any, at law.

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A That said, however, the present case is not a straightforward one. The breach of the undertaking occurred over four years ago, and the parties' positions have changed much in the meantime. The £18,000 was paid to Mr. Watts, and he is now bankrupt. Thus to order Bannisters now to re-create a fund of £18,000, and place this in an account to the credit of Mr. Watts cannot, with all respect to the judge, be right. The one person who can have no claim to the new fund is Mr. Watts or his trustee in bankruptcy.

B Again, if the sum of £18,000 is ordered to be paid into a joint account or into court, what is the issue between John Fox and Bannisters which will decide the entitlement to that fund?

C I approach the matter in a different way. The purpose of the undertaking was as I have sought to describe. What Mr. Fox lost by the breach of the undertaking was the opportunity to take whatever steps might have been open to him at the time to stop the £18,000 being paid to Mr. Watts and, ultimately, to have recourse to that money to meet his bill. What those steps were, and whether they would have been successful, are not matters canvassed adequately in the evidence in its present form. On the present evidence I am not satisfied that, if the undertaking had been faithfully honoured, John Fox would necessarily have obtained payment to them of the £18,000. Nor, conversely, am I persuaded that they would necessarily have been left empty-handed.

D That being so, I consider that the appropriate course is to direct an inquiry, in these proceedings, as to what loss, if any, John Fox suffered by reason of the breach of the undertaking. If, as contended by Bannisters, John Fox suffered no loss, Bannisters will not be required to make any payment to John Fox. If, however, John Fox can prove loss to the satisfaction of the master who will conduct the inquiry, it would only be right that Bannisters as officers of the court should now make good to John Fox the amount of that loss suffered as a result of the breach of the undertaking.

E There is one final point I should add. Mr. Toulson submitted that to succeed with an application such as this the applicant has to show he has a plain and obvious case, and that where serious or difficult questions are involved, the case is not one appropriate to be dealt with under the court's summary jurisdiction over its officers. I am unable to accept this submission expressed in such wide terms. If this submission were well founded it would mean that if, for example, a dispute arose over whether a solicitor had given an oral undertaking, or had given a written undertaking the only copy of which had been destroyed or lost, the court would be precluded from investigating the matter. That cannot be right. Since the jurisdiction is disciplinary as well as compensatory, the court must be satisfied that there has been misconduct in that there has been a breach of an undertaking given by the solicitor acting professionally. But, in an appropriate case, the court can resolve issues of fact with the assistance of cross-examination of deponents. If necessary, an order for discovery can be made.

G Again, if there is a dispute about the true construction of a document, the court can resolve that issue having heard argument on it.

H The court, however, will always have in mind that a solicitor is not necessarily to be regarded as having misconducted himself by failing to honour an undertaking when, for example, the issue of whether the words amounted to an undertaking, or the further issue of whether there has been a breach, turns on the answer to a fine or subtle point of construction. Likewise where there was real scope for genuine misunderstanding on what was said or meant by a solicitor on a particular occasion. In that sense this supervisory jurisdiction will only be exercised in a clear case.

Moreover, although the court has the means to resolve disputed issues as mentioned above when exercising its summary jurisdiction over solicitors, the court will be careful to ensure that the solicitor defendant is not prejudiced by the course which is being followed in the circumstances of the particular case, and it will exercise the discretion which it has regarding this summary jurisdiction with that in mind.

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None of that applies to this case. John Fox's evidence of the history, including what occurred on and after 30 September 1982, is clear and not disputed. To my mind this is a clear case.

Accordingly I would uphold the judge's view that there was a breach of an undertaking given professionally by Mr. Bannister, but allow the appeal to the extent of substituting for the judge's order for payment an order directing an inquiry in the terms I have indicated, with an order for payment of the sum found due in answer to that inquiry.

SIR JOHN DONALDSON M.R. I agree with the judgment of Nicholls L.J. and wish only to add a word on the nature of the summary jurisdiction of the Supreme Court over solicitors as officers of that court.

Mr. Toulson submitted that it was equivalent to the summary jurisdiction under R.S.C., Ord. 14, and that, accordingly, if it could be shown that the solicitor had an arguable defence, the court should dismiss the application, leaving it to the applicant to bring such other normal or non-summary proceedings as he thought fit. He supported this argument by reference to the decision of this court in *Geoffrey Silver & Drake v. Baines* [1971] 1 Q.B. 396 in which Lord Denning M.R. said, at p. 402:

"This summary jurisdiction means, however, that the solicitor is deprived of the advantages which ordinarily avail a defendant on a trial. There are no pleadings; no discovery; and no oral evidence save by leave. The jurisdiction should, therefore, only be exercised in a clear case."

And Megaw L.J. said, at p. 405:

"If in any particular case where it is sought to invoke this extraordinary jurisdiction it appears to the court that justice requires that another procedure should be followed rather than this special procedure, then the court must exercise its discretion to refuse to allow this extraordinary procedure to be used. In my judgment in the present case, having regard to the serious and difficult issues which are raised, it would be quite wrong, against the will of the respondent to the application, to allow this matter to be dealt with otherwise than by means of an ordinary action in the court with evidence given orally and with the opportunity for cross-examination."

The jurisdiction is indeed "extraordinary," being based upon the right of the court to see that a high standard of conduct is maintained by its officers acting as such: see *Cordery on the Law Relating to Solicitors*, 7th ed. (1981), p. 116. It is, in a sense, a domestic jurisdiction to which solicitors are only amenable because of their special relationship with the court and it is designed to impose higher standards than the law applies generally. Thus, for example, it is no answer to a complaint that a solicitor acted in breach of an undertaking given by him that there was no consideration for it: *United Mining and Finance Corporation Ltd. v. Becher* [1910] 2 K.B. 296, 303.

Its summary character lies not in the burden or standard of proof, although it is only exercisable where there has been a serious dereliction of duty, but in the procedure whereby it is invoked. This is normally by originating summons, although it can be by simple application in an action where the conduct complained of occurred in the course of that action, and will not automatically or usually involve pleadings, discovery or oral evidence, although the court can, in appropriate circumstances, require a definition of the issues (by pleadings or otherwise), discovery and oral evidence.

In *Geoffrey Silver & Drake v. Baines* [1971] 1 Q.B. 396, what I think that the judges were saying was that the court will only exercise this jurisdiction where in the end it is clearly established that there has been a serious dereliction

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John Fox v. Bannister, King & Rigbeys (C.A.)

Sir John
Donaldson M.R.

A of professional duty by a solicitor as such. Both Lord Denning M.R., at p. 403B, and Widgery L.J., at p. 404D, held that Mr. Baines, the solicitor, was not acting in that capacity and so could not have been guilty of any such breach of duty. On the other hand, the plaintiff might have had a claim in contract against Mr. Batts, the employee of Mr. Baines, and against Mr. Baines as an individual, but not as a solicitor, if Mr. Batts had acted with his authority. Such a claim, even if successfully established, would not however fall within the special jurisdiction invoked by the plaintiff, not because of its summary nature but because its application is limited to professional conduct.

*Appeal allowed in part.**Defendants to pay 50 per cent. of plaintiffs' costs in Court of Appeal.**Order for costs below to remain undisturbed.**Leave to appeal refused.*

Solicitors: Kidd Rapinet Badge & Co.; Herbert Smith & Co. for James Chapman & Co., Manchester.

R. C. W.

[FAMILY DIVISION]

MAPLES (FORMERLY MELAMUD) v. MAPLES

MAPLES (FORMERLY MELAMUD) v. MELAMUD

1987 March 17, 18, 19; 26

Latey J.

Husband and Wife—Divorce—Foreign decree, recognition of—Jewish get—Jewish get of divorce obtained in London—Judgment of confirmation in Israel—Whether together entitled to recognition—Whether marriage still subsisting—Foreign Judgments (Reciprocal Enforcement) Act 1933 (23 & 24 Geo. 5, c. 13), s. 8(1)(2)¹—Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 16(1)²

In September 1968, the wife married her first husband in Haifa, Israel where the matrimonial home was established. A son was born in 1970. In May 1974 the wife and son came to London. The husband followed in August 1974 and a second son was born in October 1974. The marriage broke down. On 2 June 1977 following formalities at the Beth Din in London the husband granted and the wife accepted a get by which both acknowledged that the marriage celebrated in Haifa had been dissolved according to Jewish law. On 31 July 1977 the District Court of Haifa issued a judgment of confirmation of the get obtained in London. In the meantime, the wife had left the matrimonial home to live with another man with whom she went through a ceremony of marriage at the register office in St. Albans on 7 August 1978.

¹ Foreign Judgments (Reciprocal Enforcement) Act 1933, s. 8: "(1) Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action . . ."

² Domicile and Matrimonial Proceedings Act 1973, s. 16(1): see post p. 491A.

Maples v. Maples (Fam.D.)

[1987]

In an undefended petition the wife sought a decree of nullity of the marriage of 7 August 1978 on the ground that at that time she had no capacity to marry since the marriage celebrated in Haifa was still subsisting. In a defended petition the wife sought dissolution of the Haifa marriage on the ground that the marriage had irretrievably broken down, evidenced by the fact that the parties had lived apart for more than five years. By his answer, the first husband maintained that the Haifa marriage had been dissolved by the granting and acceptance of the get together with the judgment of confirmation issued by the District Rabbinical Court of Haifa. He asserted that the Jewish decree was entitled to be recognised by the court under the provisions of section 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

On the question whether the get coupled with the judgment of confirmation was a dissolution of the marriage valid in English law:—

Held, (1) that on its true construction section 8 of the Act of 1933 did not apply to judgments affecting marital status since such judgments did not solely concern “the parties thereto” and, in any event, the Haifa judgment confirming that the get obtained in London dissolved the marriage in Israeli law was not “the same cause of action” as the present, and, accordingly, the Haifa judgment was not one to which section 8 applied (post, pp. 491F–G, 492D–F).

Dicta of Lord Reid in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 617, H.L.(E.) and of Sir John Arnold P. in *Vervaeke (formerly Messina) v. Smith* [1981] Fam. 77, 125–126, C.A. considered.

(2) That section 16 of the Domicile and Matrimonial Proceedings Act 1973 expressly excluded from recognition a non-judicial proceeding in the United Kingdom; and that, accordingly the Jewish get of divorce granted in London, being such a proceeding, was not entitled to recognition and both petitions would be granted (post, p. 490H).

The following cases are referred to in the judgment:

Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591; [1975] 2 W.L.R. 513; [1975] 1 All E.R. 810, H.L.(E.)
Vervaeke (formerly Messina) v. Smith [1981] Fam. 77; [1981] 2 W.L.R. 901; [1981] 1 All E.R. 55, Waterhouse J. and C.A.; [1983] 1 A.C. 145; [1982] 2 W.L.R. 855; [1982] 2 All E.R. 144, H.L.(E.)

The following additional cases were cited in argument:

Reg. v. Secretary of State for the Home Department, Ex parte Ghulam Fatima [1986] A.C. 527; [1986] 2 W.L.R. 693; [1986] 2 All E.R. 32, H.L.(E.)
Flynn, decd., In re [1968] 1 W.L.R. 103; [1968] 1 All E.R. 49
Qureshi v. Qureshi [1972] Fam. 173; [1971] 2 W.L.R. 518; [1971] 1 All E.R. 325

PETITIONS

The petitioner, Louise Rachel Maples (formerly Melamud) went through a ceremony of marriage at the register office in St. Albans, Hertfordshire with the respondent, Stephen Maples on 7 August 1978. On 31 May 1985 the petitioner filed a petition for a decree of nullity on the ground that at the time of the ceremony of marriage she had no capacity to marry the respondent because she was lawfully married to Yair Melamud. The suit was undefended.

3 W.L.R.

Maples v. Maples (Fam.D.)

A By a petition filed on 2 April 1984 and amended on 15 January 1986 the petitioner, Louise Rachel Maples (formerly Melamud) prayed for the dissolution of her marriage, which took place on 3 September 1968, to Yair Melamud in Haifa, Israel, on the ground that the marriage had irretrievably broken down, evidenced by the fact that the parties had lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

B Paragraph 6 of the petition stated that on 2 June 1977 the parties had obtained a Jewish religious divorce at the Beth Din (the Court of the Chief Rabbi), Tavistock Square, London and that on 31 July 1977 the District Rabbinical Court, Haifa, Israel had issued a judgment of confirmation but that those proceedings would not be recognised in England and Wales as validly dissolving the marriage.

C By an amended answer filed on 20 October 1986 the respondent, Yair Melamud, admitted that a Jewish religious divorce had been obtained in England on 2 June 1977 and that the District Rabbinical Court in Haifa, Israel had issued a judgment of confirmation and averred that the judgment of the District Court, Haifa was a declaratory judgment of a superior court of the country in which both parties were domiciled declaring the status of the parties which would be recognised under the English rules of private international law. Paragraph 4 of the amended answer stated that the petitioner had married Stephen Maples in England on 7 August 1978; that the petitioner had capacity to marry and that the marriage celebrated on 7 August 1978 was a valid and subsisting marriage. The respondent prayed for the rejection of the petition.

E The facts are stated in the judgment.

E. James Holman for the wife.

Hugh Morgan for the husband, Mr. Melamud.

Cur. adv. vult.

F 26 March. LATEY J. read the following judgment. The petitioner, the wife, presents two petitions. She asks for a decree of nullity of her ceremony of marriage with Mr. Maples on 7 August 1978; and she asks for a decree of divorce of her marriage with Mr. Melamud on 3 September 1968. The result of both petitions depends on whether a Jewish get divorce dissolved the marriage according to English law.

G What happened was this. In September 1968 the wife and Mr. Melamud married in Haifa. The wife's mother was Jewish; her father was British and Christian. Mr. Melamud is Jewish. There are two children, both boys, E., born 27 July 1970, now 16½ years old, and D., born 23 October 1974, now 12 years old.

H Between 1968 and 1974 they lived together in Haifa. Then, in September 1973, there was the Yom Kippur War and the husband was called up as an army reservist. In January 1974 the wife's father died and her mother was ill. In May 1974 the wife and E. came to England. At that time the wife was carrying D. In August 1974, on release from the Israeli army, the husband joined them in England and obtained employment here. In October 1974, D. was born, and in 1975 they bought a house in London.

It is convenient to say here, that after the issues on the petitions are decided there will, or may, be financial issues to be decided; and they

may involve questions of conduct. At this stage I am dealing solely with the two petitions and the question of marital status they involve.

Late in 1976 and early in 1977 the marriage went adrift. For present purposes the reasons do not matter. Divorce was discussed. Mr. Melamud was ready to agree to a Jewish get divorce, but not to an English civil divorce which would have involved allegations of one kind or another being made, which neither wished to make against the other. So, after preliminary inquiries, on 2 June 1977 they went to the Beth Din, Tavistock Square. There, with the formalities which are required duly complied with, Mr. Melamud granted and the wife accepted a get—a paper stating and acknowledging that their marriage was dissolved according to Jewish law. The wife went to live with Mr. Maples. On the advice of the Beth Din, Mr. Melamud wrote to the Rabbinical Court at Haifa. On 31 July 1977, the District Rabbinical Court of Haifa issued a judgment of confirmation of the London Beth Din divorce; a “judgment of confirmation” is how the Hebrew is translated in the translation prepared for these proceedings.

The wife and Mr. Maples wanted to marry. The Registrar-General refused to authorise a marriage between them because of his understanding of the position in English law. The wife says she told the husband about this and asked for a civil divorce. Her husband refused that but said he would “sort it out.”

In April 1978 the husband, when next in Haifa, went to the Rabbinical Court and there emerged another judgment of confirmation, which omitted mention that the divorce had taken place in the Beth Din in London. It is agreed that this was a colourable transaction with no materiality to the issues in this case; but it sufficed to enable the wife and Mr. Maples to go through a ceremony of marriage, though the Registrar-General wrote a cautionary letter stressing that it was questionable whether the marriage would be valid in English law. On 7 August 1978 the wife and Mr. Maples went through a ceremony of marriage.

This brief history omits much which may be relevant in any ancillary financial proceedings. As I have said, I am dealing now solely with the two petitions concerned with matrimonial status. The wife now petitions (1) for a decree of nullity of the ceremony of marriage with Mr. Maples, on the ground that her marriage with Mr. Melamud was not dissolved according to English law. Mr. Maples does not contest that petition; and (2) for a decree of divorce of her marriage with Mr. Melamud on the ground that they have been separated for five years or more. Mr. Melamud contests the petition, on the ground that their marriage was in fact validly dissolved. He accepts that if he is mistaken about that, she is entitled to a divorce decree on the ground of five years’ separation. Both petitions depend on one question only. Was the get, coupled with the judgment of confirmation, a dissolution of the marriage valid in English law?

The experts in Israeli law are agreed that the granting by the husband of the get, and the acceptance of it by the wife, at the Beth Din in London effectively and finally dissolved their marriage according to Israeli law. This was an extra-judicial proceeding and, if the matter stopped there, it would have no validity in English law by reason of the provisions of section 16(1) of the Domicile and Matrimonial Proceedings Act 1973. This provides:

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Maples v. Maples (Fam.D.)

Latey J.

A "No proceeding in the United Kingdom, the Channel Islands or the Isle of Man shall be regarded as validly dissolving a marriage unless instituted in the courts of law of one of those countries."

B It is a simple, straightforward enactment. The proceeding in the Beth Din, London, was not a proceeding instituted in an English court of law. It is, no doubt, because of this that the guidance issued by the Jewish Marriage Council and the Beth Din, London stresses the importance, indeed the necessity, of obtaining a civil divorce in the courts.

C So, the get of 2 June 1977 is only valid in English law if there is some basis of recognition other than pursuant to the Domicile and Matrimonial Proceedings Act 1973. For Mr. Melamud it is contended that such basis is to be found in the Foreign Judgments (Reciprocal Enforcement) Act 1933. For the wife it is contended that the Act of 1933 does not provide any such basis.

Counsel remarked that the decision may have far-reaching implications for the Jewish community here, and probably for the Muslims and other communities, where there is extra-judicial "divorce." They have researched widely and have argued the case fully and helpfully.

D Mr. Morgan, for Mr. Melamud, bases his contention on a passage in the judgment of Sir John Arnold P. in the Court of Appeal in *Vervaeke (formerly Messina) v. Smith* [1981] Fam. 77, 125-126. In that passage Sir John Arnold P. sets out the relevant sections of the Act of 1933 which led him to the view that, contrary to its seeming tenor, the Act does apply to judgments of marital status.

E It is to be observed, first, that what Sir John Arnold P. said was obiter. Secondly, that on this particular point he was in a minority. Both Cumming-Bruce and Eveleigh L.JJ. were doubtful whether the Foreign Judgments (Reciprocal Enforcement) Act 1933 applied to matrimonial cases involving judgments of status. The fact that matrimonial causes are mentioned in the Act could be explained on the basis that money judgments in matrimonial causes are envisaged. Thirdly, the "judgment" in that case was a decree of nullity given in the Belgian courts.

F Mr. Morgan accepts that the get granted at the Beth Din was what dissolved the marriage in Israeli law, and that he cannot rely on that as dissolving the marriage in English law, or, of course, as something to which the Act of 1933 could apply. But he submits that the "judgment" in the Haifa court is covered by the Act.

G What did that "judgment" do? It did not dissolve the marriage. The marriage had already been dissolved in Israeli law by the get in England. That is agreed. All it did was to certify that the requirements for a valid get (valid, that is to say, in Israeli law) had been met at the Beth Din. It would be strange indeed, if that certification could be registered and recognised under the Foreign Judgments (Reciprocal Enforcement) Act 1933 as validly dissolving the marriage in English law.

H Mr. Holman argues that the whole ring and tenor of the Act of 1933 concerns commercial and tortious situations and the normal range of civil actions not involving status.

In the field of matrimonial law there are express statutory provisions dealing with validity and recognition of divorce and nullity decrees: the Recognition of Divorces and Legal Separations Act 1971, and the Domicile and Matrimonial Proceedings Act 1973. Are the provisions of those Acts outflanked by the Foreign Judgments (Reciprocal Enforcement) Act 1933? The language of the relevant parts of that Act,

especially section 8(1), is convoluted and difficult to fathom, at any rate in this context. I am not alone in finding it so. Lord Reid described it as "obscure." In *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 617, Lord Reid said:

"It is said that the effect of these obscure words in section 8(1) is to make the section apply to all judgments which would come within the terms of section 1(2) if condition (b) were omitted. Besides the fact that this would be a very odd way of bringing in another section of the Act that cannot be right. If (b) is omitted then section 1(2) would apply to every kind of judgment including judgments on status and family matters and in rem. No one suggests that section 8 was meant to deal with them."

Those dicta were obiter but, coming from such a source, they are powerful and persuasive. Sir John Arnold P. in *Vervaeke's* case [1981] Fam. 77, 125, said that section 8 "is not framed so as to yield up its meaning easily or quickly." In *Dicey and Morris, The Conflict of Laws*, 10th ed. (1980), vol. 2, p. 1075 it is described as a "tortuously drafted provision."

In my opinion, it can indeed lead to the interpretation which Sir John Arnold P. reached in *Vervaeke (formerly Messina) v. Smith* [1981] Fam. 77. But if that is the correct interpretation it has odd results, some of which I have already described.

But in my judgment, looking at the relevant provisions as a whole, the correct interpretation is that the Foreign Judgments (Reciprocal Enforcement) Act 1933 does not apply to judgments of marital status.

As well as those already mentioned, there are other indications pointing in that direction. There are the words in section 8(1) "a judgment . . . shall be recognised . . . as conclusive between the parties thereto in all proceedings founded on the same cause of action . . ." A decree or judgment affecting marital status has a wider significance than solely to "the parties thereto." The state has an interest. So may others: children, for example. Nor is "cause of action" apt language for such proceedings. In the instant case, in fact, the "cause of action," if so it can be described, in these proceedings is not the same as that in the Rabbinical Court in Haifa.

Mr. Holman advanced some further supplementary arguments. I do not reject them, but I think it unnecessary to repeat them.

For the reasons already given, in my judgment the Act of 1933 does not apply to the Haifa judgment or certification. It follows that section 16(1) of the Domicile and Matrimonial Proceedings Act 1973 does apply, and that the get did not, in English law, validly dissolve the Israeli marriage. Accordingly, the ceremony of marriage with Mr. Maples was void and on that petition there will be a decree of nullity.

The marriage with Mr. Melamud has irretrievably broken down and they have lived apart for more than five years. On that petition there will be a decree nisi of divorce. There will be a declaration that there are the two relevant children and a certificate of satisfaction as to the arrangements for their care.

To provide for certain possibilities and contingencies, counsel have asked that there be findings as to the parties' domicile at material times. Evidence has been given and the position is clear, in my judgment: Mr. Melamud's domicile of origin was Israeli and he has at no time abandoned it; that is conceded. Mrs. Maples' father was and remained

3 W.L.R.

Maples v. Maples (Fam.D.)

Latey J.

A domiciled in England and that was her domicile of origin. She retained it until she married Mr. Melamud. In January 1974 she ceased to be dependently domiciled in Israel but in fact remained so until some time after she came, and then he came, to live in England later in 1974. In 1975 they bought their house in London. The marriage went wrong. Her domicile of choice withered away during those years, and before the Beth Din get she had reverted to her domicile of origin in England, and she has never abandoned it.

Decree of nullity granted on the wife's undefended petition.

Decree nisi of divorce granted on the second petition.

Solicitors: Peter Nash, Guildford; H. C. L. Hanne & Co.

M. B. D.

[CHANCERY DIVISION]

CLAUSS AND ANOTHER v. PIR

[1985 P. No. 6528]

1986 Oct. 24

Francis Ferris Q.C. sitting as a
deputy High Court judge

Practice—Discovery—Affidavit of documents—Power of attorney—Attorney swearing affidavit verifying defendant's documents—Whether defendant's duty to verify documents discharged—Powers of Attorney Act 1971 (c. 27), s.7(1)—R.S.C., Ord. 24, r. 3

The master in a probate action made an order, under R.S.C., Ord. 24, r.3, for discovery of documents verified by affidavit and to be served by 26 June 1986. The plaintiffs complied with the order but the defendant, who was a serving Pakistani army officer resident in Pakistan, failed to comply. A further order was made that unless the defendant complied with the order by 19 August 1986, he would be debarred from defending the action. The defendant's solicitors, in purported compliance with that order and in reliance on sections 7(1) and 10(1) of the Powers of Attorney Act 1971,¹ served a list of documents in prescribed form accompanied by an affidavit sworn by the defendant's wife which stated that she held a valid power of attorney.

On the plaintiffs' motion for judgment in the action on the ground that the defendant had not complied with the order and on the defendant's motion for extension of time if the order had not been complied with:—

Held, (1) that an order made under R.S.C., Ord. 24, r. 3, requiring discovery of documents to be verified by affidavit,

¹ Powers of Attorney Act 1971, s. 7(1): see post, p. 498A.
S. 10(1): see post, p. 497B.

imposed upon a principal a personal duty to swear the affidavit; that the power of an attorney under section 7 of the Powers of Attorney Act 1971 to execute an instrument and “do any other thing” in his own name, properly construed, merely provided an alternative procedure to enable an attorney to act in his own name on behalf of his principal in respect of such things as the principal could lawfully do by that attorney; and that, since the affidavit concerned matters about which only the defendant as principal was competent to depose, the defendant’s duty could not be delegated (post, pp. 496G, 498C–G).

(2) That, since the defendant’s non-compliance had arisen out of a bona fide mistake and the plaintiffs would not suffer any inconvenience or hardship, the court would exercise its discretion to grant the defendant’s application for further time to comply with the order of the master (post, p. 499B–D).

No cases are referred to in the judgment and none were cited in argument.

MOTION

On 12 June 1986, Master Munrow made an order in a probate action requiring, inter alia, that lists of documents verified by affidavit be served on or before 26 June 1986 and inspection of the documents disclosed within seven days thereafter. The defendant, Qamar-Ud-Din Pir, did not comply with that order and, by summons dated 11 July 1986, the plaintiffs, Horst Clauss and Eva Maria Loise Daniels, applied to the master for further directions. Master Munrow made an order dated 29 July 1986, which by paragraph (2) stated that unless the defendant do on or before 4 p.m. on 19 August 1986 serve his list of documents verified by affidavit he be debarred from defending the action.

By notice of motion dated 19 September 1986 the plaintiffs sought judgment on the ground that the defendant had failed to comply with the order of 29 July and also an order that letters of administration of the estate of Ruth Aloisia Pir, deceased, late of 26, Cheniston Gardens, Kensington, London W.8 be granted to the plaintiffs’ lawful attorney, Rudolph Graupner.

By notice of motion dated 3 October 1986 the defendant sought an order that if the court decided that he had failed to comply with paragraph (2) of the order of 29 July then paragraph (2) be varied so as to grant an extension of time for compliance with the order of 29 July to six weeks from the hearing of the notice to enable the solicitors acting on behalf of the defendant to contact the defendant personally and have the affidavit sworn in Pakistan. In the alternative that if the defendant’s solicitors were to swear the affidavit and exhibit thereto and thereby comply with the order of Master Munrow that the order be varied so as to grant an extension of time for compliance of the same to 24 hours from the hearing of the notice to enable the defendant’s solicitors to swear and serve the same.

The facts are stated in the judgment.

Ian Karsten for the plaintiffs.

Steven Whitaker for the defendant.

FRANCIS FERRIS Q.C. I have before me two motions in this action. The first is a motion on behalf of the plaintiffs, whereby they seek judgment in the action on the ground that the defendant has not

3 W.L.R.

Clauss v. Pir (Ch.D.)

Francis Ferris Q.C.

A complied with an order that in default of doing certain things in relation to discovery which I will mention later he should be debarred from defending the action. The second motion is on behalf of the defendant and it is put on the following basis. The defendant denies that he has failed to comply with the order I have just mentioned, but if he be wrong about that he asks for further time for compliance.

B The action is a probate action. The plaintiffs claim to be the next of kin of a Mrs. Pir and they claim that she died intestate and that they are entitled to a grant. The defendant claims to be the adopted son of Mrs. Pir and, though I have not seen his defence and counterclaim, I understand the nature of his contentions in the action is that he claims, in the event of intestacy, to be entitled to a grant of letters of administration in priority to the plaintiffs. Alternatively, he relies upon
C an instrument which apparently relates to his adoption as being a will, in which event presumably he will be entitled either to probate of the will or to letters of administration with the will annexed.

D The action was commenced by a writ on 5 December 1985 and it proceeded in the normal way down to the close of pleadings, which happened on 17 March 1986. Neither side then gave discovery in accordance with R.S.C., Ord. 24, r. 2, but at the instance of the defendant a summons for directions was taken out and came before Master Munrow on 12 June 1986, when he made an order, amongst other things, that lists of documents verified by affidavit be served on or before 26 June 1986 and that there be inspection within seven days thereafter.

E That order was drawn up and, although the defendant seems to complain of some delay, it was in fact served on the defendant's solicitors under cover of a letter of 23 June 1986. On 24 June the plaintiffs' list of documents was served on the defendant's solicitors, accompanied by a verifying affidavit in the form required by the rules, to which I shall refer, that affidavit being sworn by the plaintiffs' solicitors.

F The defendant's solicitors were in some difficulty about giving discovery, partly because some of the documents of which discovery had to be given were in Germany and when received were in the German language and had to be translated before it could be determined whether they were, in truth, discoverable; and partly because the defendant, who is, I understand, an officer in the Pakistan Army, was not resident in this country and was resident in Pakistan.

G Mindful of that difficulty, the defendant's solicitors indicated in a letter of 15 July 1986 that they proposed that the verifying affidavit should be sworn not by the defendant but by his attorney. They did not identify the attorney at that stage, but it appears that the defendant had given a statutory general power of attorney to his wife on 19 July 1985. The plaintiffs' solicitors did not at that stage protest that a verifying affidavit sworn by the attorney for the party giving discovery would not
H comply with the order.

In view of the fact that the time for giving discovery specified in the order of 12 June 1986 had expired on the 26 June and that discovery had still not been given some weeks later, the plaintiffs' solicitors applied to Master Munrow on 29 July 1986 for further orders. The relevant part of the order which Master Munrow made on 29 July was that unless the defendant on or before 4 p.m. on 19 August 1986 serve his list of documents verified by affidavit he would be debarred from

defending this action. That order was duly drawn up and, no doubt, served. A

The defendant's solicitors then on, I think, 19 August served on the plaintiffs' solicitors a list of documents in the usual form, dated 18 August, accompanied by an affidavit sworn by the defendant's wife on 18 August. That affidavit is substantially in the form prescribed by the rules, except that an additional paragraph was added to that form in which the deponent stated: "I am the wife of the defendant in this action and hold a valid power of attorney." B

On receipt of that affidavit and the list, the plaintiffs' solicitors wrote on 20 August acknowledging receipt, but asserting that the defendant had not complied with the order of Master Munrow as the verifying affidavit was neither sworn by the defendant nor by his solicitor. They said: "We shall therefore treat the defendant as being debarred from defending this action." C

In a letter of 27 August the defendant's solicitors took issue with the plaintiffs' solicitors on this matter and on 19 September the plaintiffs' solicitors issued a notice of motion, seeking judgment on the grounds of non-compliance with Master Munrow's order of 29 July. That is the first application which I have to consider.

On 3 October the defendant's solicitors served a notice of motion seeking, as I say, an extension of time for complying with Master Munrow's order in case the defendant should be held not to have complied with it. D

The first question which I have to consider is whether it is in fact in compliance with Master Munrow's order for a verifying affidavit to be sworn by an attorney for a party and not by the party himself. The rule under which Master Munrow's order was made was R.S.C., Ord. 24, r.3, under which the court may order any party to a cause or matter to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter and may, at the same time or subsequently, also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party. E F

By Ord. 24, r.5, it is provided that a list of documents made in compliance with rule 3 of that order must be in form no. 26 in Appendix A; and by Ord. 24, r.5(3) an affidavit made as aforesaid verifying a list of documents must be in form no. 27 in Appendix A. If one looks at the form no. 27 one finds that the prescribed form is as follows: "I, the above mentioned plaintiff [or defendant] . . . make oath and say as follows" and then follow some paragraphs relating to "statements made by me" in various paragraphs of the list. G

In my judgment there cannot really be any doubt that Ord. 24, r. 5, imposes an obligation on the relevant party personally and when there is provision for an affidavit to be made "by him" that means that the order requires an affidavit to be made by that party. Of course, by implication or otherwise these provisions have to be modified in relation to companies which have no persona which would enable the company to swear an affidavit, but I do not think the need for a modification in relation to artificial persons affects the principle. H

Up to this point, as I understand it, both sides are really at one. The argument which has been put before me by Mr. Whittaker, on behalf of the defendant, is that although an order against a party, in this case the defendant, personally requires the defendant to do something, a party is

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A at liberty to do that thing by an attorney. He says that the apparently not unusual practice under which solicitors swear verifying affidavits on behalf of their clients is contrary to the rule, but there is a difference between a solicitor in his capacity as agent of a party and an attorney who is appointed formally.

B He referred me to two sections of the Powers of Attorney Act 1971. First to section 10(1), which created for the first time a statutory general power of attorney and provides:

C “Subject to subsection (2) of this section, a general power of attorney in the form set out in Schedule 1 to this Act, or in a form to the like effect but expressed to be made under this Act, shall operate to confer—(a) on the donee of the power; . . . authority to do on behalf of the donor anything which he can lawfully do by an attorney.”

D If the matter rested there, that subsection would not, I apprehend, suffice for Mr. Whittaker’s purposes because although the defendant’s wife had a statutory general power of attorney the section creates in the donee power merely to do on behalf of the donor “anything which he can lawfully do by an attorney.” It is necessary to go further and ask:

E “Can the principal in this case lawfully by an attorney discharge his obligation to swear a verifying affidavit?”

F What a principal can lawfully do by an attorney is summarised in *Halsbury’s Laws of England*, 4th ed., vol. 1 (1973), p. 420, para. 703:

G “It may be stated as a general proposition that whatever a person has a power to do himself he may do by means of an agent. The converse proposition similarly holds good that what a person cannot do himself he cannot do by means of an agent. It is, in general, necessary to ascertain who is legally competent to act or contract in order to know who is competent to be a principal. There are, however, two exceptions to the general rule that a person may do by means of an agent whatever he has power to do himself, and these are . . .”

F and then there is an exception where statute requires the evidence of a signature of the principal. The second exception is:

G “where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power, authority, or duty of a personal nature and requiring skill or discretion for its exercise . . .”

and then the paragraph goes on with an example which is not material.

It appears from that passage that a party cannot do by an attorney some act the competency to do which arises by virtue of some duty of a personal nature requiring skill or discretion for its exercise.

H It might be thought that the obligation to swear a verifying affidavit which requires the deposing party to apply his mind to matters which are or should be within his own knowledge (and, amongst other things, to make the very important statement on oath that there are not and have not been in his possession, custody or power any documents relevant to the action apart from those which are disclosed) is a clear example of a duty of a personal nature requiring skill or discretion for its exercise. But Mr. Whittaker says that that does not apply in the present case because section 7 of the Act of 1971 provides the very

widest power for the donee of a power of attorney to do things on behalf of his principal. Section 7(1) reads:

“The donee of a power of attorney may, if he thinks fit—
(a) execute any instrument with his own signature and, where sealing is required, with his own seal, and (b) do any other thing in his own name, by the authority of the donor of the power; . . .”

and then it goes on to deal with documents, which I do not read.

Mr. Whittaker relies upon the words in section 7(1)(b): “do any other thing in his own name” and, as I understand Mr. Whittaker’s argument, he says that these words constitute statutory authority for the proposition that an attorney can do anything which the principal can do.

In my judgment that is not correct. Properly understood, I think section 7 is very much more limited. Apart from section 7, as I understand the law, the correct mode in which a donee of a power of attorney should act is to express himself to be acting in the name of his principal and to sign, where signing is required, not the donee’s name but the principal’s name.

What section 7 does is to provide an alternative procedure for the attorney to act on behalf of the principal. The procedure is as follows. Where the act requires the execution of an instrument the attorney is empowered to use his own signature instead of his principal’s signature. Where a seal is needed he may use his own seal not his principal’s seal. And where some other thing is to be done he may do it not in the name of his principal but, as an alternative, in his, the donee’s name. That, in my judgment, is all that section 7 does. It does not enlarge the scope of the things which may be done by the donee of a power of attorney on behalf of his principal: it is merely procedural.

Just as section 10 gives the donee of a power authority to do only such things as the principal can lawfully do by his attorney, so the procedure made available by section 7 is a procedure which is available only to enable the donee to do things which the principal can do by his attorney.

Accordingly, if, as I think, an order under R.S.C., Ord. 24, r. 3, on the face of it requires the principal to do what is mentioned in the order, that is a personal duty which he alone can perform because of the personal knowledge which is required. After all, he is being compelled to give a particular form of evidence and in no other field would it be possible to say that a party may give evidence through an attorney. If the obligation under Ord. 24, r. 3(3), must be performed personally, there is nothing in the Act of 1971 to change that. The order which was made by Master Munrow in this case on 29 July 1986 required *the defendant* to serve a list of documents verified by affidavit. The requirement that he should serve his list verified by affidavit is not something which can be delegated. It required the defendant to do something personally which cannot be done by means of an attorney.

It follows that, in my judgment, the defendant has failed to comply with the order of Master Munrow and that, on the face of it, the debarring order has had effect. There is, however, no doubt that I can extend the time for compliance with the order to serve a list of documents verified by affidavit even though the original time for compliance has expired and Mr. Whittaker asks me to extend that time.

At the end of the day this application was not seriously opposed by Mr. Karsten, subject to the question of costs, so I do not feel I have to

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A discuss the various grounds to any great extent. It seems to be
abundantly clear that this is a case where the discretion to extend the
time ought to be exercised. There is a reason for non-compliance,
namely, the difficulty in contacting the defendant personally, coupled
with what I have now held to be the erroneous belief that it was not
B necessary to do so because the affidavit of the attorney sufficed. On the
other side, it is not possible to point to any inconvenience or hardship
which the plaintiffs would suffer if time was extended and it would
clearly be wrong to drive the defendant from the judgment seat once
and for all because of what I have taken to be a bona fide mistake as to
what the order of Master Munrow required.

C Accordingly, I have no hesitation in exercising my discretion so as to
extend the time for compliance. The defendant asks for six weeks, which
might perhaps be thought to be a rather long time having regard to the
time which has already elapsed, but I recognise that during that time
there was a dispute as to whether there has been compliance or not. It
seems to me that it really is not going to make much difference whether
I give the defendant six weeks or four weeks, as I might otherwise have
been inclined to do. The better course is to grant the application as
D asked and to allow six weeks. Of course, that carries with it the
implication that if there is not compliance within that period, being a
period which is the defendant's own suggestion, the consequences may
be serious.

Accordingly, the conclusion which I reach is to extend the time for
the defendant's compliance with paragraph 2 of the order of Master
Munrow of 29 July to six weeks from today.

E The only other matter is the question of costs, on which I would in
the ordinary way have invited further submissions from counsel, but as
they have already made their submissions to me I propose to indicate
my views now. Although I can see the force of the argument that this is
a very technical matter, I have to look at it in the context that the
defendant has chosen to stand pat on a contention which I rejected as
being wrong: that there had been compliance. If the defendant had
F decided to take the more cautious line of immediately applying for an
extension of time for verifying the list of documents by means of an
affidavit sworn by his solicitor, which is what the plaintiffs impliedly
invited him to do (though it was in my view an erroneous invitation),
then I would have seen more readily that today's application by the
plaintiffs was of technical merit only. But it seems to me that as the
G result of the defendant having chosen to stand pat on a contention,
which I have held to be wrong (namely that he complied with the order)
I ought to say that the costs of both motions before me should be paid
by the defendant in any event.

Order accordingly.

H *Solicitors: Pritchard Englefield & Tobin; Michael David & Co.*

[Reported by IAN SAXTON ESQ., Barrister-at-Law]

PEREZ-ADAMSON v. PEREZ-RIVAS AND ANOTHER

1987 March 26

Dillon, Stephen Brown and Nicholls L.JJ.

Husband and Wife—Property—Adjustment order—Registration of pending action—Property not specified in application for adjustment order—Registration by wife as pending action in respect of matrimonial home—Husband obtaining bank loan secured by charge on matrimonial home—Whether wife's claim taking priority over charge to bank—Land Charges Act 1972 (c. 61), s. 5(7)

B

Following the break down of the parties' marriage, the wife left the matrimonial home, which was owned solely by the husband. In her petition for the dissolution of the marriage, she sought ancillary relief, including a property adjustment order but without specifying any particular property. Thereafter she registered her claim as a pending action pursuant to section 5 of the Land Charges Act 1972,¹ describing the former matrimonial home as the property to be charged. A few weeks later the husband applied to the bank for a bridging loan, falsely stating that he required it for the purpose of purchasing a property for his wife as part of the divorce settlement, and he offered the bank a legal charge on the former matrimonial home as security. The bank was unaware of the wife's claim and moreover, failed to make a search at the Land Charges Registry. The bank granted the husband the loan which was secured by a first legal charge on the matrimonial home. Thereafter the husband realised all his assets in the United Kingdom and left the jurisdiction without repaying the bank's loan. He took no further part in the proceedings. On the wife's application, the bank having been made party to the proceedings, the judge made an order setting aside the bank's mortgage on the matrimonial home.

C

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On appeal by the bank:—

Held, dismissing the appeal, that the purpose of particularising the property to be charged was for the protection of those dealing with the owner of the property, and that purpose was fulfilled if the property was particularised at the time of registration of the charge; that the wife had identified the property to be charged by registering her *lis pendens* under section 5 of the Act of 1972, and that, accordingly, her claim took priority over all other subsequent transactions in respect of that property, including the bank's charge, notwithstanding that the property adjustment order was sought in general terms and that the bank had acted in good faith without notice of the wife's claim (post, pp. 504A–C, F, 506D–H, 507C–E).

F

G

Calgary and Edmonton Land Co. Ltd. v. Dobinson [1974] Ch. 102 and *Whittingham v. Whittingham (National Westminster Bank Ltd., intervener)* [1979] Fam. 9, Balcombe J. and C.A. considered.

Decision of Judge Hutchinson sitting as a judge of the Family Division affirmed.

H

The following cases are referred to in the judgments:

Calgary and Edmonton Land Co. Ltd. v. Dobinson [1974] Ch. 102; [1974] 2 W.L.R. 143; [1974] 1 All E.R. 484

¹ Land Charges Act 1972, s.5(7): "A pending land action shall not bind a purchaser without express notice of it unless it is for the time being registered under this section."

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Perez-Adamson v. Perez-Rivas (C.A.)

- A *Sowerby v. Sowerby* (1982) 44 P. & C.R. 192
Whittingham v. Whittingham (National Westminster Bank Ltd., intervener)
 [1979] Fam. 9; [1978] 2 W.L.R. 936; [1978] 3 All E.R. 805, Balcombe
 J. and C.A.

No additional cases were cited in argument.

- B APPEAL from Judge Hutchinson sitting as a judge of the Family
 Division at Lincoln.

- C By summons dated 29 October 1985, the wife, Juliet Mary Perez-
 Adamson, applied pursuant to section 37 of the Matrimonial Causes Act
 1973 for an order that the mortgage to Barclays Bank Plc. by the
 husband, Leobardo Perez-Rivas, of Heydour Priory, Heydour, near
 Grantham, Lincolnshire, dated on or about 1 July 1985 be set aside. On
 5 December 1985 the bank was granted leave at the Family Division of
 Lincoln District Registry to be joined as a party to the proceedings. On
 12 September 1986 Judge Hutchinson sitting as a High Court judge in
 the Family Division at Lincoln District Registry, ordered that the legal
 charge made between the bank and the husband be set aside and that
 the fund representing the proceeds of sale of the property be transferred
 to the wife's solicitors.

- D By notice of appeal dated 25 November 1986, the bank appealed on
 the grounds, inter alia, that the judge was wrong in law in holding that
 in all the circumstances of the case the registration of a pending action
 under the Land Charges Act 1972 amounted to notice to a third party of
 an intention on the part of the husband to defeat the wife's claim for
 financial relief within the meaning of section 37 of the Matrimonial
 Causes Act 1973, and that the judge wrongly exercised his discretion
 under section 37(2) of the Act of 1973 in ordering that the legal charge
 be set aside.

The facts are set out in the judgment of Dillon L.J.

- F *Gavin Lightman Q.C.*, *Michael Jefferis* and *Thomas Sharpe* for the
 bank.

Joseph Jackson Q.C. and *Iain MacLeod* for the wife.

- G DILLON L.J. This is an appeal by the third party, Barclays Bank Plc.,
 against an order of His Honour Judge Hutchinson, sitting as a judge of
 the High Court, made on 12 September 1986. It arises in relation to
 proceedings in the Family Division between Mrs. Juliet Mary Perez-
 Adamson, the petitioner, and Mr. Leobardo Perez-Rivas, the respondent,
 formerly husband and wife.

- H The husband came from abroad but had, until the matters in
 question, made his home with the wife in this country, latterly at a
 property called Heydour Priory, Heydour, near Grantham in Lincolnshire.
 The husband and wife had been married in December 1970, and since
 January 1974 the husband had been a customer of the bank at its
 Grantham branch. The marriage, however, unfortunately broke down.
 The wife left Heydour Priory, and on 4 June 1985 she presented a
 petition in the Lincoln County Court whereby she prayed for the
 dissolution of the marriage and to be granted custody of the four
 children of the marriage. She also asked, in the usual general terms, for
 ancillary relief, which included, without specifying any particular
 property, a property adjustment order.

Having issued her petition, she applied to the court on the next day for various injunctions which are not directly relevant to these proceedings, but, in addition, she also applied through her solicitors to the Land Charges Registry for the registration of a pending action under section 5 of the Land Charges Act 1972 in respect of her claim for ancillary relief. The registration was effected on 7 June 1985, and the property charged is described as Heydour Priory, Heydour, Grantham. That was obviously defined by the application for the registration.

On 18 June 1985 notice to proceed with the application for ancillary relief was duly issued by the wife's solicitors returnable on 9 July 1985. That, for present purposes, is franked by the prayer in the petition. Then on 21 June the husband went to see the bank's manager at the Grantham branch, a Mr. Sargeant, and he sought a loan from the bank on the security of the property Heydour Priory. Mr. Sargeant regarded the husband as a reliable businessman and a blue-chip customer, and his evidence is that at his meeting with the husband, the husband told him that the husband and the wife had decided to separate; that their affairs were being sorted out amicably; and that the husband wished to purchase a property for the wife as part of the settlement of their affairs. He asked, therefore, for a bridging loan of £50,000 (later increased to £60,000) to purchase such a property. He said he had not yet found a suitable property, but he wanted the cash to be available to facilitate a speedy purchase when the right property was found. A bridging loan was therefore arranged for a period of 12 months to be secured by a first legal charge on the property. The husband was the sole legal owner of the property. The husband apparently told the bank manager that he had about £100,000 worth of investments, but that there might be disadvantages in realising investments to repay the bank's loan because they had been recently purchased and realisation would result in a loss.

It was a plausible explanation; it was untrue. What the husband was in fact doing was realising as many of his assets as he possibly could and sending the money, via another bank account of which the wife did not know, out of the jurisdiction of this court. In this he was successful.

On 4 July 1985 a legal charge on Heydour Priory in favour of the bank was duly executed by the husband. On 8 July £50,000 of the agreed advance of £60,000 was drawn down by the husband. The balance of the advance was drawn out shortly afterwards. The bank accepted the legal charge and made the advance without making any search in the Land Charges Registry. Consequently, the bank did not actually know that the wife had effected the registration of the lis pendens under section 5 of the Act of 1972.

The bank found out, however, not very long afterwards, that the husband was not acting honestly. It was, of course, by that time too late to recall the money which the husband had had. I need not go further into the history of the husband's misdoings; he has played no part in the proceedings before the judge or in this court; he remains outside the jurisdiction with the money which he has succeeded in taking outside the jurisdiction and also, in breach of orders of the court, with the children of the marriage.

What came before the judge on the occasion on which he made his order were the wife's applications for ancillary relief, including application for a property adjustment order in respect of Heydour Priory and another property, and also an application by the wife to set aside the

A mortgage in favour of the bank under section 37 of the Matrimonial Causes Act 1973. That section starts with a definition of "financial relief" as including relief under any of certain provisions of the Act which are referred to in the section and which include the statutory provision for making property adjustment orders. Section 37 provides:

“(2) Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person—(a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim; (b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition; (c) if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subsection (1) above by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition; . . . (4) Any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of subsection (2)(b) and (c) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.”

It is common ground in these proceedings, in so far as it is material, that the legal charge in favour of the bank was made for valuable consideration and that the bank acted in relation to it in good faith. It is also clear that the bank had no express notice of any intention on the part of the husband to defeat the wife's claim for financial relief. The case turns on the effect of the registration under section 5 of the Act of 1972.

The first point that is taken by Mr. Lightman for the bank is that there was nothing capable of being registered under section 5 because the land in respect of which the wife was seeking a property adjustment order had not been identified in the proceedings between the wife and the husband at the time the registration was effected. He refers to some observations by Sir Robert Megarry V.-C. in *Sowerby v. Sowerby* (1982) 44 P. & C.R. 192, where the Vice-Chancellor considered at the end of his judgment that where the claim in the matrimonial proceedings was not particularised it could not be said that there was an action or a proceeding relating to land within the meaning of section 5. He said that a *lis pendens* must involve a claim in relation to specific property. But, having expressed his doubts and expressed, further, the view that, if a procedure was adopted in the Family Division for obtaining an order requiring a proper specification of the property in question, the doubts would be resolved, he left the matter there, recognising that he had not heard the matter fully argued out.

If it is open to a wife, for instance, who has in the usual form sought a property adjustment order without indicating what property she has in mind in the petition for divorce, to particularise in the divorce proceedings by specifying the particular property, whether in response to a demand from her husband's advisers or not, it seems to me that what one has got in the petition is a general claim to a property adjustment order in respect of any property the husband might own, which the wife has in this case particularised, so far as Heydour Priory is concerned, in her application to the Land Charges Registry to register the *lis pendens* in respect of that property. I see no need for any further particularisation. The need that the property should be particularised arises for the protection of those dealing with the owner of the property and it is satisfied if there is a registration in respect of a particular property. Because of the provisions of the Land Charges Act 1972, persons dealing with the owner will not be prejudiced if they are dealing in respect of a property which has not been the subject of any registration. Therefore I would reject that point of Mr. Lightman's which would indeed, if valid, seem to upset the established practice in the Family Division. I see no reason why more should be required of an applicant wife in that respect.

Then comes the question: what is the effect of a registration under section 5 of the Land Charges Act 1972? It is referred to as a registration in the register of pending actions, and it seems that registration of pending actions by the term *lis pendens* goes back as far as the Judgments Act 1839. Section 5(7) of the Act of 1972 provides that "A pending land action"—that is the description of what is to be registered—"shall not bind a purchaser without express notice of it unless it is for the time being registered under this section." Section 198(1) of the Law of Property Act 1925 provides:

"The registration of any instrument or matter under the provisions of the Land Charges Act 1925, or any enactment which it replaces, in any register kept at the land registry or elsewhere, shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration . . . and so long as the registration continues in force."

The clear implication, as it seems to me, from section 5(7) is that a pending land action does bind a purchaser, even if he has no express notice of it, if it is for the time being registered under the section. The term "pending land action" is defined in section 17 of the Act of 1972 as meaning "any action or proceeding pending in court relating to land or any interest in or charge on land." "Land" is widely defined, but does not include an undivided share in land. That definition was considered by Megarry J. in *Calgary and Edmonton Land Co. Ltd. v. Dobinson* [1974] Ch. 102. He said, at p. 107:

"As for more general considerations, it seems to me that once it is accepted (as it has been) that some restriction must be placed on the wide statutory language, the question becomes one of what restriction is most consonant with the language and general purposes of the statute, and with common sense and practicability. The rights made registrable under the Land Charges Act 1972, as under the Land Charges Act 1925, are in general substantive rights in the land. Those with specified rights *or claims* to the land or any

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A interest in it must register those rights or claims (and so give
warning to purchasers) or else suffer the consequences of failure to
register. What is protected is some substantive right adverse to the
owner, rather than a mere fetter on the owner's rights of disposition.
... What is registrable as a pending land action is an action or
proceeding which claims some proprietary right in the land, and not
B an action merely claiming that the owner should be restrained from
exercising his powers of disposition." (Emphasis added).

The effect of that, because otherwise there is no point in having
registration to give warning to purchasers, seems to me to be that the
claim, if it be a claim rather than a present right which is being
protected, will bind the purchaser once registration has been effected, so
long as the registration subsists.

C The position of registration of claims for ancillary relief was
considered by the courts in *Whittingham v. Whittingham (National
Westminster Bank Ltd., intervenor)* [1979] Fam. 9. What that case
actually decided was that, where a wife had applied in divorce
proceedings for an order that a certain property be transferred to her
but she had not effected any registration of the claim as a pending
D action and her husband subsequently charged the property in favour of a
bank, the wife could not apply to set aside the charge because her claim
under section 24 of the Matrimonial Causes Act 1973 for the transfer of
the property was not binding on the bank. Of course registration of such
a claim for a property adjustment order could only arise after a divorce
petition has been presented, and there may well be cases in which the
avoidance transaction, or, as it is put in section 37, "the reviewable
E disposition," has been made before the petition was presented. In those
cases all that will have to be considered where a third party is concerned
is whether the third party gave valuable consideration and at the time of
the disposition acted in relation to it in good faith and without notice of
any intention on the part of the other party to defeat the applicant's
claim for financial relief. Where, however, there has been a registration,
F the position is not quite the same. Balcombe J., having given his reasons
in *Whittingham v. Whittingham* [1979] Fam. 9 at first instance for
concluding that on the facts of that case the wife's claim for ancillary
relief was not binding on the bank, said, at p. 18:

"I do not believe that the practical effect of this judgment will be
seriously to prejudice the ability of a spouse, usually a wife, to set
aside a reviewable disposition of land under section 37. Where a
G party has applied for a transfer of property order, registration of
that application as a pending land action should afford an effective
protection against any future disposition."

When that case came to this court the decision of Balcombe J. was
affirmed. Stamp L.J. giving the leading judgment of this court said, at
H p. 21:

"I am bound to say that considering the matter without the aid of
authority I would not feel much hesitation in holding that a
summons to obtain the transfer of a specified property under section
24 does relate to that property. Furthermore, it appears to me
desirable that a wife who has issued such a summons should be able
to safeguard the property, pending hearing of the application, by
registering a lis. If this is not so, she is placed in the unenviable

position of having to establish that a transaction which subsequently takes place by way of sale or mortgage is a reviewable disposition within section 37, involving litigation in which the good faith of the purchaser or mortgagee and the question whether he had notice of the wife's intention fall to be considered. Such questions are not usually at all easy to decide; in fact it was because of the difficulties involved in establishing whether a purchaser or mortgagee had or had not constructive notice of a particular dealing with land that the policy of registration of interests in land was brought into force by the effect of the Land Charges Acts. The right of a wife or husband to apply for a transfer of property under section 24 is of recent origin, and I can see no good reason for not regarding a summons to obtain a transfer of a particular property as one which does relate to that property."

Orr L.J. agreed.

The position therefore is that the long-established procedure for the registration of a *lis pendens* has to be married with the code under the Matrimonial Causes Act 1973 for property adjustment as between spouses. The Land Charges Act 1972 also includes provisions for the registration of various other property rights or interests which have in some cases been previously the subject of registrations under quite different statutes.

Taking the whole together, I would accept the view of Stamp L.J. that the code, as we now have it, has the effect that the registration of the *lis pendens* in respect of the wife's claim for property adjustment gives her priority over any subsequent conveyance or mortgage of the property executed by the husband. Mr. Lightman urges that that is only so if the other party to the transaction, being supposed to know of the claim for ancillary relief and the property adjustment order, is to be held to have had notice of intention on the part of the husband to defeat the wife's claim for financial relief. If the bank or other third party, not having actual knowledge of the registration and of the existence of the claim for ancillary relief, did not ask any questions, it might be difficult to establish that it had notice of an intention on the part of the husband to defeat the claim for ancillary relief. If the bank or third party did ask but was given a specious but untruthful answer, it would be well nigh impossible for a court to hold that the bank or other third party had the requisite notice of the husband's intention. There would be a very serious lacuna in the protection for the wife which Stamp L.J. thought so desirable.

In my judgment there is no such lacuna, and so, for these reasons which are substantially the same as those which the judge in the court below gave, I would dismiss the appeal because the wife's claim for a property adjustment order has priority to the bank's charge and the wife has obtained, from the order of the judge now under appeal an order for the transfer of the proceeds of the property to her. The property was sold pending the hearing, it being common ground that neither spouse was then occupying it.

I would dismiss the appeal.

STEPHEN BROWN L.J. I agree, for the reasons given by Dillon L.J. that this appeal should be dismissed.

NICHOLLS L.J. I agree. In *Whittingham v. Whittingham* [1979] Fam.

3 W.L.R.

Perex-Adamson v. Perez-Rivas (C.A.)

Nicholls L.J.

A 9, this court decided that proceedings in which a property adjustment order is sought under section 24 of the Matrimonial Causes Act 1973 are, to the extent to which they relate to land, a pending land action within section 5 of the Land Charges Act 1972. The court reached that conclusion notwithstanding that until the property adjustment order is made, the applicant under section 24 has not, or may not have, a subsisting proprietary interest in the land in question.

B The effect of registration of a pending land action in the register of pending actions is, as provided in section 198(1) of the Law of Property Act 1925, that the registration is "deemed to constitute actual notice of [the] . . . matter . . . to all persons and for all purposes connected with the land affected . . ." In this case the "matter" consists of the proceedings in which the property transfer order is being claimed.

C In my view the effect of these statutory provisions is that, when the bank took a charge over the property after the registration of a pending land action had been made in the present case in respect of the property, that charge ranked behind the claims made by the wife with regard to that property in the pending petition. Any other view would fly in the face of the purpose intended to be achieved by registration. If what is registrable is, as here, a subsisting claim under a statute which D enables the property or an interest therein to be transferred to the petitioner or to others, it seems to me to follow that what is intended to be protected by that registration, by means of all persons being deemed to have actual notice, is that claim. Accordingly, if that claim ultimately results in a property transfer order, a person who was deemed to have actual notice of that claim when he acquired his interest ranks behind E the interest in the land which the court orders to be transferred to the petitioner or other person in accordance with section 24 of the Matrimonial Causes Act 1973. Accordingly, in this case the bank's charge ranks behind the interest in the property ordered to be transferred to the wife, and it does so without any recourse needing to be had to section 37 of the Matrimonial Causes Act 1973.

F I too would dismiss this appeal.

*Appeal dismissed with costs here
and below.*

Legal aid taxation of wife's costs.

G *Solicitors: Durrant Piesse; Norton & Hamilton, Grantham.*

S. H.

H

[1987]

[CHANCERY DIVISION]

A

MACLAINE WATSON & CO. LTD. v. INTERNATIONAL TIN COUNCIL

[1986 M. No. 7362]

1987 April 28, 29, 30;
May 1, 13

Millet J.

B

Company—Receiver—International organisation—Organisation created by treaty—Headquarters of organisation in United Kingdom—Organisation insolvent—Whether jurisdiction in court to appoint receiver by way of equitable execution over organisation's rights against member states—Supreme Court Act 1981 (c. 54), s. 37(1)

C

Between 29 August and 23 October 1985, the applicants, who were dealing members of the London Metal Exchange, entered into contracts with the International Tin Council (the "I.T.C."), an international organisation set up by treaty between Great Britain and a number of foreign sovereign states, which was currently constituted under the Sixth International Tin Agreement (the "Agreement") for the purchase and sale of tin. The I.T.C. defaulted. In an arbitration to which the I.T.C. submitted, the applicants obtained an award in their favour of £6,000,000 with taxed costs of £7,116. The award was not satisfied. Having obtained leave pursuant to section 26 of the Arbitration Act 1950 to enforce the award, the applicants, on 25 November 1986, entered judgment against the I.T.C. for £6,024,376, inclusive of interest. That judgment remained unsatisfied. By a notice of motion dated 9 December 1986, the applicants sought the appointment, under section 37¹ of the Supreme Court Act 1981 and R.S.C., Ord. 51, r. 1, of a receiver by way of equitable execution over the relevant assets of the I.T.C., which consisted of the right which it was said to have to be indemnified by or demand contributions from member states for its liabilities incurred to the applicants, for the purpose of satisfying the amounts due to them under the judgment which they had obtained. The notice of motion further sought an order that the receiver appointed be empowered, in the I.T.C.'s name, to make formal demands on the member states and to enforce payment, if necessary, by litigation in the English courts. By a notice of motion, as amended, dated 12 February 1987, the I.T.C. applied for the motion of 9 December 1986 to be struck out on the grounds, inter alia, that the court had no jurisdiction to determine the existence or otherwise of the alleged assets over which receivership was sought, namely rights of action against the I.T.C.'s member states, which would involve the interpretation and construction of a treaty between sovereign states, namely the Agreement.

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On the hearing of the motions:—

Held, that while the court in principle possessed jurisdiction, not being debarred by any technical objection, to appoint a receiver by way of equitable execution over the relevant assets of the I.T.C., namely its possible claims to be indemnified by or to receive contributions from its member states, and while any such receiver could be given power to bring proceedings in the I.T.C.'s name, the applicants had failed to show any arguable case for contending that the I.T.C. had any cause of action

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¹ Supreme Court Act 1981, s. 37(1): see post, p. 514c–d.

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- A against its members which was not derived from international treaty; that since it was accepted that a cause of action based on an alleged breach of the treaty would not be justiciable in the English courts, the applicants had failed to show that the I.T.C. had an arguable cause of action against the member states capable of being taken over by the receiver and entertained by the court, and their application for the appointment of a receiver must be dismissed (post, pp. 517G—518D, E—F, 519F—H, 521G—H).
- B *Goldschmidt v. Oberrheinische Metallwerke* [1906] 1 K.B. 373 and *Bourne v. Colodense Ltd.* [1985] I.C.R. 291, C.A. applied.
Holmes v. Millage [1893] 1 Q.B. 551, C.A. considered.

The following cases are referred to in the judgment:

- C *Anglo-Italian Bank v. Davies* (1878) 9 Ch.D. 275, C.A.
Bonsor v. Musicians' Union [1956] A.C. 104; [1955] 3 W.L.R. 788; [1955] 3 All E.R. 518, H.L.(E.)
Bourne v. Colodense Ltd. [1985] I.C.R. 291, C.A.
Edwards & Co. v. Picard [1909] 2 K.B. 903, C.A.
Goldschmidt v. Oberrheinische Metallwerke [1906] 1 K.B. 373, C.A.
Harris v. Beauchamp Brothers [1894] 1 Q.B. 801, C.A.
Holmes v. Millage [1893] 1 Q.B. 551, C.A.
- D *International Tin Council, In re* [1987] 2 W.L.R. 1229, [1987] 1 All E.R. 890
Johnson v. Diamond (1855) 24 L.J.Ex. 217
Manchester and Liverpool District Banking Co. Ltd. v. Parkinson (1888) 22 Q.B.D. 173, C.A.
Maspons y Hermano v. Mildred Goyeneche & Co. (1882) 9 Q.B.D. 530, C.A.
- E *Morgan v. Hart* [1914] 2 K.B. 183, C.A.
Royal Bank of Australia, In re, Robinson's Executor's Case (1856) 6 De G.M. & G. 572
Sea Fire and Life Assurance Co., In re, Greenwood's Case (1854) 3 De G.M. & G. 459
Shephard, In re (1889) 43 Ch.D. 131, C.A.
Westhead v. Riley (1883) 25 Ch.D. 413

- F The following additional cases were cited in argument:

- Adams v. Adams (Attorney-General intervening)* [1971] P. 188; [1970] 3 W.L.R. 934; [1970] 3 All E.R. 572
Alcom Ltd. v. Republic of Columbia [1984] A.C. 580; [1983] 2 W.L.R. 750; [1984] 2 All E.R. 6, H.L.(E.)
Birmingham and District Land Co. v. London and North Western Railway Co. (1888) 40 Ch.D. 268, C.A.
Blackman v. Fysh [1892] 3 Ch. 209, C.A.
Bull (Henry) & Co. v. Murphy (1900) 21 N.S.W.(Eq.) 1
Buttes Gas and Oil Co. v. Hammer (No. 3) [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.)
Cadogan v. Lyric Theatre Ltd. [1894] 3 Ch. 338, C.A.
Central Bank v. Ellis (1896) 27 O.R. 583
- H *Congreso del Partido, I* [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064, H.L.(E.)
Douglas, Heron & Co. v. Hair (1778) 33 Mor. Dict. 14605
Dreyfus v. Inland Revenue Commissioners (1929) 14 T.C. 560, C.A.
Forsyth (William) v. Hare (John) & Co., 1834 S.C. 42
Godman v. Winterton (1940) Vol. II Annual Digest and Reports of Public International Law Cases, 205
Hart v. Emelkirk Ltd. [1983] 1 W.L.R. 1289; [1983] 3 All E.R. 15
Imperial Bank of Canada v. Motton (1897) 29 N.S.R. 368

- Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110, C.A. A
- Levermore v. Levermore* [1979] 1 W.L.R. 1277; [1980] 1 All E.R. 1
- National Bank of Greece and Athens S.A. v. Metliss* [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608, H.L.(E.)
- Nissan v. Attorney-General* [1970] A.C. 179; [1969] 2 W.L.R. 926; [1969] 1 All E.R. 629, H.L.(E.)
- Pooley v. Driver* (1876) 5 Ch.D. 458
- Potts, In re, Ex parte Taylor* [1893] 1 Q.B. 648, C.A.
- Salomon v. Salomon & Co. Ltd.* [1897] A.C. 22, H.L.(E.) B
- Sheffield Corporation v. Barclay* [1905] A.C. 392, H.L.(E.)
- Telfair Shipping Corporation v. Inersea Carriers S.A.* [1985] 1 W.L.R. 553; [1985] 1 All E.R. 243
- Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529; [1977] 2 W.L.R. 356; [1977] 2 All E.R. 881, C.A.
- Von Hellfeld v. E. Rechnitzer and Mayer Frères & Co.* [1914] 1 Ch. 748, C.A. C
- Walker v. Baird* [1892] A.C. 491, P.C.
- Willows v. Ball* (1806) 2 Bos. & Pul. (N.S.) 376

MOTIONS

By a notice of motion dated 9 December 1986, the applicants, Maclaine Watson & Co. Ltd., sought against the respondents, the International Tin Council (the "I.T.C.") the following relief, viz. (1) An order that Michael Anthony Jordan of Shelley House, 3 Noble Street, London E.C.2 or some other fit and proper person might be appointed receiver by way of equitable execution over those assets of the I.T.C. comprising the right of the I.T.C. to be indemnified by contributions from member governments for its liabilities incurred to the applicants, for the purpose of satisfying the amounts due to them under the judgment entered in the Queen's Bench Division (Commercial Court), (1986 M. No. 5388) on 13 November 1986; (2) an order that the receiver be empowered to make formal demand on the member states of the I.T.C. to demand contributions from and/or to indemnify it for the liabilities incurred to the applicants; (3) an order that the receiver be granted liberty to apply for such further or other directions and orders as he might be advised; (4) all necessary or consequential directions and orders, including directions as to the hearing of the applications by the I.T.C. for orders that the applicants' motion be struck out and costs. D E F

By a notice of motion dated 12 February 1987 (as amended), the I.T.C. moved that the application of 9 December by the applicants, be struck out or dismissed on the following grounds: (1) that it required determination of issues that were not justiciable in that the court, which had no jurisdiction to determine the existence or otherwise of the alleged assets over which receivership was sought, namely an alleged right or rights of action against member states of the I.T.C., which determination would involve the interpretation and construction of a treaty made between sovereign states. (2) The I.T.C. was immune from suit and legal process and, on the true construction of article 6(1) of the International Tin Council (Immunities and Privileges) Order 1972, not subject to the receivership jurisdiction of the court. (3) The appointment of a receiver of any such assets as alleged in the applicants' notice of motion would involve interference with the rights, privileges and functions of the I.T.C. whose status was that of an international organisation established by sovereign states and recognised under international law. (4) The appointment of a receiver would involve G H

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A interference with and/or the interpretation of and/or adjudication upon international treaty-based transactions between, and the rights and obligations of, independent sovereign states. (4A) The court had no jurisdiction in any event to appoint a receiver either for the purpose of creating an asset (as by making a demand for contribution or indemnity) or in respect of an alleged right to exercise a power to make such a demand. (4B) Further, in any event the court had no jurisdiction to

B appoint a receiver by way of equitable relief except where the interest of the judgment debtor in the alleged asset was an equitable interest only which, if it had been a legal interest, could have been reached by execution at law. (5) Further, the relief sought was in respect of money alleged to be due or accruing due from the Crown and accordingly, by virtue of R.S.C., Ord. 77, r. 16, no order for the appointment of a

C receiver under R.S.C., Ord. 30 or Ord. 51 could be made. (6) In these circumstances the relief sought would never be granted by the court in any event. The I.T.C.'s motion further sought an order that the costs of their application be paid by the applicants.

By a notice of motion dated 24 March 1987 the applicants sought an order pursuant to R.S.C., Ord. 77, r. 16 restraining the I.T.C. from receiving the amount of the debt due or accruing due from the

D Department of Trade and Industry to the I.T.C. or so much thereof as would satisfy the debt due under the judgment entered in the Queen's Bench Division (Commercial Court) (1986 M. No. 5388) on 25 November 1986 for £6,024,376.40 and costs in the action in which the judgment was in favour of the applicants, and directing payment thereof and of the costs of this application by the Department of Trade and Industry to the

E applicants.

The facts are stated in the judgment.

Mark Littman Q.C., Richard Aikens Q.C., Richard McCombe and Adrian Hughes for the applicants.

Robert Alexander Q.C., Richard Sykes Q.C., Nicholas Chambers Q.C., Rosalyn Higgins Q.C., Peter Irvin and Leslie Kosmin for the

F respondent, International Tin Council.

Sir Maurice Bathurst Q.C., Anthony Grabiner Q.C., John Mummery, Nicolas Bratza and David A. S. Richards for the Attorney-General.

Cur. adv. vult.

G 13 May. MILLETT J. read the following judgment. This is another application resulting from the failure of the International Tin Council ("the I.T.C.") to meet its obligations. For the factual background and for the relevant provisions of the Sixth International Tin Agreement ("the Agreement") under which the I.T.C. is presently constituted and of the International Tin Council (Immunities and Privileges) Order 1972, (S.I. 1972 No. 120), reference may be made to the previous application:

H *In re International Tin Council* [1987] 2 W.L.R. 1229.

The present applicants, Maclaine Watson & Co. Ltd., are ring dealing members of the London Metal Exchange. Between 29 August and 23 October 1985 they entered into contracts with the I.T.C. for the purchase and sale of tin. The I.T.C. defaulted on those contracts. The applicants' claims were referred to arbitration. The I.T.C. submitted to the jurisdiction of the arbitrators in all respects and participated fully in the arbitration. On 6 November 1986 the applicants obtained an award

in their favour of £6,000,000, together with the costs of the award which were taxed and settled in the sum of £7,116.25.

The award was not satisfied. On 13 November 1986 the applicants obtained leave, pursuant to section 26 of the Arbitration Act 1950, to enforce the award in the same manner as a judgment or order to the same effect. On 25 November 1986 the applicants entered judgment against the I.T.C. for a total amount, inclusive of interest, of £6,024,376.40. The judgment remains unsatisfied.

The total debts of the I.T.C. to unsatisfied creditors amount to several hundred million pounds. It has assets in the United Kingdom, but its only substantial assets appear to consist of such rights, if any, as it may have to be indemnified by, or demand contributions from, its member states. It has to date made no demand upon them. In an endeavour to discover what other assets the I.T.C. may have against which their judgment could be enforced, the applicants have made an application under R.S.C., Ord. 48, r. 1. That application was refused by the master, whose decision is under appeal.

On 9 December 1986 the applicants made the application which is now before me for the appointment of a receiver by way of equitable execution over those assets of the I.T.C. which consist of the right which it is said to have to be indemnified by or demand contributions from its members for the purpose of satisfying the judgment. The applicants seek orders authorising the receiver, in the name of the I.T.C., to make formal demands upon the member states and to enforce payment if necessary by litigation in the English courts. One of the members is Her Majesty's Government in the United Kingdom, and in the case of any claim of the I.T.C. to be indemnified by or demand contributions from the Crown the applicants seek an appropriate form of relief under R.S.C., Ord. 77, r. 16.

Meanwhile on 3 December 1986 the applicants, trying a different approach, issued a writ directly against the Department of Trade and Industry, as representing Her Majesty's Government in the United Kingdom, claiming payment of the sum due. I shall call that action "the direct action." On 10 April 1987 the defendant served a notice of motion to strike out the writ in the direct action. That motion is due to be heard before me on 20 July. In the meantime, I understand that other creditors with arbitration awards in their favour have brought similar direct claims against the member states, and these claims are due to be heard in the Commercial Court later this month.

In the direct action, as in all the direct claims, the status of the I.T.C. in English law is likely to be of crucial importance. The commercial contracts for the sale and purchase of tin entered into by the I.T.C. were governed by English law, and the identity of the persons who can sue and be sued on such contracts must also be determined by that law: *Maspons y Hermano v. Mildred, Goyeneche & Co.* (1882) 9 Q.B.D. 530, 539. The I.T.C. was able to enter into the contracts in question, incur liabilities and suffer the arbitration award against it because paragraph 5 of the Order of 1972 provides that it shall have the legal capacities of a body corporate. If, however, as a matter of English law it has no sufficient legal personality of its own distinct from that of its members, then the liabilities which have resulted from those contracts may be the liabilities of its members enforceable directly against them. If, on the other hand, the I.T.C. has a sufficient legal personality of its own distinct from that of its members, not merely in international law

A but in English domestic law also, then the contracts in question were entered into by the I.T.C. and not by its members, and the resulting liabilities were the liabilities of the I.T.C. and not of its members. It is, of course, at least theoretically possible that even in these circumstances the members may be liable for the debts of the I.T.C., but that is another question.

B It is common ground in the present application that, as I said in the previous application (see [1987] 2 W.L.R. 1229, 1237–1238), the I.T.C. is an international organisation created by treaty with legal personality in international law on which the Order of 1972 has conferred the legal capacities of a body corporate; but it is not incorporated in the United Kingdom or anywhere else. At this point, however, the two sides part company. The applicants contend that the I.T.C.'s status in English law is exhaustively defined by the Order of 1972, under which it is an unincorporated organisation or association of member states with the legal capacities, but not the legal status, of a body corporate, and with no separate legal existence of its own. Mr. Alexander, who appeared for the I.T.C., contended that the existence of the I.T.C. with its own separate legal personality in international law is recognised by the Order of 1972 and that the English court must give effect to this. Since this would not be sufficient to avoid the liability of the members, Mr. Alexander presumably meant, although he did not in terms say, that the English court must give effect to the Order of 1972, not merely by recognising that the I.T.C. has legal personality in international law, but by according it similar personality in English domestic law. One obvious difficulty in the way of such an argument, of course, is that it would seem to be inconsistent with the express conferment on the I.T.C. of the legal capacities of a body corporate, a provision which would be unnecessary if it already had separate legal existence of its own.

E I did not find it necessary to decide this question on the previous application, and I deliberately left it open: see [1987] 2 W.L.R. 1229, 1239D–G. It is no more necessary now. Since it is likely to be crucial in the direct action and in the other direct claims, and has not been fully argued before me, I propose to say no more about it. I shall approach the present application simply on the basis of what is expressly stated in paragraphs 4 and 5 of the Order of 1972, namely, that the I.T.C. is an organisation which may or may not have its own separate legal existence in English law, of which Her Majesty's Government in the United Kingdom and the governments of foreign sovereign powers are members, and that it has the legal capacities of a body corporate.

G To succeed in the present application, the applicants must satisfy four conditions. They must show, first, that the court has jurisdiction to appoint a receiver by way of equitable execution over the relevant assets of the I.T.C.; secondly, that if a receiver were appointed he could be given power in the name of the I.T.C. to bring proceedings in the English courts against member states; thirdly, that there is at least an arguable case that the I.T.C. has an identifiable cause of action against its members; and, fourthly, that the relevant cause of action is justiciable by these courts. The argument in fact has centred largely on the first and third of these requirements.

(1) *Jurisdiction to appoint a receiver by way of equitable execution*

It was conceded before me that in a proper case the appointment of a receiver by way of equitable execution would represent a process for

the enforcement of an arbitration award and thus fall within one of the exceptions from the immunity of the I.T.C. conferred by paragraph 6 of the Order of 1972. A number of technical grounds were put forward in the pleadings for contending that, even in the absence of the special features which the nature of the I.T.C. presents, this would not be a proper case for the appointment of a receiver; but in the end only two were relied on before me. It was submitted that the court has no jurisdiction to appoint a receiver by way of equitable execution except where the interest of the judgment debtor in the alleged asset is an equitable interest only which, if it had been a legal interest, could have been reached by execution at law. Alternatively, it was said that there must be some other difficulty, arising from the nature of the property, which precludes execution at law but which can be overcome by the appointment of a receiver. For the reasons which will appear, I reject the first but accept the second of these submissions.

The court's jurisdiction to appoint a receiver by way of equitable execution derives from section 37(1) of the Supreme Court Act 1981, which gives the court power to appoint a receiver "... in all cases in which it appears to the court to be just and convenient to do so." That subsection re-enacts in virtually identical terms section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which in turn replaced section 25(8) of the Supreme Court of Judicature Act 1873; but it is well established that, despite the width of the language used, these statutory provisions did not confer on the court power to appoint a receiver by way of equitable execution in a case where prior to the Judicature Acts no court could have granted such relief.

In *Bourne v. Colodense Ltd.* [1985] I.C.R. 291, the plaintiff brought a test case against the defendants. After a hearing which lasted for 42 days, the trial judge dismissed the action with costs. The judge understood that the litigation was financed by the plaintiff's union. The union refused to pay the costs, and the plaintiff refused to ask it to do so. The Court of Appeal held that there was an arguable case that the plaintiff was entitled to an indemnity from his union against his liability to pay the defendants' costs, and that defendants were entitled to have a receiver appointed by way of equitable execution in order to make the necessary demand and take over the plaintiff's rights of action against the union.

In my judgment, on the present question that case is on all fours with the present. There, as here, the debtor's asset was a legal chose in action, namely, a claim to be indemnified on demand. The debtor refused to make the necessary demand or to enforce his claim. Execution at law was not available, for a claim to be indemnified is not an attachable debt and cannot be made the subject of a garnishee: *Johnson v. Diamond* (1855) 24 L.J.Ex. 217. This difficulty was overcome by the appointment of a receiver. In the course of his judgment, Dillon L.J. said in *Bourne v. Colodense Ltd.* [1985] I.C.R. 291, 302:

"The appointment of a receiver by way, as it is traditionally called, of equitable execution is a form of equitable relief to enforce payment of a judgment debt which the court may grant in the special circumstances of a particular case if, as in the present case, the recovery of the judgment debt by the more usual processes of execution or attachment of debts is not practicable. The remedy is, however, discretionary and it is plain that the court would not

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Maclaine Watson & Co. v. I.T.C. (Ch.D.)

Millett J.

- A appoint a receiver if the court were satisfied that the appointment would be fruitless because there was nothing for the receiver to get in."

- Mr. Alexander submitted that this passage states the law too widely. There is certainly abundant Court of Appeal authority for the propositions: (i) that the court has no jurisdiction to appoint a receiver by way of equitable execution merely because in all the circumstances it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution: *In re Shephard* (1889) 43 Ch.D. 131 and *Harris v. Beauchamp Brothers* [1894] 1 Q.B. 801, 806–807; and (ii) that the special circumstances which would justify the making of an order must be such circumstances as would have enabled the Court of Chancery before the Judicature Acts to have intervened by way of injunction or the appointment of a receiver at the suit of the judgment creditor: *Holmes v. Millage* [1893] 1 Q.B. 551; *Harris v. Beauchamp Brothers* [1894] 1 Q.B. 801, 810; *Edwards & Co. v. Picard* [1909] 2 K.B. 903 and *Morgan v. Hart* [1914] 2 K.B. 183. These authorities show that what is required is that there should be some hindrance arising from the nature of the property which prevents the judgment creditor from obtaining execution at law, but which the appointment of a receiver can overcome. In *In re Shephard*, 43 Ch.D. 131, 135 Cotton L.J. said:

- E "But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law."

Citing this passage with approval in *Morgan v. Hart* [1914] 2 K.B. 183, 188, Buckley L.J. added:

- "Perhaps the expression 'hindrance' requires some explanation. The learned judge meant, I think, hindrance arising from the nature of the property."

- F In *Edwards & Co. v. Picard* [1909] 2 K.B. 903, 910 Buckley L.J. said:

"Equitable execution is relief given on the ground that there is no remedy by execution at law: it operates by removing a hindrance which prevents execution at law."

- G The principle was stated somewhat more widely by Vaughan Williams L.J. in *Goldschmidt v. Oberrheinische Metallwerke* [1906] 1 K.B. 373, 375:

"he must shew that the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of his judgment, unless what has been called equitable execution be granted to him."

- H It is not necessary for me to express any view whether this more liberal formulation is correct, since I am not concerned with a case where execution at law is merely difficult or impractical. It is impossible, for a claim by a judgment debtor to be indemnified by a third party is not susceptible to any process of legal execution.

Is it susceptible to equitable execution? Mr. Alexander's contention that a receiver by way of equitable execution cannot be obtained over property in which the judgment debtor has a legal, and not merely an

equitable, interest was based almost entirely on a passage in the judgment of Lindley L.J. in *Holmes v. Millage* [1893] 1 Q.B. 551 where, giving the judgment of the court, he said, at p. 555:

“We have simply to deal with a case in which an ordinary judgment creditor sought the aid of a court of equity to enforce his judgment against property not capable of being reached by any common law process. The only cases of this kind in which courts of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only.”

This was said to be supported by a passage in the judgment of Buckley L.J. in *Edwards & Co. v. Picard* [1909] 2 K.B. 903, to which I will come later.

In *Holmes v. Millage* [1893] 1 Q.B. 551 the plaintiff sought the appointment of a receiver over the future salary of the judgment debtor. The application was refused, not on the ground that the judgment debtor was entitled to his salary at law, but because a man's future salary is not attachable at law or in equity. The ratio of the case is to be found at p. 555:

“the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor; and the Court of Chancery had no jurisdiction to prevent him from earning his living or from receiving his earnings, unless he had himself assigned or charged them.”

And at p. 557:

“In [*Manchester and Liverpool District Banking Co. v. Parkinson* (1888) 22 Q.B.D. 173] an order for a receiver was discharged, because there was no difficulty in enforcing payment of a judgment by the ordinary legal methods. In this case there is such a difficulty; but it does not arise from any impediment which the old Court of Chancery had jurisdiction to remove. The difficulty arises from the fact that future earnings are not by law attachable by any process of execution direct or indirect.”

In my judgment, the passage on which Mr. Alexander relied forms no part of the ratio of the case, and as a historical exposition is too narrowly stated. As Davey L.J. pointed out in *Harris v. Beauchamp Brothers* [1894] 1 Q.B. 801, 808, the most common case for the appointment of a receiver by way of equitable execution before the Judicature Acts was that described by Jessel M.R. in *Anglo Italian Bank v. Davies* (1878) 9 Ch.D. 275, but it was not the only case.

In *Edwards & Co. v. Picard* [1909] 2 K.B. 903 the plaintiffs sought the appointment of a receiver by way of equitable execution over a patent, but there was no evidence that the patent was being exploited or that the judgment debtor was in receipt of any royalties. The application was dismissed on the ground that there was no property of the judgment debtor for the receiver to receive. Buckley L.J. said, at p. 910:

“I fail to grasp what is meant by a receiver of a patent or of the profits of a patent which is not being worked. There is nothing receivable. A receiver could not sue for infringement, nor could he, I think, bring an action to enforce any right to use the patentee's

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A name to sue for infringement, nor could he work the patent and thus produce profits.”

A little earlier in his judgment, speaking of the patent, Buckley L.J. said, at p. 910:

B “It creates in him a right of action to prevent anyone else manufacturing. It creates in him a right to bring an action for infringement with resultant remedy by way of injunction, or damages, or both. This right is a legal right. There is no question of equity in the matter. This right must either be amenable to execution at law, or not at all. Equitable execution is relief given on the ground that there is no remedy by execution at law: it operates by removing a hindrance which prevents execution at law. There is here no hindrance for equity to remove. It is not a case in which the debtor has an equitable interest only in property which could have been reached at law if he had had the legal interest in it. The property is property in which he has the legal interest.”

D Mr. Alexander relied upon that passage, but, in my judgment, it provides no support for the thesis for which he was contending. Buckley L.J. was speaking of the right to bring an action for infringement. As he pointed out in the later passage which I have quoted from his judgment, a receiver could not sue for infringement. It was for that reason that the right in question “must either be amenable to execution at law or not at all.” It was, perhaps, not so much a case where there was no hindrance for equity to remove, but rather a case where there was a hindrance which even equity could not remove. In this context, it is clear that the last two sentences of the passage merely deal by way of contrast with the typical case; they are not intended to describe the only possible one.

E The test stated by Chitty J. in *Westhead v. Riley* (1883) 25 Ch.D. 413 is that there should be no way of getting at the fund except by the appointment of a receiver.

F No case has been cited to me in which a receiver has been refused on the ground that the judgment debtor had a legal interest in the property sought to be attached; and two cases, *Goldschmidt v. Oberrheinische Metallwerke* [1906] 1 K.B. 373 and *Bourne v. Colodense Ltd.* [1985] I.C.R. 291, have been cited in which a receiver was appointed over property in which the debtor had such an interest. In every case where the appointment has been refused, it has been either on the ground that there was no legal impediment to execution at law (G *Manchester and Liverpool District Banking Co. Ltd. v. Parkinson* (1888) 22 Q.B.D. 173 and *Morgan v. Hart* [1914] 2 K.B. 183), or on the ground that the nature of the property was such that it could not be reached by either law or equity: *Holmes v. Millage* [1893] 1 Q.B. 551 and *Edwards & Co. v. Picard* [1909] 2 K.B. 903.

H In the present case, the property in question cannot be reached by any process of legal execution for three reasons: first, because with the exception of Her Majesty's Government in the United Kingdom all the indemnifying parties are out of the jurisdiction; secondly, because the I.T.C. has not made, and it is reasonable to infer that it does not intend to make, any formal demand upon its members; and, thirdly, because a claim to be indemnified by a third party is not amenable to garnishee. I have the authority of the decision of the Court of Appeal in *Bourne v. Colodense Ltd.* [1985] I.C.R. 291 for

holding that the second and third of these impediments can be overcome by the appointment of a receiver by way of equitable execution with power to make the demand and to bring proceedings if necessary; and the first obviously can. In my judgment, therefore, there is no technical objection to the appointment which is sought. A

(2) *The power of the I.T.C. to sue its own members*

It is common ground between the parties, although for different reasons, that, if a justiciable cause of action exists, the I.T.C. can maintain an action against its members in the English courts. The I.T.C. says that this is because it is a juristic person. The applicants say that it is because, although the I.T.C. is not a juristic person but merely a collective name for its members, the Order of 1972 has conferred on it the capacities of a body corporate. These include the power to contract with its members, to demand performance from them, and to maintain proceedings and obtain judgments against them. This is not an empty process since, even if the I.T.C. is not a legal person distinct from its members, it has the capacity to hold property with the result that such property is distinct from that of its members, so that a judgment obtained against it in its own name is recoverable only from its own funds: see *Bonsor v. Musicians' Union* [1956] A.C. 104. The purpose of the present application is to compel payment by the member states into the funds of the I.T.C., against which alone the applicants' existing judgment is recoverable. B C D

(3) *The existence of a cause of action*

It is at this stage that the applicants' real difficulties arise. They must show that the I.T.C. has an arguable cause of action against the member states capable of being taken over by the receiver and which the court can entertain. Mr. Littman, who appeared for the applicants, accepted that for the reasons stated in the previous application (see [1987] 2 W.L.R. 1229, 1241H to 1242D) a cause of action based on an alleged breach of the Agreement would not be justiciable in these courts. Accordingly, he embarked on a quest for an arguable cause of action which does not depend on the Agreement and does not require the court to interpret the terms of an international treaty or enforce the obligations arising thereunder. In my judgment, the quest was hopeless. E F

Mr. Littman put the case in various ways. First, he submitted that as a matter of English law the I.T.C. is simply an unincorporated association of member states engaged in trade, with the legal capacities of a body corporate but without any separate existence of its own: in other words, a partnership; that every member of such a partnership is liable as principal for the debts and liabilities of the firm, and is entitled to contribution from his co-partners, for the debts and liabilities of the firm are as much theirs as they are his; and that this right of contribution can be enforced by the I.T.C. or by the receiver in its name. Alternatively, he submitted that even if the I.T.C. falls to be treated as having its own legal personality distinct from that of its members, nevertheless it is not incorporated and is still a trading partnership, like a Scottish partnership, with a right, like that of a Scottish partnership, to call upon the members to put it in funds to meet its liabilities. As a further alternative, he submitted that even if the I.T.C. is not a partnership of any kind, nevertheless the contracts which give rise to the liability were entered G H

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A into by the I.T.C. as agent for its members or alternatively at their request, and on either footing the I.T.C. is entitled to be indemnified by them.

B In my judgment, all these alternative ways of putting the case involve the same three fallacies: (i) that because the contracts which the I.T.C. entered into with the applicants were governed by English law, therefore the mutual rights and obligations of the I.T.C. and its members, including the right of the I.T.C. to be indemnified by or demand contributions from its members, must be governed by the same law; (ii) that because the liability of the members to third parties cannot be excluded or cut down by any private agreement between the members, such an agreement cannot be the source of the mutual rights and obligations of the I.T.C. and its members; and (iii) that because no relevant rights of indemnity or contribution can in fact be found in the Agreement or would be enforceable in the English courts if they could be found, such rights must derive from some other source.

C That may readily be allowed that there is an arguable case for saying that, in English law, the relationship between the member states is that of partners, and that the relationship between each of the member states and the I.T.C. is that of principal and agent. If so, then the member states are directly liable as principals on any contracts entered into by the I.T.C. and governed by English law, and their liability cannot be excluded or cut down by any agreement among themselves, for the rights of the creditors are extrinsic to any such agreement: see *In re Sea Fire and Life Assurance Co., Greenwood's case* (1854) 3 De G.M. & G. 459, 475–476. But the receiver would not be enforcing the liability of the member states to the applicants, but their liability to the I.T.C.; and while the liability of the principal to the third party is governed by the proper law of the contract into which his agent has entered, the mutual rights and obligations of the principal and agent, and any liability of the principal to indemnify his agent, arise from the contract between them and must be governed by the proper law of that contract.

D Accordingly, to succeed in his claim against the member states, the receiver would have to establish the existence of some agreement, express or implied, between the member states under which the right of indemnity or contribution could be said to arise and which is justiciable in these courts. Since the I.T.C. was established to trade in England and has done so, some agreement by the members to this effect may readily be inferred. Unfortunately for the applicants, there is no room for inference; the existence of the relevant treaty can be proved as a fact. It was the Sixth International Tin Agreement. That is the treaty by the member states which established the I.T.C., conferred international legal personality upon it, and authorised it to trade in England. That is the treaty under which the mutual rights and obligations of the member states and the I.T.C. arise; there is not a scrap of evidence to suggest that there was any other agreement, and no conceivable reason to infer one. The fact that the Agreement is not enforceable by the English courts does not entitle the courts to pretend that it does not exist, or to cast around for some other and fanciful source of the I.T.C.'s rights against its members. Its rights derive from the treaty and nowhere else, and, as the Order of 1972 acknowledges, the treaty is not a contract of partnership or agency but of membership. The relationships it creates are not those of partners or of principal and agent but of an organisation and its members.

Mr. Littman submitted that, given the existence of 33 principals each with its own system of law, the proper law of the contract of agency must in the absence of some other agreement be the law of the country where the agent is to transact his principals' business. That would no doubt be so if the principals were ordinary individuals or trading companies who are bound to subject their agreement with each other to some national system of law. But here the members are independent sovereign states with the power to enter into an international treaty which is governed by the law, and enforceable by the national courts, of no single country. That is what they have done and, on the evidence before me, all that they have done.

Mr. Littman submitted that the I.T.C.'s rights of indemnity or contribution from its members cannot derive from the Agreement because the I.T.C. is not a party to the treaty, and because in fact no such rights can be found in it. The Agreement is, of course, not only the agreement between the members which established the I.T.C., but also the I.T.C.'s constitutional instrument. Whether it creates rights between the members only, or whether it creates rights also between the I.T.C. and the members, and if so whether its express provisions need to be augmented by further implied terms, are questions upon which, as a judge of the national courts of one of the member states only, I have no authority to pronounce. But let it be assumed that, for whatever reason, no right of indemnity or contribution, express or implied, is given to the I.T.C. by the treaty. What follows? What follows is not that the right must derive from some other source, but that there is no such right.

Mr. Littman's reliance on the Scottish law of partnership was equally unproductive. A Scottish firm is not a body corporate, but, as is well known, it possesses a separate legal personality of its own distinct from that of its members. Any liabilities which it incurs are the liabilities of the firm and not of the members, but the members are liable as guarantors of the firm, and in some circumstances—such as winding up—can apparently be sued not only by the creditors of the firm but by the firm itself. As I understood his argument, Mr. Littman contended that this is a feature which is inherent in the very nature of any non-corporate trading organisation which has its own legal personality. That may be so, for all I know, at least under some systems of law; but it is still necessary to identify the source of the members' obligation, not to pay the creditors but to indemnify the organisation. In my judgment, that can only be the agreement between the members or the law under which the organisation is established. Once again, the applicants are driven back to the treaty.

Mr. Littman submitted that in demanding payment from the members, the receiver would not be enforcing the claims of the I.T.C., but setting in motion machinery to enforce the claims of the applicants. For this proposition he relied on *In re Royal Bank of Australia, Robinson's Executor's Case* (1856) 6 De G.M. & G. 572. That was a case of an unregistered company which was being wound up under the Winding-up Acts 1848–1849, at a time when even the shareholders of registered companies did not enjoy the benefit of limited liability. The question for decision was whether a call made on the contributories by the master gave rise to a specialty or a simple contract debt. In the course of his judgment Lord Cranworth L.C. said, at p. 587:

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A “Every shareholder, as a partner, is liable to every creditor to the full amount of his demand, and the sum raised by the master represents not any demand of the shareholders inter se, but the aggregate demand of all the creditors on the partnership.”

B But the case was one in which the contract with the creditor, the constitution of the company and the winding up were all governed by English law, and the power of the master to make the call arose under an express statutory provision, the Joint Stock Companies Act 1848 (11 & 12 Vict. c. 45), section 83, the distant ancestor of section 74 of the Insolvency Act 1986, which authorised the master to levy calls on the members, not for what they had agreed inter se to pay into the common pool, but for such amount as might be necessary to pay the debts and liabilities of the company and the costs and expenses of the winding up.

C That power was exercisable only in a winding up, and the result of the previous application is that the modern statutory counterpart is not available. So the essential machinery is missing. Mr. Littman submitted that the appointment of a receiver, coupled with the Order of 1972, would supply alternative machinery. But this alternative machinery works on a different principle, and is defective. It works on a different principle by vesting in the receiver not the statutory right of a liquidator, and not the claims of the applicants against the members, but those of the I.T.C. It is defective, because the appointment does no more than vest in the receiver whatever rights the I.T.C. may have, while the Order of 1972 does no more than give the I.T.C. the capacity to enter into arrangements to obtain the necessary rights. Unlike the Winding-Up Acts 1848–1849, neither of them actually creates the rights themselves. The source, and the only source, of those rights remains the treaty.

E

F Finally, it was submitted that, if necessary, the receiver would contend that the trading activities carried out at the material time by the buffer stock manager of the I.T.C., including the contracts giving rise to the judgment debt, although carried out with the full knowledge, authority and at the request of the member states, were outside the scope of the Agreement. I entirely fail to understand how the contention, even if true, could help the receiver. As between the I.T.C. and the member states, the scope, extent and meaning of the Agreement are not justiciable in the English courts, which could not make the necessary findings. But even if they could, what would follow? The implied agreement to indemnify the I.T.C. which is said to follow would be an agreement between independent sovereign states in augmentation of the treaty, and would still be governed by international law and not enforceable in these courts.

G

(4) Conclusion

H In my judgment, the applicants have failed to show any arguable case for contending that the I.T.C. has a cause of action against its members which is not derived from the treaty. It is rightly conceded that these courts cannot entertain a cause of action which is so derived, and accordingly I must dismiss the application.

Motions dismissed.

Solicitors: Elborne Mitchell; Cameron Markby; Treasury Solicitor.

T. C. C. B.

[HOUSE OF LORDS]

A

CAMPBELL APPELLANT

AND

SECRETARY OF STATE FOR THE HOME
DEPARTMENT RESPONDENT

B

[On appeal from REGINA v. OXFORD REGIONAL MENTAL HEALTH REVIEW
TRIBUNAL, *Ex parte* SECRETARY OF STATE FOR THE HOME DEPARTMENT]

1987 July 9; 29

Lord Bridge of Harwich, Lord Brandon of Oakbrook,
Lord Ackner, Lord Oliver of Aylmerton
and Lord Goff of Chieveley

C

*Mental Disorder—Mental health review tribunal—Discharge of
patient—Tribunal's decision to defer conditional discharge of
patient—Whether tribunal having power to reconsider decision—
Mental Health Act 1983 (c. 20), s. 73(2)(7)*

D

A patient applied to a mental health review tribunal for a review of an order restricting his discharge from a mental hospital. On 12 February 1985 the tribunal, acting under section 73(2) and (7) of the Mental Health Act 1983,¹ directed that the patient be conditionally discharged but deferred the direction until 28 June. The Secretary of State, who had not been informed of the date of the tribunal hearing, applied for judicial review. Woolf J., on the ground that the tribunal could reconsider the order to defer discharge made under section 73(7) of the Act of 1983, refused the application. On appeal by the Secretary of State, the Court of Appeal allowed the appeal.

E

On appeal by the patient:—

Held, dismissing the appeal, that the provisions of section 73(2) were mandatory and once the tribunal were satisfied that a patient should be conditionally discharged they were obliged to make the order, which was final, and they could only defer it under section 73(7) for the necessary arrangements for the patient's discharge to be made; that, accordingly, mental health review tribunals had no power to reconsider their decisions, and that, therefore, it was right that the Secretary of State's application for judicial review had been granted, since the order had been made without the Secretary of State having the opportunity to be heard (post, pp. 526G—527C, 528H—529C).

F

Per Lord Bridge of Harwich. There is no authority in the Act of 1983 or the Mental Health Review Tribunal Rules 1983 for “a deferred direction for conditional discharge in accordance with section 73(7) of the Act” to be deferred to a fixed date. In the nature of the case it is impossible for a tribunal in making a deferred direction for conditional discharge to predict how long it will take to make the necessary arrangements. The decision should simply indicate that the direction is deferred until the necessary arrangements have been made to the satisfaction of the tribunal and specify what arrangements are required (post, p. 528E—G).

G

H

Decision of the Court of Appeal [1986] 1 W.L.R. 1180; [1986] 3 All E.R. 239 affirmed.

No cases are referred to in the opinions of their Lordships or were cited in argument.

¹ Mental Health Act 1983, s. 73(2)(7): see post, pp. 523H—524D.

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Campbell v. Home Secretary (H.L.(E.))

A APPEAL from the Court of Appeal.

This was an appeal by leave of the House of Lords (Lord Keith of Kinkel, Lord Templeman and Lord Griffiths) dated 5 November 1986, by the appellant, Ernest Campbell, a patient in Broadmoor Hospital, Crowthorne, Berkshire, from the judgment dated 23 April 1986 of the Court of Appeal (Lawton and Stephen Brown L.JJ. and Sir John Megaw) allowing an appeal by the respondent, the Secretary of State for the Home Department, from the judgment dated 8 November 1985 of Woolf J. dismissing an application by the respondent for judicial review of the decision dated 12 February 1985 of the Oxford Regional Mental Health Review Tribunal to direct the conditional discharge of the appellant.

The facts are stated in the opinion of Lord Bridge of Harwich.

C *David Sullivan Q.C.* and *Oliver Thorold* for the appellant.
Nigel Fleming for the respondent.

Their Lordships took time for consideration.

D 29 July. LORD BRIDGE OF HARWICH. My Lords, the appellant, who is now 46 years old, suffers from psychopathic disorder as defined in section 1 of the Mental Health Act 1983. When he was 17 years old he sexually abused and strangled a 6-year-old boy. He was acquitted of murder, but convicted of manslaughter on the ground of diminished responsibility. There being no power at that time to make a hospital order, he was sentenced to 10 years' imprisonment. He was released in 1965. In 1969 he became a voluntary patient at the West Middlesex Hospital and shortly thereafter was admitted to and detained at Broadmoor Hospital pursuant to section 26 of the Mental Health Act 1959. He disclosed that he had committed certain burglaries of which he was in due course convicted and he was thereupon made subject to a hospital order under section 60 of the Act of 1959 and a restriction order without limit of time under section 65. Those orders continue in force under the corresponding sections 37 and 41 of the consolidating Act of 1983.

The Secretary of State has power under section 42 of the Act of 1983 to order the discharge of a patient subject to a hospital order and a restriction order either absolutely or subject to conditions. Upon absolute discharge both the hospital order and the restriction order cease to have effect. A conditional discharge leaves the patient liable to recall by the Secretary of State, which, in effect, reactivates the hospital order and the restriction order. Under the Act of 1959 it was only by the exercise of this executive discretion that such a patient could secure his discharge. But now such a patient (a "restricted patient" within the definition of that phrase in Part V of the Act of 1983) enjoys the benefit of one of the changes in the law effected by the Mental Health (Amendment) Act 1982 in that a mental health review tribunal is empowered to order his discharge under section 73 of the Act of 1983.

The provisions of section 73 of the Act of 1983 upon which this appeal depends, if written out in full to include in subsection (1)(a) the words incorporated by reference from section 72(1)(b), read as follows:

"(1) Where an application to a mental health review tribunal is made by a restricted patient who is subject to a restriction order, or

where the case of such a patient is referred to such a tribunal, the tribunal shall direct the absolute discharge of the patient if satisfied—
(a) [(i) that he is not then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (ii) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment;] and (b) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

“(2) Where in the case of any such patient as is mentioned in subsection (1) above the tribunal are satisfied as to the matters referred to in paragraph (a) of that subsection but not as to the matter referred to in paragraph (b) of that subsection the tribunal shall direct the conditional discharge of the patient.

“(7) A tribunal may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for that purpose have been made to their satisfaction; and where by virtue of any such deferment no direction has been given on an application or reference before the time when the patient's case comes before the tribunal on a subsequent application or reference, the previous application or reference shall be treated as one on which no direction under this section can be given.”

The effects of absolute and conditional discharge by order of a mental health review tribunal are the same as those respectively of absolute and conditional discharge by the Secretary of State under section 42. In addition, the Secretary of State may add to the conditions imposed by the tribunal and may, from time to time, vary any conditions, whether imposed by the tribunal or by himself.

In June 1984 the appellant applied to the Oxford Regional Mental Health Review Tribunal for his discharge. The procedure in relation to such an application is governed by the Mental Health Review Tribunal Rules 1983 (S.I. 1983 No. 942) (“the rules”). I need not refer to them in any detail. In accordance with the rules, reports on the appellant by Dr. Tidmarsh, the consultant psychiatrist who had been responsible for the care and treatment of the appellant at Broadmoor since 1981, were submitted to the tribunal. These were to the effect that discharge would be quite inappropriate. The Secretary of State, who is clearly the only party capable of representing any interest the public may have in opposing an application for discharge, notified the tribunal of his opposition. The tribunal heard and determined the application on 12 February 1985. In breach of the rules the Secretary of State was not given notice of the hearing. A report commissioned by the appellant's solicitor from Dr. Russell Davis, a consultant psychiatrist who had seen the appellant for an aggregate of one and a half hours on two visits in January 1985 was put before the tribunal. This supported the application for discharge on the ground that the appellant's disorder was not “of a nature or degree which makes it appropriate for him to be liable to be detained.” A copy of this report, dated 1 February 1985, was sent to the Secretary of State, as the rules require, but did not reach him until the very day of the tribunal's determination. Dr. Tidmarsh, your Lordships

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A were told, attended the hearing and was cross-examined by the solicitor appearing for the appellant. Dr. Russell Davis did not attend.

The determination of the tribunal is recorded in a document headed "Decision of the Oxford Regional Mental Health Review Tribunal." The operative part reads as follows:

B "The tribunal has considered the patient's application relating to the above named and hereby directs that:— This patient shall be conditionally discharged, such discharge to be deferred to Friday, 28 June 1985, for proposals to meet the conditions to be prepared. The conditions shall be that:— 1. The patient reside at and abide by the rules of a suitably supervised hostel which has an active rehabilitation programme. 2. The patient shall be placed under the supervision of a suitable probation officer or suitable social worker, who shall report from time to time as requested to the Home Office and the hospital referred to in condition 3. 3. The patient shall attend a psychiatric out-patient clinic as directed by a consultant psychiatrist yet to be nominated.

C "The tribunal is satisfied about these reasons because:— They were satisfied that this patient continues to suffer from psychopathic disorder but not of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment but were satisfied that this patient should remain liable to recall."

D It has always been common ground that this decision was made in breach of the rules. What is more important is that there was here a breach of the most fundamental rule of natural justice, in that the Secretary of State, as a vitally interested party, was denied a hearing. That is not in dispute.

E On receiving notice of the tribunal's decision, the Secretary of State promptly applied by way of judicial review to have it quashed. On 8 November 1985 Woolf J. refused the remedy sought on the ground that it was unnecessary and that the appropriate alternative remedy was for the tribunal to re-open the issue to the extent of considering the representations of the Secretary of State before finally determining the appellant's application under section 73(7). The Secretary of State's appeal against this decision was allowed by the Court of Appeal (Lawton and Stephen Brown L.JJ. and Sir John Megaw) [1986] 1 W.L.R. 1180, who on 23 April 1986 quashed the tribunal's decision. The appellant now appeals by leave of your Lordships' House.

G My Lords, whatever view be taken, as a matter of construction, of the interaction between subsections (2) and (7) of section 73, as to which Woolf J. and the Court of Appeal differed, I find it difficult to see how the tribunal's decision made in February 1985 can properly stand. Such a fundamental flaw as vitiated the proceedings leading to that decision must surely call for a complete rehearing de novo. If every issue remains open for decision under subsection (7) and that provides the appropriate occasion for the rehearing, the earlier purported decision is at best irrelevant, at worst an embarrassment which the tribunal would have to do their best to put out of mind but which would make it difficult for justice to be seen to be done at a rehearing before the tribunal constituted as it was in February 1985. If the construction adopted by the Court of Appeal is right and there is no power under subsection (7) to re-open any issue already decided under subsection (2)

the earlier decision must, of course, be quashed and that will enable the rehearing to take place, as the Court of Appeal thought that it should, before a differently constituted tribunal.

Counsel for the appellant was unable to suggest any avenue of escape from this dilemma. There is an inherent inconsistency in the argument advanced which, on the one hand, accepts that the 1985 proceedings were defective and relies on a rehearing under subsection (7) to cure that defect, but, on the other hand, claims that the appellant is entitled to rely on the earlier decision in his favour which, though reversible, should be the point from which the rehearing ought to start. Though the earlier decision was made in breach of the rules of natural justice, which in a word means unfairly, it would nevertheless be unfair to the appellant, so it is said, to deprive him of the benefit of that decision, provisionally made in his favour, when the tribunal which made that decision reconsider it under subsection (7). I am not persuaded by this argument.

I turn now to the question of the true construction of section 73 which your Lordships have to decide. The first issue which a mental health review tribunal must address on an application falling for determination under section 73 is whether they are satisfied as to one or other of the matters referred to in paragraph (a) of subsection (1). If they are so satisfied and also satisfied that the patient need not remain liable to recall it is mandatory under subsection (1) that they shall direct his absolute discharge.

If the tribunal think the patient should remain liable to recall, they can only contemplate a conditional discharge under subsection (2). Here the tribunal's satisfaction or lack of satisfaction as to one or other of the paragraph (a) matters will, I think, inevitably be coloured by the conditions they have in mind to impose. Thus the answers to the questions (a)(i) whether or not the patient's disorder is "of a nature or degree which makes it appropriate for him to be liable to be detained in hospital for medical treatment," or (a)(ii) whether or not it is necessary for his own health or safety or for the protection of others "that he should receive such treatment," which must here mean treatment under detention, may be vitally influenced by the conditions which are to be imposed to regulate his life style upon release into the community. To take obvious examples suggested by the decision of the tribunal in this case, the tribunal may perfectly properly be satisfied that hospital detention is no longer necessary provided that the patient can be placed in a suitable hostel and required to submit to treatment as an out-patient by a suitable psychiatrist. These are matters to be secured by imposing appropriate conditions.

Once satisfied under subsection (2) as to one or other of the matters referred to in paragraph (a) of subsection (1), it is mandatory that the tribunal "shall direct the conditional discharge of the patient." But if the tribunal are only able to be so satisfied by the imposition of conditions to which the patient will be subject on release, it is obvious that in many, perhaps most, cases some time must elapse between the decision that conditional discharge is appropriate and the effective order directing discharge of the patient, for the purpose of making the necessary practical arrangements to enable the patient to comply with the conditions, e.g. securing a suitable hostel placement for him and finding a suitable psychiatrist who is prepared to undertake his treatment as an out-patient. This seems to me to be the common sense of the matter and

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A it is, I think, precisely for this purpose that the tribunal, being satisfied
as required by subsection (2), are given the option either to direct the
immediate discharge of the patient under subsection (2) or to defer that
direction under subsection (7). Unless a decision has first been reached
under subsection (2) that discharge on certain conditions is appropriate,
I find it difficult to see what is envisaged by the words in subsection (7)
B “such arrangements as appear to the tribunal to be necessary for that
purpose.” The purpose contemplated must surely be that of enabling the
patient to comply with the conditions which the tribunal have already
decided to impose. Conversely, when the tribunal have deferred a
direction for the conditional discharge of the patient, the words of
subsection (7) which reserve to the tribunal the further decision as to
whether the necessary arrangements “have been made to their
C satisfaction” are wholly inapt to indicate a deferment of the decision as
to whether the tribunal can be satisfied, as required under subsection
(2), of the matters on which a decision in favour of conditional discharge
depends.

The contrary argument is that no direction for the conditional
discharge of the patient can ever be given unless the tribunal are
satisfied as required by subsection (2) at the moment when the direction
D is given. Having deferred a direction under subsection (7) the tribunal, it
is submitted, not only may, but must, examine the whole issue afresh
before the direction for discharge is given. If this were right, the two
stage procedure, which seems to be contemplated by subsections (2) and
(7) and which, as it appears to me, is designed to serve the purpose I
have suggested in the foregoing paragraph, would not seem to serve any
useful purpose at all. Moreover, for reasons indicated earlier in this
E opinion this construction of section 73 would not avail the appellant in
resisting an order to quash the decision of the tribunal in this case. But,
to my mind, the conclusive refutation of this suggested construction is to
be found in the second part of subsection (7) following the semi-colon.
This provision contemplates: (1) an application or reference leading to a
deferred direction for conditional discharge; (2) a further application or
F reference relating to the same patient coming before the tribunal before
any direction for his conditional discharge has actually been given. In
this situation it is provided that no direction may be given pursuant to
the first application or reference. The effect of this is that the whole
issue must be re-opened pursuant to the second application or reference.
If, as submitted on behalf of the appellant, the whole issue always
G remains at large following a deferred direction for conditional discharge,
this provision would be otiose. Its evident purpose is to ensure that, in
the situation to which it applies, it will not be open to the tribunal when
the second application or reference comes before them to say: “We
decided on the first application or reference in favour of conditional
discharge but deferred giving the direction; being now satisfied that the
necessary arrangements have been made for the purpose we now direct
the conditional discharge of the patient pursuant to that application or
H reference and there is no necessity for us to consider the matter afresh
pursuant to the new application or reference.”

I think this provision, so interpreted, also meets the point, of which
much was made in the argument, that if the tribunal, having deferred a
direction under subsection (7) have no power to re-open the issue under
subsection (2), they may be compelled to discharge a patient whose
condition has deteriorated since the tribunal first considered the matter

and made a deferred direction for conditional discharge. It may well be, I think, that the second part of subsection (7) is designed to meet this very contingency. But, whether that is so or not, it certainly enables the Secretary of State, when a deterioration in the condition of the patient is brought to his attention, to forestall the patient's discharge by exercising his power under section 71 of the Act of 1983 to refer the patient's case to the tribunal afresh.

My Lords, the conclusion I have expressed on the true construction of section 73 is one I have reached by considering the statute without reference to the rules. Both Woolf J. at first instance and Sir John Megaw in the Court of Appeal relied substantially on the rules in support of the respective conclusions which they reached on the meaning of the statute. I doubt, with respect, whether the rules are strictly available as an aid to construing the statute. But, on turning to the rules, I am comforted to find, as I think and as Sir John Megaw thought, that they have been drafted in a way which is wholly consistent with the interpretation of the Act which I prefer and inconsistent with that urged on behalf of the appellant.

Apart from the substantive issue, there was some discussion in argument of the form of the decision made by the tribunal on 12 February 1985. The members of the tribunal were not, of course, in any way responsible for the administrative failure to notify the Secretary of State of the hearing date, which vitiates their decision. If it had been made after the Secretary of State had had the opportunity to be heard, I should be minded to criticise its form in only one substantial respect. Leaving aside pedantic quibbles over terminology, the document recording the decision in writing, as required by rule 24(1), makes clear in substance that it is what the rules call "a deferred direction for conditional discharge in accordance with section 73(7) of the Act" (rule 2), and properly sets out the conditions to be imposed and the reasons for the tribunal's decision which show that they have applied their minds to and determined the issues arising under section 73(2). My criticism is of the deferment to a fixed date. There is no authority for this in the Act or the rules and in the nature of the case it is impossible for a tribunal in making a deferred direction for conditional discharge to predict how long it will take to make the necessary arrangements. The decision should simply indicate that the direction is deferred until the necessary arrangements have been made to the satisfaction of the tribunal and specify what arrangements are required, which can normally be done, no doubt, simply by reference to the conditions to be imposed. Whoever is responsible for making the arrangements should then proceed with all reasonable expedition to do so and should bring the matter to the attention of the tribunal again as soon as practicable after it is thought that satisfactory arrangements have been made. Pursuant to rule 25 the tribunal may then decide that the arrangements are to their satisfaction without a further hearing.

I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge of Harwich. I agree with it and for the reasons which he gives I would dismiss the appeal.

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Campbell v. Home Secretary (H.L.(E.))

A LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons which he gives I would dismiss the appeal.

B LORD OLIVER OF AYLMEYTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree that the appeal should be dismissed for the reasons which he has given.

C LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree that the appeal should be dismissed for the reasons which he has given.

Appeal dismissed.

Legal aid taxation of patient's costs.

Solicitors: Alexander & Partners; Treasury Solicitor.

D J. A. G.

E [COURT OF APPEAL]

CARR AND OTHERS v. ATKINS

1987 May 13

Sir John Donaldson M.R., Stephen Brown
and Croom-Johnson L.JJ.

F *Court of Appeal (Civil Division)—Jurisdiction—Criminal cause or matter—Order made by circuit judge for production of documentary evidence to police during course of investigation—High Court's refusal of judicial review of order—Whether order made in "criminal cause or matter"—Whether appeal from High Court to Court of Appeal (Civil Division)—Police and Criminal Evidence Act 1984 (c. 60), s. 9, Sch. 1, para. 4—Supreme Court Act 1981 (c. 54), s. 18(1)(a)*

G A circuit judge, sitting at the Central Criminal Court, made orders under section 9 of, and Schedule 1 to, the Police and Criminal Evidence Act 1984¹ for the production by the applicants of various documents relating to the accounts of a youth association. The documents were "special procedure material" within the definition in section 14 of the Act. The applicants applied for judicial review by way of certiorari to quash the orders. The Divisional Court refused relief and determined as a matter of law that the orders made by the circuit judge had been made in a criminal cause or matter, so that any appeal from the Divisional Court lay to the House of Lords. The applicants appealed to the Court of Appeal.

¹ Police and Criminal Evidence Act 1984, s. 9: see post, p. 532H. Sch. 1, paras. 1, 4: see post, p. 533A-B.

On the preliminary point whether the court had jurisdiction to entertain the appeal:—

Held, declining jurisdiction, that the nature of an order made or refused in judicial review proceedings depended on the order sought to be reviewed; that an order (or a refusal of an order) under Schedule 1 to the Police and Criminal Evidence Act 1984 relating to excluded or special procedure material was made in a criminal context in aid of a criminal investigation, notwithstanding that proceedings had not been started; and that, accordingly, it was "a criminal cause or matter" and by virtue of section 18(1)(a) of the Supreme Court Act 1981 the Court of Appeal had no jurisdiction to entertain an appeal from such a decision (post, pp. 532D, 533E–G, 535F–536D).

Day v. Grant (Note), post, p. 537 et seq., C.A. and *In re Smalley* [1985] A.C. 622, H.L. (E.) considered.

Reg. v. Southampton Justices, Ex parte Green [1976] Q.B. 11, C.A. doubted.

The following cases are referred to in the judgments:

Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government [1943] A.C. 147; [1942] 2 All E.R. 381, H.L.(E.)

Day v. Grant (Note) [1987] 3 W.L.R. 537; [1985] R.T.R. 299, C.A.

Reg. v. Bristol Crown Court, Ex parte Bristol Press and Picture Agency Ltd. (unreported), 7 November 1986, D.C.

Reg. v. Lambeth Metropolitan Stipendiary Magistrate, Ex parte McComb [1983] Q.B. 551; [1983] 2 W.L.R. 259; [1983] 1 All E.R. 321, C.A.

Reg. v. Sheffield Crown Court, Ex parte Brownlow [1980] Q.B. 530; [1980] 2 W.L.R. 892; [1980] 2 All E.R. 444, C.A.

Reg. v. Southampton Justices, Ex parte Green [1976] Q.B. 11; [1975] 3 W.L.R. 277; [1975] 2 All E.R. 1073, C.A.

Smalley, In re [1985] A.C. 622; [1985] 2 W.L.R. 538; [1985] 1 All E.R. 769, H.L.(E.)

The following additional cases were cited in argument:

Bonahumi v. Secretary of State for the Home Department [1985] Q.B. 675; [1985] 2 W.L.R. 722; [1985] 1 All E.R. 797, C.A.

Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd. [1980] A.C. 952; [1980] 2 W.L.R. 1; [1980] 1 All E.R. 80, H.L.(E.)

APPEAL from Divisional Court of the Queen's Bench Division.

The applicants, Errol Ellis Carr, Memzie Kiffin, Victor Adegbesan and Lea Jack, sought judicial review by way of certiorari to quash orders for the production of documents constituting "special procedure material" made under Schedule 1 to the Police and Criminal Evidence Act 1984 by Judge Kenneth Machin Q.C. sitting at the Central Criminal Court on 3 July 1986. The orders had been made on the application of Detective Chief Inspector Atkins of the Company Fraud Department at New Scotland Yard. On 27 February the Divisional Court (Glidewell L.J. and McCullough J.) refused the application for judicial review and determined as a matter of law that the orders made by Judge Machin had been made in a criminal cause or matter, so that an appeal from the Divisional Court's decision lay to the House of Lords.

The applicants sought to appeal on the grounds, inter alia, that (1) in dismissing the application the Divisional Court had misdirected itself in law as to the proper construction and interpretation of the Police and Criminal Evidence Act 1984; (2) in deciding that the orders had been

3 W.L.R.

Carr v. Atkins (C.A.)

A made in a criminal cause or matter the court had misdirected itself in law. The Court of Appeal heard as a preliminary point the question whether the orders had been made in a criminal cause or matter.

The facts are stated in the judgment of Sir John Donaldson M.R.

Geoffrey Shaw for the applicants.

B *Nicholas Coleman* for the respondent.

C SIR JOHN DONALDSON M.R. On 3 July 1986 Judge Machin, sitting as a circuit judge at the Central Criminal Court, made orders under Schedule 1 to the Police and Criminal Evidence Act 1984 upon the application of Detective Chief Inspector Atkins of the Company Fraud Department at New Scotland Yard requiring the four applicants in the proceedings to produce documents to a constable within seven days or within 28 days of their proposed application for judicial review. The particular documents were specified in a written information laid before the judge by the detective chief inspector, each applicant was given advance notice of the documents which were required to be produced, and those documents related to the accounts of the Broadwater Farm Youth Association.

D On 27 February 1987 a Divisional Court consisting of Glidewell L.J. and McCullough J. heard applications for judicial review designed to quash those orders of Judge Machin. The Divisional Court dismissed the applications for judicial review on their merits, and went on to determine as a matter of law that the original production orders made by the circuit judge had been made in a criminal cause or matter, thereby indicating that so far as they were concerned any appeal must be to the House of Lords. They were not asked at that moment to certify that a matter of public importance was involved and nor were they asked to give leave to appeal. If they had been asked, they might well have given a certificate but they might not have given leave to appeal as the general practice is to leave it to their Lordships' House to decide which appeals they will hear. They adjourned any further consideration in order to enable the applicants, if they were so minded, to explore the possibility of appealing to the Civil Division of the Court of Appeal. We have been dealing with such an application that we hear such an appeal as a preliminary point limited to the question of whether we have jurisdiction to do so.

G Under section 16 of the Supreme Court Act 1981, appeals lie to this court from the Divisional Court of the Queen's Bench Division unless excluded by other provisions. The only potential exclusion so far as this case is concerned is contained in section 18(1)(a) of the Act of 1981, which provides:

H "No appeal shall lie to the Court of Appeal—(a) except as provided by the Administration of Justice Act 1960,"—which relates to contempt—"from any judgment of the High Court in any criminal cause or matter; . . ."

So we have to decide whether any appeal to this court from the order of the Divisional Court could properly be described as an appeal in a criminal cause or matter.

Mr. Shaw, in an extremely helpful skeleton argument, has been good enough to draw to our attention the fact that the phrase "criminal cause

or matter” arises not only in the context of section 18 of the Act of 1981 but also under R.S.C., Ord. 53, r. 3(4), which provides that applications for leave to apply for judicial review, if refused in the first instance, can be renewed to a Divisional Court if the cause or matter is criminal, but otherwise to a single judge. Again under Ord. 53, r. 5(1), where leave has been granted, an application for judicial review is made to a Divisional Court, not to a single judge, if the cause or matter is criminal. Also, under section 5(1) of the Costs in Criminal Cases Act 1973, which has now been repealed and replaced by the Prosecution of Offences Act 1985 using rather different wording, a Divisional Court used to have power to order the payment out of central funds of the costs of any party to proceedings before the Divisional Court in a criminal cause or matter.

It is quite clear that the legislature uses the phrase “in a criminal cause or matter” as being a convenient description of matters which are not civil. It is very unfortunate that that phrase has given rise to a considerable conflict of judicial opinion as to its meaning, since if the legislature, by a simple form of words like this, is unable to divide the sheep from the goats, the criminal from the civil, great difficulties are created. But that is the position at the moment.

Given that difficulty, I have to consider the current proceedings. One thing is quite clear. The nature of an order made or refused in judicial review proceedings must depend not upon that order but upon the order that is sought to be reviewed. What was being reviewed in this case was an order under the Police and Criminal Evidence Act 1984. That is an Act which has a long title, reading:

“An Act to make further provision in relation to the powers and duties of the police, persons in police detention, criminal evidence, police discipline and complaints against the police; to provide for arrangements for obtaining the views of the community on policing and for a rank of deputy chief constable; to amend the law relating to the Police Federations and Police Forces and Police Cadets in Scotland; and for connected purposes.”

For our purposes, it is sufficient only to look at Schedule 1 and Part II of the Act. Part II, which is headed “Powers of entry, search and seizure,” deals in section 8 with the “Power of justice of the peace to authorise entry and search of premises.” But that section contains what amounts to an exception in cases where the application relates to items described as “excluded material” or “special procedure material.” One finds what those latter materials are in section 14. They are materials of a specially sensitive nature either as being journalistic material or as being material which is subject in one way or another to an obligation of confidentiality. Applications to obtain access to excluded material or special procedure material are governed by section 9. That provides:

“(1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 . . . (2) Any Act (including a local Act) passed before this Act under which a search of premises”—and I stress these words—“*for the purposes of a criminal investigation* could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches” as I have summarised above.

A I then turn to Schedule 1, which provides:

"1. If on an application made by a constable a circuit judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below."

Paragraph 4 provides:

B "An order under this paragraph is an order that the person who appears to the circuit judge to be in possession of the material to which the application relates shall—(a) produce it to a constable for him to take away; or (b) give a constable access to it . . ."

C The access conditions are complex, but for present purposes it is sufficient to say that there have to be reasonable grounds for believing that a serious arrestable offence has been committed and that the material is likely to be of substantial value, whether by itself or together with other materials, to the investigation in connection with which the application is made.

I ought also to refer to paragraph 15 of the Schedule, which provides:

D "(1) If a person fails to comply with an order under paragraph 4 above, a circuit judge may deal with him as if he had committed a contempt of the Crown Court. (2) Any enactment relating to contempt of the Crown Court shall have effect in relation to such a failure as if it were such a contempt."

E So disobedience of the circuit judge's order is being treated as if it were a contempt of the Crown Court, and of course the Crown Court is a court with a largely criminal jurisdiction.

F It is to my mind clear beyond argument that the order which was made in this case was made in a criminal context, but it is right to note, as Mr. Shaw has stressed, that there are no proceedings in existence. In the limited time that has been available I have not been able to find out whether this Act could or would be used where criminal proceedings have begun, but it does not really matter for Mr. Shaw's purposes. It is sufficient to note that no criminal proceedings have been begun here and, indeed, in most cases there is no doubt that orders would be sought under this Act where a decision had not yet been reached whether or not to prosecute. It is essentially a statutory provision in aid of a criminal investigation designed, if the evidence will stand it, to lead to a criminal prosecution. But unless it is to be said that an order under the Act is either never or very rarely one which is by its nature a criminal cause or matter merely because of the stage at which the order is made, then the fact that there are no criminal proceedings does not, in my judgment, matter. That fact stems purely from the nature of the Act and the statutory provisions and does not affect the criminal characters of the proceedings.

H As I have said, countless problems have arisen as to what is meant by a "criminal cause or matter." I can shorten this judgment by saying that all the authorities are summarised—at any rate, up to that date—in my own judgment in *Day v. Grant* [1985] R.T.R. 229. That concerned two cases in which witness summonses had been issued out of the Central Criminal Court in one and out of the Manchester Crown Court in the other. In one there was an application to a High Court judge asking him to vary order. In the other there was an application to the Divisional Court to quash the order. [His Lordship read his judgment

starting from the reference to section 18 of the Supreme Court Act 1981, at pp. 303G—306A (see post, pp. 11H—14A), and continued:] Since then, and before the judgment of the Divisional Court which we are considering, another Divisional Court considered a case which was, I think, indistinguishable from the present under the Act of 1984, *Reg. v. Bristol Crown Court, Ex parte Bristol Press and Picture Agency Ltd.* (unreported), 7 November 1986, and it held that it constituted a criminal cause or matter. Glidewell L.J. was following that decision when he reached his decision in the present case. I do not think that I need refer to that decision because we have to consider the matter de novo. Nevertheless, I should refer to the subsequent decision of the House of Lords in *In re Smalley* [1985] A.C. 622. In that case Mr. Smalley had entered into a recognisance conditioned upon his brother attending his (the brother's) trial at the Warwick Crown Court. His brother failed to attend. The question then arose as to whether the recognisance of £100,000 which Mr. Smalley had entered into should be estreated in whole or in part. It was held by the Crown Court judge that the whole amount of the recognisance should be estreated. Being dissatisfied, Mr. Smalley applied to the High Court for that decision to be judicially reviewed and quashed. The Divisional Court held that they had no jurisdiction in the matter since the judge's order was one relating to a trial on indictment within the meaning of section 29(3) of the Supreme Court Act 1981. Section 29 provides:

“(1) The High Court shall have jurisdiction to make orders of mandamus, prohibition and certiorari in those classes of cases in which it had power to do so immediately before the commencement of this Act. (2) Every such order shall be final, subject to any right of appeal therefrom. (3) In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court.”

So what was being held by the Divisional Court was that it had no jurisdiction because this related to a trial on indictment.

Smalley's case went to the House of Lords where the Divisional Court's decision was reversed. Lord Bridge of Harwich, giving the leading judgment, held that a decision in a bail case relating to recognisances was not sufficiently closely connected with the trial on indictment to be caught by this exception to the jurisdiction of the Divisional Court. But more relevant for present purposes, he adverted to a plea that their Lordships' House should consider *Reg. v. Southampton Justices, Ex parte Green* [1976] Q.B. 11, which is the fons et origo of much of the difficulty of what is meant by a “criminal cause or matter.” Lord Bridge said, at p. 633:

“In *Reg. v. Southampton Justices, Ex parte Green* [1976] Q.B. 11, the applicant was a surety for her husband's bail. Upon his failing to surrender as required, the wife's recognisance was ordered by justices to be estreated.”

He dealt with the history of the case and then quoted from the judgment of Lord Denning M.R. saying, at pp. 633–634:

““A recognisance is in the nature of a bond. A failure to fulfil it gives rise to a civil debt. It is different from the ordinary kind of

3 W.L.R.

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Sir John
Donaldson M.R.,

- A civil debt, because the enforcement is different. It is enforceable like a fine. . . . But that method of enforcement does not alter the nature of the debt. It is simply a civil debt upon a bond and as such it is not a criminal cause or matter.' In the instant case Kerr L.J. found it impossible to reconcile that decision with the conclusion which he nevertheless felt himself bound by *Brownlow's* case [1980] Q.B. 530 to reach that the order estreating the appellant's recognisance was here made in 'a matter relating to trial on indictment.' Conscious that *Green's* case [1976] Q.B. 11 presents a formidable obstacle to his arguments for the respondents, Mr. Laws invited us to overrule it. He drew our attention to the doubts expressed in *Reg. v. Lambeth Metropolitan Stipendiary Magistrate, Ex parte McComb* [1983] Q.B. 551, by Sir John Donaldson M.R., at p. 563, and by May L.J., at p. 567 as to whether *Green's* case had been rightly decided."
- B
- C

Then he said this, which is important, at p. 634:

- "In *Green's* case [1976] Q.B. 11, 15, Lord Denning M.R. relied on a passage from the speech of Viscount Simon L.C. in *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] A.C. 147, 156 in support of his conclusion. Sir John Donaldson M.R. and May L.J., in the passages referred to above, thought that the speeches of Viscount Simon L.C. and Lord Wright in *Amand's* case [1943] A.C. 147, 156, 162-163 pointed the other way."
- D

- E Then he dealt with *Amand's* case. He concluded by saying:

- "I must frankly confess that I can find nothing in the speeches in that case which throws any light one way or the other on the totally different question whether an order estreating the recognisance of a surety for a defendant admitted to bail in criminal proceedings is covered by the same language. I do not find it necessary for present purposes to give a concluded answer to that question. It follows that I am not prepared to hold that *Green's* case [1976] Q.B. 11 was wrongly decided."
- F

- That produces a very interesting situation, because Lord Denning M.R., with the concurrence of those who were sitting with him, was quite clearly founding himself on *Amand's* case [1943] A.C. 147. What Lord Bridge is saying—obiter, I grant—is that *Green's* case [1976] Q.B. 11 may well have been rightly decided but not on the basis of *Amand's* case. If that is right, then the position is as it appeared to the court in *Day v. Grant* (Note), post, p. 537, although it was at that stage precluded from saying so, namely that *Green's* case [1976] Q.B. 11 is really a decision that questions of the estreatment of bail are so collateral to a criminal trial that they do not themselves constitute a criminal cause or matter. So it does seem to me in that rather tangled situation that we are freed from the authority of *Green's* case. It may just be that we are nevertheless left with the slight difficulty that *McComb's* case [1983] Q.B. 551, which concerns the Director of Public Prosecutions' conduct, might be thought to inhibit us in some way, but *McComb's* case was of course based on *Green's* case without the benefit of Lord Bridge's advice, and it was also based on *Brownlow's* case [1980] Q.B. 530, which was
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Sir John
Donaldson M.R.

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[1987]

not wholly approved in *In re Smalley* [1985] A.C. 622. So, with all respect to the doctrine of stare decisis, I think that the time has come when we should look at this afresh. Looking at it afresh, I have no doubt whatsoever that an order or a refusal of an order under Act of 1984 and all subsequent proceedings relating to such an order or refusal are properly to be characterised as orders in a criminal cause or matter, and it would follow from that that we have no jurisdiction.

Accordingly I would decline to hear the proposed appeal.

STEPHEN BROWN L.J. I agree. The whole foundation of an application under Schedule 1 to the Police and Criminal Evidence Act 1984 is that it should be made for the purpose of a criminal investigation. As Sir John Donaldson M.R. has pointed out, paragraph 12 of Schedule 1 to the Act provides: "If a person fails to comply with an order under [the Schedule], a circuit judge may deal with him as if he had committed a contempt of the Crown Court." The criminal investigation is, in my judgment, the basis of the application in the instant case. This is undoubtedly, in my view, a criminal cause or matter, and to hold otherwise would render the administration of this Act well nigh impracticable.

I would accordingly decline jurisdiction.

CROOM-JOHNSON L.J. I agree.

Jurisdiction declined.

No order for costs.

Leave to appeal.

Solicitors: Cowan Lipson & Rumney; Crown Prosecution Service (Fraud Investigation Group).

R. C. W.

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3 W.L.R.

NOTE

[COURT OF APPEAL]

DAY AND ANOTHER v. GRANT

REGINA v. MANCHESTER CROWN COURT, *Ex parte* WILLIAMS

1985 Jan. 25

Sir John Donaldson M.R., Kerr and Lloyd L.JJ.

Court of Appeal (Civil Division)—Jurisdiction—Criminal cause or matter—Witness summonses issued in Crown Court—Orders made in connection with summonses in High Court and Divisional Court—Whether orders of High Court and Divisional Court made in “criminal cause or matter”—Whether appeal to Court of Appeal (Civil Division)—Criminal Procedure (Attendance of Witnesses) Act 1965 (c. 69), s. 2 (as amended by Courts Act 1971 (c. 23), s. 56(1), Sch. 8—Supreme Court Act 1981 (c. 54), s. 18(1)(a)

DAY v. GRANT

APPEAL from Sir Neil Lawson sitting as a judge of the Queen’s Bench Division.

On 20 December 1984, on an application by Mr. Reginald Day and the Department of Trade and Industry, Sir Neil Lawson, sitting as a judge of the Queen’s Bench Division, directed that a witness summons issued on behalf of a defendant in criminal proceedings at the Central Criminal Court, Mr. Alexander Grant, should be of no effect concerning the production of any documents requested in the summons.

The defendant, Mr. Grant, appealed on the grounds, inter alia, that (1) the proceedings could not or should not have been determined by the judge but should have been determined by the trial judge in the criminal proceedings due to commence on 7 January 1985; (2) the judge exercised his discretion to hear the action upon the wrong principles, thereby causing injustice to the defendant; (3) in determining the action the judge failed to balance the two competing issues of public interest correctly, namely balancing any harm that might be done to the public service against ensuring that administration of justice and a fair trial might not be frustrated; (4) the judge was wrong in holding that the documents were not material, relevant or admissible at the criminal trial as he had neither afforded himself nor had he been afforded the opportunity of viewing their contents prior to reaching his decision; (5) in the circumstances the order constituted a breach of natural justice.

REGINA v. MANCHESTER CROWN COURT, *Ex parte* WILLIAMS

APPEAL from the Divisional Court of the Queen’s Bench Division.

On 21 December 1984 the Divisional Court of the Queen’s Bench Division [1985] R.T.R. 49 granted an application by the applicant, Dr. Paul Williams, for judicial review by way of an order of certiorari to quash a witness summons issued in the Manchester Crown Court under the provisions of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965, as amended. The summons had been issued at the request of a defendant, Mr. Dennis Dicks, who was appealing to the Crown Court against conviction by Manchester City Magistrates’ Court of a driving offence.

The defendant, Mr. Dicks, appealed on the grounds, inter alia, that, a witness summons having been issued requiring a non-party to produce a thing or document and that non-party having made an application to the Divisional Court to quash the summons, the court wrongly held that the burden was on the defendant to prove (a) that the thing or document was likely to be material evidence; (b) that there was a burden on the defendant

to prove that such evidence would or was likely to provide a complete defence; and (c) that section 2 of the Act of 1965 could not apply to a document where it was intended to become admissible evidence not by reason of the testimony of the person producing it but by reason of the testimony of the defendant or his witnesses.

The facts are stated in the judgment of Sir John Donaldson M.R. Both appeals were heard together.

The following cases are referred to in the judgment of Sir John Donaldson M.R.:

Amand v. Home Secretary and Minister of Defence of the Royal Netherlands Government [1943] A.C. 147; [1942] 2 All E.R. 381, H.L.(E.)

Reg. v. Lambeth Metropolitan Stipendiary Magistrate, Ex parte McComb [1983] Q.B. 551; [1983] 2 W.L.R. 259; [1983] 1 All E.R. 321, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Dannenberg [1984] Q.B. 766; [1984] 2 W.L.R. 855; [1984] 2 All E.R. 481, C.A.

Reg. v. Sheffield Crown Court, Ex parte Brownlow [1980] Q.B. 530; [1980] 2 W.L.R. 892; [1980] 2 All E.R. 444, C.A.

Reg. v. Southampton Justices, Ex parte Green [1976] Q.B. 11; [1975] 3 W.L.R. 277; [1975] 2 All E.R. 1073, C.A.

No additional cases were cited in argument.

Stuart Stevens and *Pamela Chegwidden-Radcliffe* for the defendant, Mr. Grant.

John Mummery for the applicant, Mr. Day, and the Department of Trade.

Christopher Limb for the defendant, Mr. Dicks.

H. M. Boggis-Rolfe for the applicant, Dr. Williams.

SIR JOHN DONALDSON M.R. These two appeals have been called on together because they have two factors in common. First, both relate, directly or indirectly, to summonses issued under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965; and, secondly, both raise an issue as to the jurisdiction of this court.

I shall refer first to *Reg. v. Manchester Crown Court, Ex parte Williams*. In that case the Manchester Crown Court issued a witness summons, acting under the powers contained in section 2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965, requiring Dr. Williams to give evidence in an intoximeter case. Dr. Williams is, I think, a director or is associated with the Lion Intoximeter company.

Section 2(1) (as amended by section 56(1) of, and Schedule 8 to, the Courts Act 1971) provides:

"For the purpose of any criminal proceedings before the Crown Court a witness summons, that is to say, a summons requiring the person to whom it is directed to attend before the court and give evidence or produce any document or thing specified in the summons, may be issued out of the Crown Court or out of the High Court."

The summons was issued at the request of Mr. Dicks, who had been convicted before a magistrates' court and was appealing to the Crown Court.

Dr. Williams might have been expected, if he objected to the summons, to have applied under section 2(2) of the same Act. That section provides:

"If any person in respect of whom a witness summons has been issued applies to the Crown Court or to the High Court, and satisfies the court that he cannot give any material evidence or, as the case may be,

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A produce any document or thing likely to be material evidence, the court may direct that the summons shall be of no effect."

In fact, what he did was to apply to the High Court for judicial review in the nature of certiorari to quash the witness summons.

B I think from what we have been told in this court that all concerned with those proceedings recognised that they had—to put the matter charitably—some degree of irregularity: because, where there is a statutory right of this nature, one would not have thought that it was open to the Divisional Court to make an order by way of judicial review. However, both parties consented and, I apprehend, must have encouraged the Divisional Court to rule on the matter, the reason being that the Divisional Court was seized of various other Intoximeter problems, which it was thought could conveniently be dealt with at the same time, and because Dr. Williams was being besieged by witness summonses from all points of the compass, and it was thought that a more authoritative ruling would be given by the Divisional Court than by a single judge. For our purposes, I think we have to assume that the order of the Divisional Court was effective, and that order was that the witness summons be set aside. Mr. Dicks now seeks to appeal to this court in order to have the summons restored.

D In *Day v. Grant* a witness summons was issued out of the Central Criminal Court exercising its power under section 2(1) of the Act requiring Mr. Day to attend to give evidence and to produce documents at the trial of Mr. Grant.

Mr. Grant is charged with certain offences which might generally be described as company fraud offences. At an earlier stage Mr. Day had been appointed by the Department of Trade and Industry to conduct an inquiry into the activities of the company concerned, a company called Axair Ltd.

E The Department and Mr. Day applied to the High Court to have this summons varied. It might perhaps have been more convenient if they had applied to the court which had issued it, but the statute gives them the alternative right.

F The summons was heard by Sir Neil Lawson, sitting as a deputy High Court judge. He allowed the summons to stand in so far as it required Mr. Day to attend and give evidence if required so to do, but he set it aside in so far as it required Mr. Day to produce documents at the trial. The relevant document, we are told, was Mr. Day's report to the Secretary of State following his inquiry. The reason why Sir Neil set it aside is clear from the papers, namely that there was a claim to public interest immunity.

G Mr. Grant now appeals to this court. Mr. Stevens on his behalf says that this report is essential to Mr. Grant's defence in that if Mr. Day is called to give evidence on behalf of the defence, the prosecution, who have this report, will be in a position to cross-examine Mr. Day, and Mr. Stevens, appearing in his defence, will not have a similar advantage. Mr. Stevens says that under the Attorney-General's guidelines, where a witness has given a proof of evidence to the prosecution and the prosecution does not intend to call that witness, it is customary for the prosecution to make the proof of evidence available to the defence. This report, he says, is to be regarded as analogous to a proof of evidence.

H However that may be—and there may be distinctions between a proof of evidence and a general report—the answer here is the claim to public interest immunity and the fact that, in the light of that claim, prosecuting counsel does not feel able to make the document available.

We are not concerned with that unless we have jurisdiction to consider the appeal itself. So I turn to this preliminary point applying to both appeals, namely, have we any jurisdiction?

The starting point must be section 18 of the Supreme Court Act 1981. Section 18(1) provides: "No appeal shall lie to the Court of Appeal—(a) . . . from any judgment of the High Court in any criminal cause or matter."

Mr. Stevens also referred us to section 53(3) of the same Act, which provides: "The civil division of the Court of Appeal shall exercise the whole of the jurisdiction of that court not exercisable by the criminal division." He argued that if the criminal division has no jurisdiction, then this division has; and if this division has no jurisdiction, then no division has. That may well be right.

The meaning of this section in its earlier form, where it is contained in section 31 of the Supreme Court of Judicature Act 1925, was authoritatively considered by the House of Lords in *Amand v. Home Secretary and Minister of Defence of the Royal Netherlands Government* [1943] A.C. 147. I need only cite from the speeches of Lord Wright and Viscount Simon L.C. If I might take first Lord Wright, who said, at pp. 159-160:

"The words 'cause or matter' are, in my opinion, apt to include any form of proceeding. The word 'matter' does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word 'cause.' In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of habeas corpus deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right."

Again, he said, at p. 162:

"The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter.' The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal. The order may not involve punishment by the law of this country, but if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal cause or matter, as is shown by *Ex parte Woodhall*, 20 Q.B.D. 832 and *Rex v. Brixton Prison (Governor of)*, *Ex parte Savarkar* [1910] 2 K.B. 1056."

So Lord Wright was saying that you look not to the particular order under appeal, but to the underlying proceedings in which that order was made, and those are the proceedings which have to be characterised as either criminal or non-criminal.

Viscount Simon L.C. said, at p. 156:

"It is the nature and character of the proceedings in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal. This is the true effect of the 'two conditions' formulated by Viscount Cave in *In re Clifford and O'Sullivan* [1921] 2 A.C. 570, 580."

So Lord Simon is saying precisely the same thing. Habeas corpus as such cannot be a criminal cause or matter; it is either neutral or civil. What Lord

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A Simon is saying is that you look to see what is the nature or character of the proceedings in which habeas corpus is sought, and that provides the test.

B Applying *Amand's* case, it is quite clear that these witness summonses were issued or varied in criminal causes or matters. But this appeal has been argued on the basis that there are two decisions of this court which suggest that *Amand's* case has a narrower meaning. I think, on analysis, that there is probably only one case, namely *Reg. v. Southampton Justices, Ex parte Green* [1976] Q.B. 11, but reference is also made to *Reg. v. Sheffield Crown Court, Ex parte Brownlow* [1980] Q.B. 530.

C In *Green's* case Mrs. Green was complaining of an order by magistrates estreating her bail. The matter went to the Divisional Court for judicial review, and then came to this court, presided over by Lord Denning M.R. Lord Denning M.R. with the agreement of Browne L.J. and Brightman J. sitting with him, held that it was within the jurisdiction of this court, and he cited the passage from Lord Simon, which I have already cited, but unfortunately he did not cite the first sentence from that passage, namely, "It is the nature and character of the proceedings in which habeas corpus is sought which provide the test." He cited [1976] Q.B. 11, 15 only the succeeding sentence:

D "If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."

And he said that the outcome of the order to estreat bail could not be the punishment or conviction of Mrs. Green, and therefore this court had jurisdiction.

E Both I and May L.J., with whom I was sitting, in the case of *Reg. v. Lambeth Metropolitan Stipendiary Magistrate, Ex parte McComb* [1983] Q.B. 551, expressed our personal view that *Green's* case [1976] Q.B. 11 involved a misinterpretation of *Amand's* case [1943] A.C. 147, but both of us of course recognised that we were bound by *Green's* case unless we could distinguish it. We did not think that we could distinguish it in *McComb's* case [1983] Q.B. 551 for reasons to which I shall return in a moment. Equally, I do not consider that sitting on this occasion I could do other than follow *Green's* case if it is indistinguishable; but, in my judgment, it quite plainly is distinguishable. Of *Green's* case it can be said that the proceedings in relation to Mrs. Green were collateral to the criminal cause or matter. In this case the summonses were both issued by the court which was itself charged with the criminal cause or matter and in that matter. If there is to be a distinction, that must be it; and, in my judgment, it is a valid distinction, assuming that *Green's* case validly interprets *Amand's* case.

F *Brownlow's* case was slightly different. It was concerned with jury vetting, and the court held that it had no jurisdiction because of section 10 of the Courts Act 1971. It was only Lord Denning M.R. who expressed a firm view on the jurisdiction of this court in terms of section 18. Shaw L.J., who was sitting with him, said that the matter had not been fully argued, and Brandon L.J. treated the remarks of the then Master of the Rolls as being unnecessary for the decision of the case.

G That leaves *McComb's* case [1983] Q.B. 551, to which I have already referred. There proceedings were brought which, at the time when they came to the Court of Appeal, involved only a claim to a declaration as to the duties of the Director of Public Prosecutions in relation to a criminal cause or matter. That is quite clearly rather further removed from the criminal cause or matter than was the situation in *Green's* case [1976] Q.B. 11, although, as I say, both I and May L.J. expressed the view that but for *Green's* case we would have held that that arose from a criminal cause or matter and that accordingly we had no jurisdiction.

H The latest case in this line of cases is *Reg. v. Secretary of State for the Home Department, Ex parte Dannenberg* [1984] Q.B. 766, in which this

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court on appeal from the Divisional Court was concerned with the propriety of a recommendation for deportation. This court seems to have held that the recommendation was made in a criminal cause or matter and that there could be no appeal against the refusal of the Divisional Court to quash it. However, this court itself quashed the recommendation upon the basis that it was invalid, having been made without referral. This appears to be a further refinement.

For my part, I cannot think of a case in which the order appealed from arises more clearly in a criminal cause or matter than this, and I would decline jurisdiction. It is right to say that the distinction which is made in *Green's* case [1976] Q.B. 11 from the general line that this court has no jurisdiction in a criminal cause or matter has caused a great deal of difficulty, and if a convenient opportunity occurred for their Lordships' House to consider *Amand's* case [1943] A.C. 147 and the subsequent cases and either reaffirm or vary or clarify *Amand's* case, I cannot help thinking that it would be an exercise which would be applauded both by the judiciary and perhaps even more so by practitioners. But, for the reasons I have given, I would decline jurisdiction in these appeals.

KERR L.J. I agree.

LLOYD L.J. I also agree.

Appeals dismissed.

*No order for costs save legal aid taxation
in Day v. Grant.*

Leave to appeal refused.

*Order for costs adjourned in Reg. v.
Manchester Crown Court, Ex parte
Williams.*

*Solicitors: Mendoza Janes; Treasury Solicitor; J. S. Sierzant & Co.,
Chorley; Walters Fladgate for Phillips & Buck, Cardiff.*

R. C. W.

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A [COURT OF APPEAL]

BASS HOLDINGS LTD. v. MORTON MUSIC LTD.

[1985 B. No. 5853]

B 1987 March 3, 4, 5; 19

Kerr, Nicholls and
Bingham L.JJ.

Landlord and Tenant—Option to extend term—Conditions—Option to take further lease conditional upon observance of covenants—Breaches of positive and negative covenants—Breaches of positive covenants remedied—Whether breaches of negative covenants remediable—Whether breaches precluding exercise of option—Whether notice exercising option specifying correct date

C By a lease dated 20 September 1982, the plaintiffs granted the defendants a term of 15 years from 1 April 1982 and, by clause 9 of the lease, the defendants had the option to take a further lease for a period of 125 years “from the date of the term hereby granted” provided that not later than 29 September 1985 the defendants gave the plaintiffs written notice of their desire to exercise the option and they had performed and observed the tenant’s covenants contained in the lease. Those covenants included a requirement to pay the rent in the manner prescribed, to pay rates and not to apply for planning permission for the demised premises without the plaintiffs’ written consent. In 1984 the defendants, without the consent of the plaintiffs, made two unsuccessful applications for outline planning permission and fell into arrears in payment of the rent and the water rates. The plaintiffs re-entered the demised premises but, in 1985, the defendants obtained from the court relief from forfeiture and paid off the arrears of rent and water rates. Subsequently by letter dated 19 September 1985, the defendants purported to exercise the option “to take a further term . . . for 125 years from 1 April 1982 . . .” The plaintiffs brought proceedings for declarations that the purported exercise of the option was invalid and the option could no longer be exercised.

F On the trial of preliminary issues as to the validity of the exercise of the option Scott J. held that the expression “from the date of the term hereby granted” was to be construed as referring to 1 April 1982 and not to the date when the lease was executed and thus the terms of the letter of 19 September 1985 were effective to constitute an exercise of the option in accordance with the provisions of clause 9 of the lease, and the defendants were not precluded under clause 9 of the lease from exercising the option if they had remedied their past breaches of covenants but that, although a breach of a positive obligation was capable of remedy, once an act resulting in the breach of a negative covenant had been done the covenant had been broken and its breach could not be remedied so that while the defendants had remedied their breaches of the positive covenants by paying the rent and the water rates, their action in applying for planning permission, without the plaintiffs’ consent, albeit unsuccessfully, could not be remedied thus preventing fulfilment of the condition precedent and precluding the defendants from exercising the option contained in clause 9 of the lease.

H On appeal by the defendants and cross-appeal by the plaintiffs:—

Held, (1) allowing the defendants’ appeal, that the option in favour of the defendants to take a further lease was in common

form and was not to be construed as requiring the defendants to have duly observed and performed all the covenants so that the exercise of the option was limited to so strict an observance of the covenants that it would be unlikely that any tenant would be in a position to exercise the option; that the common form of option required that at the time the option was exercised no breach subsisted that had not been remedied or for which the landlords had an unsatisfied cause of action; that where there had been a breach that had ceased or had been remedied, the breach of covenant was spent and a spent breach of covenant, whether of a negative or positive covenant, did not affect the exercise of the option; and that, accordingly, the unsuccessful applications for planning permission, being breaches of a negative covenant which were spent at the material time, did not affect the defendants' right to exercise the option (post, pp. 549D-H, 557F-G, 559E-G, 564D-F, 565B-F).

Grey v. Friar (1854) 4 H.L.Cas. 565, H.L.(E.) and *Finch v. Underwood* (1876) 2 Ch. D. 310, C.A. applied.

Bassett v. Whiteley (1982) 45 P. & C.R. 87, C.A. considered.

(2) Dismissing the cross-appeal, that the words "from the date of the term hereby granted" were apt to refer to the beginning of the term of the lease and were not a natural way of referring to the date of the expiry of the original term and since that was the most likely date the parties had in mind the defendants' letter of 19 September 1985 complied with the formal requirements for the exercise of the option contained in clause 9 of the lease (post, pp. 558B, 566A-C, E-F).

Decision of Scott J. [1987] 2 W.L.R. 397; [1987] 1 All E.R. 389 varied.

The following cases are referred to in the judgments:

Bassett v. Whiteley (1982) 45 P. & C.R. 87, C.A.

Bastin v. Bidwell (1881) 18 Ch.D. 238

Expert Clothing Service & Sales Ltd. v. Hillgate House Ltd. [1986] Ch. 340; [1985] 3 W.L.R. 359; [1985] 2 All E.R. 998, C.A.

Finch v. Underwood (1876) 2 Ch.D. 310, C.A.

Germax Securities Ltd. v. Spiegel (1978) 37 P. & C.R. 204, C.A.

Grey v. Friar (1850) 5 Ex. 584; (1850) 15 Q.B. 891; (1850) 15 Q.B. 901; (1854) 4 H.L.Cas. 565, H.L.(E.)

Porter v. Shephard (1796) 6 Durn. & E. 665

Rugby School (Governors) v. Tannahill [1934] 1 K.B. 695

Scala House & District Property Co. Ltd. v. Forbes [1974] Q.B. 575; [1973] 3 W.L.R. 14; [1973] 3 All E.R. 308, C.A.

Simons v. Associated Furnishers Ltd. [1931] 1 Ch. 379

The following additional cases were cited in argument:

Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191; [1984] 3 W.L.R. 592; [1984] 3 All E.R. 229, H.L.(E.)

Carradine Properties Ltd. v. Aslam [1976] 1 W.L.R. 442; [1976] 1 All E.R. 573

Dyet Investments Ltd. v. Moore (1972) 223 E.G. 945

Gardner v. Blaxill [1960] 1 W.L.R. 752; [1960] 2 All E.R. 457

Hankey v. Clavering [1942] 2 K.B. 326; [1942] 2 All E.R. 311, C.A.

Leeds and Hanley Theatre of Varieties v. Broadbent [1898] 1 Ch. 343, C.A.

Raffety v. Schofield [1897] 1 Ch. 937

Robinson v. Thames Mead Park Estate Ltd. [1947] Ch. 334; [1947] 1 All E.R. 366

Starkey v. Barton [1909] 1 Ch. 284

United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd. [1968] 1 W.L.R. 74; [1968] 1 All E.R. 104, C.A.

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- A *Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.* [1974] A.C. 235; [1973] 2 W.L.R. 683; [1973] 2 All E.R. 39, H.L.(E.)

APPEAL from Scott J.

B By a lease dated 20 September 1982, the plaintiffs, Bass Holdings Ltd., demised to the defendants, Morton Music Ltd., premises known as the Queen's Hotel, Hamlet Court Road, Westcliff-on-Sea, Essex, for a term of 15 years computed from 1 April 1982 at a yearly rent of £15,000, payable on the usual quarter days. There was provision for three yearly rent reviews. The lease contained covenants by the tenant to pay the rent, rates and taxes, etc. and to keep the demised premises in good and substantial repair, order and condition. There was also a negative covenant by the tenant not to apply under the provisions of the planning law for planning permission in respect of the demised premises without the lessors' prior written consent, such consent not to be unreasonably withheld. Clause 9 of the lease contained an option that the defendants could take a further lease for a term of 125 years "from the date of the term hereby granted" provided they were not in breach of any of the tenant's covenants contained in the lease.

D The defendants failed to pay the rent and the water rates and it also twice unsuccessfully applied for outline planning permission without the plaintiffs' consent. The plaintiffs re-entered and forfeited the lease but the defendants successfully applied for relief against forfeiture and paid off the arrears.

E By a letter dated 19 September 1985, the defendants sought to exercise the option contained in clause 9, to ask for a further term of 125 years from 1 April 1982. The plaintiffs contended that the notice was ineffective because "the date of the term hereby granted" was either 20 September 1982 or 31 March 1997, and that in any event the defendants' breaches of covenant precluded them exercising the option. The plaintiffs by originating summons dated 7 November 1985, sought (1) a declaration that the letter of 19 September 1985 was invalid and ineffective for the purpose of exercising the option; (2) further or alternatively that by reason of breaches of covenant the defendants were not entitled to the grant of a further lease pursuant to clause 9; and (3) a declaration that the option could no longer be exercised. By an order of Master Cholmondeley Clarke the following questions were directed to be tried as preliminary issues (a) whether the option notice dated 19 September 1985 was a valid notice to exercise the option contained in clause 9, and (b) whether the defendants were precluded from exercising the option by virtue of past breaches of covenant.

G Scott J. decided that the terms of the letter of 19 September 1985 were effective to constitute an exercise of the option in accordance with clause 9 of the lease, but that the breaches of covenant committed by the defendants in applying for planning permission could not be remedied so that the defendants were not entitled to the grant of a further lease pursuant to clause 9 of the lease and that the option contained in the clause could not be exercised by the defendants.

H By a notice of appeal dated 20 August 1986 the defendants appealed from the judge's decision on the second preliminary issue on the grounds that (i) the judge was wrong in law in holding that by reason of the making of two applications for outline planning permission without the consent of the plaintiffs the defendants were not entitled to exercise the option contained in clause 9 of the lease and (2) the judge ought to

have held that on the true construction of clause 9 and in the events which had happened the defendants were entitled to exercise the option and were entitled to be granted a further lease pursuant to the clause. A

By a respondent's notice dated 28 August 1986 under R.S.C., Ord. 59, r. 6 the plaintiffs sought the judge's decision on the second preliminary issue to be affirmed on the following additional grounds that (1) the letter dated 19 September 1985 was invalid and ineffective for the purpose of exercising the option contained in clause 9 of the lease; (2) the defendants were not entitled to the grant of a further lease pursuant to clause 9 by reason of breaches of covenant committed by the defendants and by reason of the defendants' failure to pay rent reserved by the lease prior to the date of the letter dated 19 September 1985. B

The facts are stated in the judgment of Kerr L.J. C

Robert Pryor Q.C. and Nicholas Dowding for the defendants.
Paul Morgan for the plaintiffs.

Cur. adv. vult.

19 March. The following judgments were handed down. D

KERR L.J. This is an appeal from a judgment of Scott J. [1987] 2 W.L.R. 397 given on 30 July 1986. It arises from the trial of a number of preliminary issues concerning the validity of the exercise by the defendant tenants of an option for a further lease from the plaintiff landlords. The main controversy turns on the materiality, if any, of past breaches of covenants by the defendants, both positive and negative, whose effect was spent before the exercise of the option. This raises a point of considerable general importance. There is also a relatively minor issue on the validity of the wording of the letter which purported to exercise the option. The plaintiffs issued an originating summons claiming declarations that on all these grounds there had been no valid exercise of the option. The judge agreed on the ground of the defendants' past breaches of one of the negative covenants in the lease, but he rejected the plaintiffs' other contentions. The defendants now appeal to reverse this decision, and the plaintiffs cross-appeal to uphold it on all the grounds raised by their summons. E

The leased premises are the Queen's Hotel, Hamlet Court Road, Westcliffe-on-Sea, Essex. The plaintiff freeholders form part of the well known brewery group, and the premises include a tied public house as well as a hotel. By a lease dated 20 September 1982 the plaintiffs let the premises to the defendants for "15 years computed from 1st April 1982" at a yearly rent of £15,000 "for the first three years of the said term." Thereafter the rent was to be subject to upward adjustments in accordance with a rent review procedure. The lease contained the usual types of covenants to be found in lettings of commercial premises, as well as a series of further covenants specifically designed for tied public houses. The covenants were both positive and negative without any purported distinction between them. Some contained both positive and negative obligations in the same provision, and the effect of others was put both positively and negatively in different provisions, e.g. a covenant to deal exclusively with the plaintiffs and not to purchase any supplies from anyone else, or not to do anything which might cause the licence F G H

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A for the premises to lapse on the one hand, and to use best endeavours to ensure that it was regularly renewed on the other. There was also a provision for re-entry for any breach of covenant in the normal form.

Clause 9 contained the option which has given rise to the dispute:

B “If the tenant shall be desirous of taking a further lease of the demised premises for a further term of 125 years from the date of the term hereby granted and shall not later than 29 September 1985 give to the lessors notice in writing of such its desire and if it shall have paid the rent hereby reserved and shall have performed and observed the several stipulations on its part herein contained and on its part to be performed and observed up to the date thereof then the lessors will on payment to them by the tenant of the sum of £300,000 let the demised premises to the tenant for a further term of 125 years from the date of the term hereby granted at a rent of one peppercorn per annum (if demanded) subject in all other respects to the same stipulations as are herein contained except this clause for renewal and save for the alterations referred to in Part III of the schedule hereto.”

D By a letter of 19 September 1985 from the defendants’ then solicitors, which the plaintiffs received on the following day, the defendants purported to exercise this option in the following terms:

E “We act for Morton Music Ltd. the tenant of the above premises under a lease granted by you on 20 September 1982. We hereby give you notice of our client’s desire under clause 9 of the lease to take a further term of the demised premises for 125 years from 1 April 1982 and otherwise upon the terms referred to in the lease. We are sending a copy of this letter to Messrs. Nabarro Nathanson your solicitors and we look forward to hearing from them in connection with the new lease accordingly.”

F The plaintiffs deny that this letter constituted an effective exercise of the option. First, they challenge the wording of the letter because it referred to the commencement of the new term as from 1 April 1982 whereas they contend that it should have been either from 20 September 1982, the date of the lease, or from 31 March 1997, the date of the expiry of the 15 year term. Secondly, and mainly, the plaintiffs rely on a number of breaches of covenants on the ground that these preclude the right to exercise the option in any event. One of these is disputed and its determination remains in issue, viz., whether the premises complied with the repairing and decorating covenants throughout the period from 20 September 1982 to 20 September 1985 inclusive. In that respect the defendants are said to have been in breach of covenant at the time when they purported to exercise the option. This is disputed by the defendants but it is common ground that if the defendants were in breach at the time when they purported to exercise the option, then it must necessarily follow that it could not have been exercised validly. However, in order to avoid possibly needless proceedings to decide this issue of disputed fact, it was agreed that there should be a trial of the other two issues which I have mentioned, the form of the exercise of the option and the materiality, if any, of past breaches of covenant. I will deal first with the latter and main issue, which raises questions of principle.

H The defendants’ past breaches of covenant fall into two groups, one positive and the other negative, and all of them are undisputed. The

course of events was briefly as follows. By September 1984 rent due under the lease was in arrears to the extent of about £18,000 and the defendants were also in default in payment of water rates. These were breaches of positive covenants. On 11 September 1984 the plaintiffs re-entered the premises and forfeited the lease on account of the rent arrears. On 9 October 1984 the defendant issued a summons seeking relief from forfeiture. In reply to this application the plaintiffs relied on two breaches of a further negative covenant:

“The tenant will not apply under . . . the planning law for planning permission in respect of the demised premises without the lessors’ prior written consent (such consent not to be unreasonably withheld).”

In that connection it is agreed that in March and again in October or November 1984 respectively two applications for outline planning permission relating to the premises were made on behalf of the defendants without the plaintiffs’ consent. Both were rejected by the local planning authority, and it is common ground that neither has caused any quantifiable loss or damage to the plaintiffs. When the plaintiffs relied upon these breaches of covenant as an additional ground for forfeiting the lease, the defendants applied for relief in relation to these breaches as well. Their application was granted by Master Dyson by an order made on 12 March and slightly varied on 1 April 1985. This recited an undertaking by the defendants at all times thereafter to comply with the covenant not to apply for planning permission without the plaintiffs’ written consent. It also granted the defendants relief from forfeiture both in respect of the arrears of rent and water rates and in respect of these breaches of covenant, but subject to certain conditions. These required the defendants to pay the arrears of rent and water rates together with interest and the plaintiffs’ taxed costs. Each of these conditions was complied with, so that the defendants’ lease had been reinstated unconditionally before the purported exercise of the option.

The relief from forfeiture and reinstatement of the lease could obviously not undo any of the breaches of covenant in the sense that it could not be said that they had never taken place. On the other hand, the breaches lay wholly in the past and their effect was spent. It was not contended that any cause of action based upon them subsisted at the time of the purported exercise of the option other than a possible theoretical claim for nominal damages on the ground that the planning applications had been made without the plaintiffs’ consent. But this is a submission without any commercial or other sensible reality, and the judge rightly did not base himself upon it. Moreover, these admitted breaches of covenant, like the others, became subject to the proceedings between the parties and were dealt with in the resulting order. It follows that their effect was then spent.

This brings me to the classification of breaches of covenants by reference to the time of their occurrence and subsistence, on which the present issues turn. As explained below, there is clearly a long standing conveyancing practice, going back more than two centuries, whereby tenants’ options in leases are made subject to provisos dealing with the observance of the tenants’ covenants, similar to the option in the present case, whether the option be for a new lease as here, or for premature termination of an existing lease (a “break” option), or for the purchase of the freehold. In all such cases the provisos link the required

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A observance of the covenants to a point of time in the nature of a
terminus ad quem. This may be either the date of the exercise of the
option as here, or the date of the expiry of the option, or—in cases of
options for renewals or for the purchase of the freehold—the date of the
expiry of the lease. For present purposes the particular date referred to
in the proviso (“the operative date”) does not matter. What matters is
B whether the breach (or breaches) of covenant on which the plaintiffs
rely as precluding the exercise of the option has only occurred in the
past, so that its effect is spent by the operative date in question, or
whether there is still a breach—or at any rate a cause of action based
upon a breach, whether for forfeiture or damages or both—which
subsists on the operative date. I will refer to the breaches of covenant in
these two situations respectively as “spent breaches” and “subsisting
C breaches.” The present appeal is concerned exclusively with spent
breaches.

In my view the position on the authorities and on the issues raised by
the present case can be summarised as follows.

(1) The first question is whether, on the true construction of the
proviso in question, the absence of any material breaches of covenant by
the defendants is a *condition precedent* to the exercise of the option, as
D well as the giving of the requisite notice purporting to exercise the
option.

Generally, and admittedly in the present case, the proviso contains a
double condition precedent, viz. (i) the absence of any material breaches
of covenants and (ii) compliance with the requirement as to notice.

(2) That, however, leaves the crucial question whether the condition
precedent (i), that there must be no material breaches of covenant by
E the defendants, applies to spent as well as to subsisting breaches. This
question is covered by dicta in numerous cases, going back in particular
to *Grey v. Friar* (1854) 4 H.L.Cas. 565, and by the decision of Clauson
J. in *Simons v. Associated Furnishers Ltd.* [1931] 1 Ch. 379. The upshot
of these authorities is that spent breaches will not destroy the tenant's
F right to exercise the option, but subsisting breaches will. As shown by
the passages to which I refer below, the reasoning is in effect as follows.
First, it must be accepted that absolute and precise compliance by the
tenant with every single covenant throughout the period of the lease
prior to the operative date is virtually impossible of attainment. If this
were required as a condition precedent, then the option would in
practice be worthless or merely at the mercy of the landlord. Therefore
G the parties cannot have intended that the absence of spent breaches
should be a condition precedent. Secondly, however, it is natural and
sensible that the landlord should require the tenant not to be in breach
of any covenant on the operative date and that all outstanding claims for
breach of covenant should have been previously satisfied, so that the
lease is then effectively clear. The proviso is therefore to be construed
as intended to apply to subsisting breaches, with the result that the
H relevant condition precedent is the absence of any subsisting breach.

(3) The only suggestion that spent breaches might be able to preclude
the exercise of the option is to be found in the judgment of Griffiths L.J.
in *Bassett v. Whiteley* (1982) 45 P. & C.R. 87. But this lies in a different
line of authority, as explained below, and cannot properly be applied to
the present case.

(4) Subject to the question whether the wording of any particular
proviso imposes a condition precedent to the exercise of the option,

which was the issue in *Grey v. Friar*, 4 H.L.Cas. 565, the precise words used in such provisos in relation to the observance of the covenants have played no part in the conclusions summarised in (2) above. While it would of course be possible to formulate a proviso which is sufficiently explicit to cause spent breaches to preclude the exercise of the option, there appears to be no reported case in which this was so; and the wording of the proviso in the present case is in a form similar to, and effectively indistinguishable from, the formulations adopted in all the cases subsequent to *Grey v. Friar*. Accordingly, in mentioning some of these cases below, it would serve no purpose to set out the precise terms of the particular provisos.

(5) The reasoning summarised in (2) above, which has led to the generally accepted conclusion that the condition precedent imposed by provisos like the present was intended to apply only to subsisting breaches, is of course particularly cogent in relation to “break” options. In such cases it will obviously be of great importance to the landlord that the demised land or premises should be surrendered to him free from any subsisting breaches of covenant. In cases of options for renewals it may also be of some importance to the landlord that the slate should be clean before the new lease takes effect. In cases of options to buy the freehold, the absence of subsisting breaches may be less important to the landlord. However, the authorities suggest no distinction between these types of option in relation to the conclusions summarised in (2) above. Admittedly, *Grey v. Friar* in 1854, 4 H.L.Cas. 565, and *Porter v. Shephard* (1796) 6 Durn. & E. 665, which was followed in *Grey v. Friar*, both involved “break” options. But their reasoning has been followed and applied in relation to tenants’ options generally. Accordingly, there is nowadays no reason for imposing any different or special construction on the familiar forms of provisos governing any particular type of tenants’ option, such as the option for a further lease in the present case.

(6) Strong arguments can admittedly be raised in extreme cases against the construction that the effect of the condition precedent is to be limited to the absence of subsisting breaches. For instance, what about a tenant who has persistently broken his covenants and only puts matters right just before the operative date? As mentioned below, this troubled Griffiths L.J. in *Bassett v. Whiteley*, 45 P. & C.R. 87, albeit in a different context. But it must also be borne in mind that the condition requiring the absence of any subsisting breach on the operative date involves not only that any breach should have ceased, but also that there should be no subsisting cause of action in respect of any breach. Thus, a landlord may perhaps take advantage of the latter condition, in order to defeat a tenant’s option, by postponing any claim for forfeiture or damages in respect of an earlier breach until after the operative date. Anomalies on both sides are inevitable on any construction. But the consensus to be found in the authorities is that the anomaly which must be rejected as too great to be acceptable is that any spent breach should disqualify.

(7) The upshot, in cases such as the present, is that we are nowadays dealing with what has become a standard conveyancing formula imposing a condition precedent concerning the absence of (material) breaches of covenant in relation to the exercise of virtually any tenants’ option in leases. The unanimous consensus on the authorities in relation to a proviso such as the present is as summarised in (2) above, viz. that the

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A condition applies to subsisting breaches and not to spent breaches. There is no reported case in which any tenant's option has been defeated by a spent breach, and virtually none in which this has even been suggested. In these circumstances it is in my view of great importance that this accepted long standing interpretation of provisos such as the present should be respected and upheld, since it must have been relied upon and applied in countless transactions.

B (8) Up to this point my conclusions accord entirely with those of the judge. But I regret that at this juncture there comes a parting of the ways between our views. He points out, entirely correctly, that the jurisprudence leading to the accepted interpretation which I have summarised above, that spent breaches are irrelevant to the exercise of tenants' options, has been concerned throughout with spent breaches of positive covenants, such as failures to pay rent, to repair, etc. The issue has never arisen in the context of a spent breach of a negative covenant. Admittedly, none of the authorities contains any suggestion that there is any difference between breaches of positive and negative covenants for present purposes, whether the breaches be spent or subsisting. But the judge nevertheless concluded that there was a material difference between them. He appears to have based this on the consideration that a breach of a positive covenant can be remedied in the sense, or to the extent, of belated performance. In effect, the tenant can take some positive action to put things right. But a breach of a negative covenant, albeit "spent" in the sense in which I have used this term, is irremediable. It cannot be undone, any more than Omar Khayam's "moving finger . . . having writ," or an indelible stain on the tenant's escutcheon. The judge accordingly concluded that while the defendants' failure to pay the rent and water rates did not disqualify them from exercising the option, their applications for planning permission without the plaintiffs' consent did have this effect. The reason was that the former were breaches of positive covenants whereas the latter were breaches of a negative covenant. The judge therefore granted the plaintiffs' application for a declaration that the defendants' option had not been validly exercised.

F (9) With all due respect, I cannot agree with this analysis or with the conclusion to which it leads. It is not based on any commercial or other practical consideration. Its effect would be entirely fortuitous. Thus, as mentioned at the beginning of this judgment, many of the covenants in this lease in common form contain both positive and negative obligations in one provision, and other obligations to the same or similar effect have been expressed in the form of both positive and negative covenants. I do not see on what realistic grounds it could be said that the intention of the parties was that spent breaches of positive covenants should be irrelevant, but that any breach of any negative covenant, albeit equally "spent" in its practical effect, should disqualify.

H This is a summary of the reasons why, while agreeing with the judge on the main part of his analysis of the authorities, I respectfully differ from his ultimate conclusion.

I must now briefly review the authorities. Although I agree with the judge about their effect, I must do so because Mr. Morgan challenged the judge's analysis as a whole. He did not abandon reliance upon the distinction which he drew between the different effect of spent positive and negative covenants. But his primary submission was that any breach of any covenant during the currency of the lease prior to the operative date, whether spent or subsisting, disqualified the tenant from exercising

the option. In relation to the present case he therefore placed equal reliance on the defendants' failures to pay the rent and water rates in due time as on their unsuccessful planning applications without the plaintiffs' consent.

In reviewing the authorities one must necessarily start with *Grey v. Friar*, 4 H.L.Cas. 565. Although of great importance for present purposes, it was a remarkably unattractive case which occupied the courts repeatedly between July 1848 and August 1853. "Bleak House" was published in instalments between March 1852 and September 1853, and "*Jarndyce v. Jarndyce*" must have appeared familiar to the parties. There were two successive actions by the landlords for breaches of covenants contained in a mining lease for 42 years with a "break" option in favour of the tenants after eight years, and every third year thereafter, subject to 18 months' prior notice and the following proviso, at p. 568:

"then in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed,) this lease and every clause and thing herein contained shall, at the expiration of the first eighth year and thereafter at the expiration of any such third year . . . cease, determine, and be utterly void . . . *But nevertheless* without prejudice to any claim or remedy which any of the parties hereto . . . may then be entitled to for breach of any of the covenants or agreements hereinbefore contained."

As pointed out in the headnote to the first action (1850) 15 Q.B. 891, "the covenants on the part of the lessees . . . were very numerous, and some . . . were negative covenants." The landlords sued for arrears of rent due in the ninth year and alleged breaches of covenant. The tenants pleaded that they had validly exercised the "break" option so as to determine the lease at the end of the eighth year and that there were then no subsisting breaches. The landlords replied to the effect that they put the tenants to proof of due compliance with all covenants at the end of the eighth year. This was held to be a good replication by the Court of Exchequer but bad by the Exchequer Chamber on a writ of error, holding that the landlords had to limit their joinder of issue to particularised breaches. In addition, the Exchequer Chamber 15 Q.B. 901, 912 held, obiter, that in view of the last sentence of the proviso, performance of the covenants "could never have been meant to be a condition precedent to the power to terminate the lease."

But the landlords were undeterred and brought a fresh action. On this occasion their replication relied, inter alia, on a breach of a particular covenant which gave a right of re-entry "if any thing should be done, or neglected to be done, whereby the colliery might be drowned with water, or otherwise damnified" 4 H.L.Cas. 565, 566. It is interesting to note that this covenant was both positive and negative in its terms. There was then a demurrer joining issue on the question whether due performance of all the covenants throughout the period of the lease was a condition precedent to the tenants' right to exercise the option.

That issue does not directly affect the subsequent cases, including the present, since it turned largely on the last sentence of the proviso which thereafter fell out of use. But the division of opinion which followed was supported on both sides by comments which are of great relevance, and the history of the action was remarkable. The Court of Exchequer held

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A that the proviso was not a condition precedent to the exercise of the option. This was unanimously reversed by the judges of the Exchequer Chamber, having evidently changed their minds about the obiter passage in the first action mentioned above. The case then went to the House of Lords who called on the judges for assistance. There were eleven reported judgments, eight in favour of the view that the proviso contained a condition precedent and three against. The Judicial Committee consisted only of Lord Cranworth L.C. and Lord Brougham, but Lord Cranworth L.C. gave the only judgment, since Lord Brougham was absent due to illness. Lord Cranworth L.C. had been a party to the decision of the Court of Exchequer (as he pointed out), and was in favour of allowing the appeal. But he said that Lord Brougham had told him that he took the opposite view and agreed with the Exchequer Chamber. Lord Cranworth L.C. added that he derived some comfort (but evidently little conviction) from the fact that there was such a large majority of the judges who took the same view. Accordingly, since the House of Lords was equally divided, the decision of the Exchequer Chamber stood.

D For present purposes, it is not the outcome but the reasoning which is important. None of the judgments supported the conclusion that spent breaches barred the exercise of the option. There was general consensus that the parties could not have intended to make it a condition precedent that none of the covenants should ever have been broken in the slightest degree during the currency of the lease. Both sides proceeded on the basis that the absence of any breach to which I have referred as a "spent" breach could not have been intended as a condition precedent.

E The division of opinion between them was accordingly on the following lines. The minority thought that, in view of this, the proviso could not have been intended as a condition precedent, particularly having regard to the concluding sentence. The majority, on the other hand, did take the view that the proviso as a whole was in the nature of a condition precedent, but then concluded that spent breaches did not bar the exercise of the option, provided that there were no subsisting breaches at the operative date, the end of the first eight years of the term. That was the outcome. But since all the proceedings were by way of demurrer, without any investigation of the facts, history does not relate whether Mr. Grey or Mr. Friar was ultimately successful.

G Many passages could be quoted from the judgments on both sides in support of the view summarised in paragraph (2) above, which Scott J. also accepted. But the clearest are four passages cited by him from those who were in the majority, as set out below. Talfourd J. said, at pp. 592-593:

H "the truth probably is, that in the framing of the proviso in question, the parties did not intend to use the words 'duly observed and performed' in their technical sense, as importing that no covenant during the eight years or longer period had ever been broken; in which sense they are certainly unreasonable; but in a sense in which they import a condition perfectly natural and just, namely, that before the expiration of the notice, the objects of the covenants should be attained, that is, that the works should be put into repair, the water pumped out of the mine, and everything done which the lessees were bound to do in order that they might deliver up the premises in a proper condition to their landlord."

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Alderson B. said, at p. 595:

"But I think that the condition precedent, even taking the words of it, may really mean that covenants broken, if the breach shall be compensated for before the expiration of notice, shall be considered as covenants duly performed within this proviso. For as rent in arrear, if paid before the expiration of the notice, clearly is within it, so the performance of the other covenants being found in conjunction with it, may bear the like interpretation."

Erle J. said, at pp. 599–600:

"It is said that there would be inconvenience in restricting the power of determining it to the event of all the covenants having been performed, which would be almost an impossibility. To this one answer is, that if the parties agree so to stipulate, the law must give effect to the stipulation. It may also be answered, that the stipulation does not mean that there should not have been any breach of covenant during the term, but that when the notice expires there should not exist any cause of action in respect of performance of covenants. The stipulation for arrears of rent being paid, refers to a covenant which had been broken; but all cause of action for the breach having been satisfied by subsequent accord, and the covenant for rent would, within the meaning of this clause, be observed and performed, if all arrears of rent were paid before the expiration of the notice. So the covenant for repair, though broken during the term, would be observed if all repairs were at last completed. So in respect of other breaches; if the damage had been settled by arbitration and the amount paid, or if an action had been brought and the judgment satisfied, the legal duty of the covenantor, by reason of his covenant, would have been so far observed and performed, that all liability in respect thereof would be at an end. In this sense, the stipulation would be free from any hardship towards the lessee, as he might obtain the privilege if he did his duty. This construction does not depend upon giving a peculiar effect to the words of this instrument, for it seems to me that the same principle is applicable to all contracts. The legal effect of the promise in every contract at common law is alternative, either to do the thing promised or make compensation instead. In some contracts the alternative is expressed when liquidated damages are stipulated for, in others the liability arises by implication of law, either to do or to compensate for not doing, according as may be settled by accord, or arbitration, or judgment. In all contracts the legal duty thereunder has been performed, and so the contract may be said in one sense to be performed, when either the thing contracted for has been done, or compensation instead thereof has been made."

Finally, Coleridge J. said, at pp. 608–609:

"The condition, thus expressed, I think it reasonable to understand as requiring that the account between the parties must, both as to rent and covenants, be clear; the rent need not have been always paid on the day; but all arrears, if any, must have been paid up; the covenants must have been strictly kept, or, if broken, must have been satisfied for. So understood, the words import a condition precedent neither impossible nor unreasonable; and where that is

A clearly the case, the mere difficulty of performance, from the number or nature of the covenants to be performed,—a fact which must have been perfectly within the knowledge of the party contracting,—seems to me a very unsatisfactory reason for holding it to be otherwise.”

B This is the reasoning which has in effect been adopted in the line of cases which followed. Scott J. referred to *Finch v. Underwood* (1876) 2 Ch. D. 310; *Bastin v. Bidwell* (1881) 18 Ch. D. 238 and the decision of Clauson J. in *Simons v. Associated Furnishers Ltd.* [1931] 1 Ch. 379. In *Finch v. Underwood* an obiter passage in the judgment of Mellish L.J. expresses the same view. In *Bastin v. Bidwell*, Kay J. did not have to decide the issue, but there is nothing in his judgment suggesting the contrary. But in *Simons v. Associated Furnishers Ltd.* Clauson J. decided it in the same sense, with references to *Grey v. Friar* in the following terms [1931] 1 Ch. 379, 386:

C “The next question is, what does the clause mean? Upon a possible construction, it may make it essential that the tenant should comply with all the covenants throughout the whole period of the five years or, in other words, that the tenant must be able to say that in no single instance during that period has rent been in arrear or a covenant broken. On that question there has been from time to time a certain amount of difference of judicial opinion. If the condition imports that it is unfulfilled if there has been any breach of covenant, even if it has been remedied, the condition may be a very hard one and such as can scarcely be supposed that parties would enter into; but here I am bound by a very heavy weight of judicial opinion to hold that the true meaning of that clause is this, that it will have been complied with, if at the end of the five years ‘there should not exist any cause of action in respect of performance of covenants:’ or, I may put it this way, the condition must be understood as ‘requiring that the account between the parties must, both as to rent and covenants, be clear; the rent need not have been always paid on the day; but all arrears, if any, must have been paid up; the covenants must have been strictly kept, or, if broken, must have been satisfied.’ In the language I have used I have ventured to quote the language in the first case of Erle J. [in *Grey v. Friar*, 4 H.L.Cas. 565, 599] and in the second case the language of Coleridge J. [at p. 608] in advising the House of Lords in the case to which I have already referred.”

G The only expression of judicial opinion the other way, but in a different context, is to be found in the judgment of Griffiths L.J. in this court in *Bassett v. Whiteley* in 1983, 45 P. & C.R. 87. A lease for eight years contained an option for renewal for a further term of the same length by giving to the landlord a written notice not more than 12 nor less than six months before the expiration of the term, provided that the tenants:

H “shall have paid the rent hereby reserved and shall have reasonably performed and observed the several stipulations herein contained and on their part to be performed and observed up to the termination of the tenancy hereby created . . .” see p. 88.

It will therefore be seen that the wording is virtually identical with the proviso in the present case, but subject to the addition of the

important word "reasonably;" and whereas the "operative date" in the present case was the exercise of the option, in that case it was the termination of the original term. The tenants gave notice of their desire to exercise the option and this was accepted. Subsequently, however, they were twice late with their payments of rent, but by the operative date all the rent had been paid and there was no subsisting breach of covenant. The issue before the court, consisting of Waller and Griffiths L.J.J., was whether the condition precedent of the proviso had been satisfied on the ground that the tenants "shall have paid the rent hereby reserved and shall have reasonably performed and observed (the covenants up to the operative date)." The court unanimously upheld the exercise of the option. The ratio can be seen from the following passage towards the end of the judgment of Griffiths L.J., at p. 93:

"I agree with the approach of Waller L.J. I think this clause has to be read as a whole. It means that the whole of the rent must have been paid by the time that the eight-year term ended, and it further means that there must have been a reasonable performance of all the stipulations. For the reasons that he has given I think there was a reasonable performance of the stipulations, and in particular the one concerning the payment of rent."

But Mr. Morgan relied strongly on the following other passages in the judgment of Griffiths L.J. with reference to the citation by Mr. Maddocks for the tenants of *Finch v. Underwood*, 2 Ch. D. 310, and *Bassett v. Bidwell*, 8 Ch. D. 238. He said in that regard at the beginning of his judgment, at p. 92:

"Mr. Maddocks submitted that in construing an option of this kind the critical date at which to look was the termination of the tenancy, and he submitted that if, at that date, it could be seen, first, that all the rent had now been paid and, second, that any previous breaches of covenant, however troublesome, had now been remedied, then the tenants were, on a true construction of the clause, entitled to exercise their option. Now I emphatically disagree with that approach for it would mean this, that if throughout the whole of the eight-year term the tenants had continuously been woefully in arrears with their rent and had constantly had to be chased for it and were obviously late and poor payers, the landlord could, nevertheless, be saddled with them as tenants for another term if they paid up the arrears at the eleventh hour."

This highlights one of the anomalies to which I referred in paragraph (c) above flowing from the construction that spent breaches do not bar the exercise of an option. Nevertheless, and in agreement with the judge, I think that the current of judicial authority the other way is by now far too strong to be overcome by this short passage, and I cannot think that on a full consideration of the extracts from the judgments which I have cited Griffiths L.J. would have taken a different view. His remarks were obiter and concerned with a different point. My impression is that he was rejecting the argument of Mr. Maddocks in the context of the word "reasonably." He meant that unreasonable conduct throughout the term could not have been cured by late performance just before the operative date, since the stipulations in the proviso would in that event not have been "reasonably performed and observed."

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A Apart from placing great reliance upon that decision, Mr. Morgan also sought to rely on the unusual terms of the proviso in the present case. He pointed out that the option was exercisable at the beginning of the term, at any time within the first three years of a 15 year term, and he submitted that in these circumstances it was no hardship to require the tenants to perform all their covenants meticulously. He said that the purpose of the proviso was to enable the landlords to decide whether the tenants were satisfactory. But, in the same way as the judge, I cannot accept that this proviso, which is otherwise in common form and covered by all the authorities to which I have referred, should for those reasons receive some different and special construction in the present case.

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C I then come to the point where I differ from the judge. While agreeing that spent breaches of positive covenants did not bar the option, he took a different view about spent breaches of negative covenants. I have already explained in paragraphs (8) and (9) above why I cannot accept this distinction. I can see no basis for it from the point of view of the sensible commercial construction of the clause. Nor is there any support for it to be found in the authorities. On the contrary, it seems to me that the policy line, if one may so call it, which has prevailed ever since *Grey v. Friar*, 4 H.L.Cas. 565, must logically apply in precisely the same way both to positive and negative covenants. Indeed, it is very often pure chance how a particular obligation is worded.

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E The judge appears to have been influenced by some of the cases dealing with relief from forfeiture under section 146 of the Law of Property Act 1925. He referred to passages in *Rugby School (Governors) v. Tannahill* [1934] 1 K.B. 695; *Scala House & District Property Co. Ltd. v. Forbes* [1974] Q.B. 575 and *Expert Clothing Service & Sales Ltd. v. Hillgate House Ltd.* [1986] Ch. 340. These cases contain discussions about the irremediability of negative as opposed to positive covenants. But this issue does not go to the substance of the rights and obligations of the parties; but merely to the form of the notices which must be given pursuant to the section. As illustrated by the present case, in appropriate circumstances a tenant will obtain relief from forfeiture following breaches of negative covenants just as readily as for non-compliance with positive covenants. In both cases the effect of the breach becomes spent in the same way. Accordingly I cannot accept the judge's conclusion that the breaches of covenant in relation to rent and rates did not preclude the defendants from exercising the option to renew, but that the applications for planning permission without the plaintiffs' consent had this effect.

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G This only leaves the plaintiffs' cross-appeal against the judge's conclusion that the form of wording in the letter of 19 September 1985 from the defendants' then solicitors complied with the formal requirements for the exercise of the option. It will be remembered that the lease was for "15 years computed from 1 April 1982," that the option was "for a further term of 125 years from the date of the term hereby granted," and that the letter referred to a further term "for 125 years from 1 April 1982." I entirely agree with the judge's conclusion on this part of the case. As regards the plaintiffs' alternative date of 31 March 1997, the judge pointed out the improbability that the parties could have intended that the new term should run from then, when the option had to be exercised more than 12 years earlier and the condition precedent

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requiring compliance with the covenants ceased to have effect thereafter. Moreover, 31 March 1997 was not “the date of the term hereby granted,” but the date on which it expired. As regards the other alternative date, 20 September 1982, when the lease was executed, this cannot have been of any particular materiality to the parties and may well have been unpredictable at the time when the proviso was negotiated. Moreover, as the judge pointed out, if this had been intended, then the proviso would no doubt have said simply “from the date hereof” or words to that effect. In my view the words “from the date of the term hereby granted” are perfectly apt to refer to 1 April 1982, and this is the most likely date which the parties had in mind. On behalf of the defendants Mr. Pryor additionally submitted that in any event the terms of the letter were sufficiently clear to constitute a valid exercise of the option even if there had been a mistake in regard to the date, and he relied in particular on *Germax Securities Ltd. v. Spiegel* (1978) 37 P. & C.R. 204. If it had been necessary to decide this point I would have been inclined to follow that decision in the present case, but in the circumstances I express no concluded opinion about it.

It follows that I would allow this appeal and refuse the plaintiffs’ application for declarations that, on the basis of the preliminary issues before the court, the defendants’ exercise of the option to renew was invalid.

NICHOLLS L.J.

The defendants’ appeal: the condition precedent

Leases frequently contain a clause entitling the tenant at his option to determine the lease prematurely or, conversely, to extend his interest in the demised property by obtaining a further lease. Such “break” or “renewal” clauses often, although by no means always, include a provision to the effect that the exercise by the tenant of his option is conditional upon his having paid his rent and performed and observed his covenants and agreements under the lease up to a specified date. Typically the specified date is either the date upon which the tenant gives notice of his intention to exercise his option or the date from which the notice would take effect: for example, in the case of a break clause, the date on which, if the option is exercised, the lease will determine.

Clauses in this form have been widely used in leases for a long time. Speaking in 1930, Clauson J. said that this “exceedingly familiar form” of clause had been in common use “for more than a century past:” *Simons v. Associated Furnishers Ltd.* [1931] 1 Ch. 379, 384. Shortly stated, the question of general importance, which arises on this appeal is whether in these clauses a condition to the effect I have mentioned requires for its fulfilment that throughout the whole term of the lease up to the specified date there shall have been no breach of any of the tenant’s covenants and agreements, or whether the condition is fulfilled if at the specified date there is no subsisting breach of any of these covenants or agreements. By the shorthand expression “no subsisting breach” I mean that in respect of the rent, covenants and agreements there is at the specified date no outstanding cause of action. I shall call the first of these two alternatives the “never any breach” construction, and the other alternative the “no subsisting breach” construction.

A I preface my observations by noting that, although each lease falls to be construed having regard to its own particular language and terms, the degree of similarity of language in break clauses and renewal clauses in common use is sufficiently marked in crucial respects for it to be possible and sensible to consider the matter, initially, in fairly general terms.

B The two alternative constructions have only to be stated for it to be apparent that the “never any breach” construction would mean that in practice the condition would be impossible of fulfilment in almost all cases of leases of buildings containing a full range of repairing and other covenants by a tenant. However diligent or even punctilious a tenant may be in carrying out his obligations under his lease, in such cases there will in practice inevitably be occasions when there will be
C outstanding some dilapidations which would, strictly, constitute breaches of the repairing or re-decorating covenants. Thus the practical consequence of the “never any breach” construction in such cases would be that the break or renewal option would seldom, if ever, be exercisable by a tenant.

D Even in the case of other leases, where the tenant’s covenants might be less far-reaching, this construction would lead to much uncertainty for tenants and their assigns. Break options and renewal options may be valuable but, on this construction, after a few years and particularly if there have been assignments or sublettings, the current tenant or a would-be assignee of the lease would be unable in many cases to discover whether or not a break option or a renewal option had already lapsed by reason of a breach of covenant. Indeed, short of a positive
E answer from a co-operative landlord, it is difficult to see how in this type of situation a tenant or would-be assignee could ever be sure that there had not been a breach, maybe trifling, of one covenant or another in the history of the lease.

F It is considerations of this nature that have led the court, for well over a century, to reject the “never any breach” construction. When parties to a lease include an option for the tenant to determine or renew the lease, their intention must be, adopting the words of Martin B. in his advice to the House of Lords in *Grey v. Friar*, 4 H.L.Cas. 565, 582, that “this was meant to be a real power, and not a merely delusive one.” On this question of construction there was a divergence of view in 1854, but thereafter there have been judicial dicta, of long standing, preferring the “no subsisting breach” construction. For many years that
G has been the conventional construction. The underlying rationale is that, whilst it is open to parties to agree that the exercise of a break option or a renewal option shall be subject to a condition as onerous and difficult to fulfil as a “never any breach” condition, where the language used is capable of another, more sensible, meaning, that meaning is to be preferred.

H I turn to the authorities. In *Grey v. Friar* the House of Lords considered a break clause in a 42 year lease of a colliery and a farm. The material part of the break clause provided that upon the lessees giving 18 months’ notice expiring on certain dates,

“then in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed,) this lease . . . shall . . . cease . . . But nevertheless without prejudice to any claim or remedy

which any of the parties hereto . . . may then be entitled to for breach of any of the covenants or agreements hereinbefore contained:" see p. 568.

The issue before the House of Lords was whether the words in parentheses constituted a condition precedent to the exercise of the right of termination. The Court of Exchequer held not. The Court of Exchequer Chamber reversed that decision. The House of Lords was equally divided, and so the decision of the Court of Exchequer Chamber stood. An important feature in that case, not found in the present case, was the "without prejudice" proviso at the end of the clause. On the one hand, it could be said, the terms of this proviso were inconsistent with the right of termination being exercisable only if the covenants and agreements had all been duly observed. On the other hand, if the words in parentheses did not constitute a condition precedent, they were wholly inoperative.

Of the 11 judges who attended the House of Lords to advise their Lordships, three were of the view that the words in parentheses did not create a condition precedent and eight were of the contrary view. In reaching their conclusions each of the three judges in the minority placed some reliance on the view that to construe the words as creating a condition precedent would be likely to defeat the purpose of the clause, because, as Martin B. stated, at p. 582, "the slightest deviation from any covenant would put an end to the power." Crompton J. made the same point, at pp. 585-586, as did Parke B. at pp. 612-613. Thus these judges supported the literal, "never any breach" construction.

In coming to the contrary conclusion, that the words created a condition precedent, some of the eight judges favoured the "no subsisting breach" construction of these words, a construction assisted in that case by the reference to "arrears of rent." This phrase assumed that the rent had not always been paid punctually and this, in turn, assisted in giving a liberal meaning to the words "duly observed and performed" in relation to the lessees' covenants. Nevertheless some of the observations made are of relevance. In particular, Talfourd J., at p. 592, thought that "probably" the words "duly observed and performed" were not intended to be used in their technical sense, "as importing that no covenant during the eight years or longer period had ever been broken," but in the sense that before the expiration of the notice

"the objects of the covenants should be attained, that is . . . everything done which the lessees were bound to do in order that they might deliver up the premises in a proper condition to their landlord."

Erle J., at p. 599, considered the argument that the words in parentheses did not mean that there should not have been any breach during the term but that when the notice expired "there should not exist any cause of action in respect of performance of covenants." He observed that the requirement of arrears of rent having been paid referred to a covenant which had been broken but in respect of which all cause of action for the breach had been satisfied by subsequent accord. From this starting point he was attracted by the view that, likewise, if all repairs were at last carried out, and damages paid or any judgment satisfied in respect of breaches of other covenants, the legal duty of the covenantor would have been observed and performed to the

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A extent that "all liability in respect thereof would be at an end." He added:

"In this sense, the stipulation would be free from any hardship towards the lessee, as he might obtain the privilege if he did his duty."

B He regarded this construction as not depending upon giving a peculiar effect to the words of that lease, but as an application of a general principle applicable to all contracts whereby

"In all contracts the legal duty thereunder has been performed, and so the contract may be said in one sense to be performed, when either the thing contracted for has been done, or compensation instead thereof has been made:" see p. 600.

C Likewise Coleridge J., at p. 608, construed the words in parentheses as requiring that at the relevant time:

D "the account between the parties must, both as to rent and covenants, be clear; the rent need not have been always paid on the day; but all arrears, if any, must have been paid up; the covenants must have been strictly kept, or, if broken, must have been satisfied for."

E That case concerned a break clause. With such a clause the commercial purpose achieved by a condition construed as meaning "no subsisting breach" is readily apparent: before the lease can be ended prematurely all the rent due must have been paid, the property must have been put into a proper state of repair, and the other covenants must have been observed and performed in the sense that all liability in respect of any previous breaches must be at an end. What commercial purpose, in such a case, would be served by the "never any breach" construction of the condition precedent is not so readily apparent. In this respect an option to renew may not stand on precisely the same footing. Where a lease is being renewed a landlord may well be concerned not merely with the state of the account between the parties when the option is exercised, but with the tenant's conduct, at least in the recent past. Furthermore, as already noted, *Grey v. Friar*, 4 H.L.Cas. 565, was a case in which the "no subsisting breach" construction was aided by the presence of the reference to arrears of rent.

F However, 20 years later the Court of Appeal had to consider a clause which did not contain any mention of arrears of rent and which was concerned with renewal. In *Finch v. Underwood*, 2 Ch. D. 310, 311, a seven-year lease contained a covenant for renewal by the landlord at the expiration of the term thereby granted "(in case the covenants and agreements on the said tenants' part shall have been duly observed and performed)." Notice exercising the option was given shortly before the end of the term, and at that time and also when the lease expired the interior of the property was in need of repairs. The repairs were not major, for a builder was ready to undertake the necessary work for £13 10s. The court construed the material words as creating a condition precedent to entitlement to a new lease. Hence the tenants' claim to be entitled to a new lease failed. However, both James and Mellish L.JJ. firmly adopted the "no subsisting breach" construction of the condition. James L.J., having observed that no doubt every property must at times be somewhat out of repair, said, at p. 315:

“but where it is required as a condition precedent to the granting a new lease that the lessee’s covenants shall have been performed, the lessee who comes to claim the new lease must show that *at that time* the property is in such a state as the covenants require it to be.” (Emphasis added.)

Mellish L.J. added, even more explicitly, at pp. 315–316:

“Under the terms of the covenant in the present case the lease is to be granted only in case the covenants and agreements on the part of the tenants shall have been duly observed and performed. What does that mean? I think it does not mean that the tenants must have strictly observed and performed the covenants all through the term, for the expression is, ‘shall have been duly observed and performed;’ and I think that this is satisfied if they have been so observed and performed that *there is no existing right of action under them at the time when the lease is applied for.*” (Emphasis added.)

Those observations were obiter dicta, but they are clear and strong statements, made in a case in which there had been repeated failures to pay rent. On four occasions distress had been levied, and on two other occasions a bailiff had gone to distrain but the rent had been paid before the levy had actually been made. Despite this unattractive record the court was firm in its adoption of the “no subsisting breach” construction.

In 1930 Clauson J. in *Simons v. Associated Furnishers Ltd.* [1931] 1 Ch. 379, 380, had to consider the effect of a break clause in a 17 year repairing lease under which the tenant company had the right to determine the lease after five or ten years if they should give six months’ notice and if they

“shall up to the time of such determination pay the rent and perform and observe the covenants and conditions on their part hereinbefore contained . . .”

In that case dilapidations existed when the notice was given but they had been remedied by the time the notice expired. Clauson J. decided that this fulfilled the requirements of the condition.

In that case the issue before the court concerned the particular date as at which there must be performance of the tenant’s covenants: was it the date of the giving of the notice? or was it the date of expiry of the notice? It is not without significance that no argument was advanced in favour of a “never any breach” construction. Nevertheless, in deciding in favour of the latter date, and having been referred to the authorities, Clauson J., at p. 386, did consider that construction as “a possible construction,” but he concluded that he was bound by “a very heavy weight of judicial opinion” to hold that the true construction was what I have called the “no subsisting breach” construction.

I come to the most recent authority, much relied upon by Mr. Morgan. In *Bassett v. Whiteley*, 45 P. & C.R. 87, this court considered a renewal clause in an eight year lease, where the condition was expressed in these terms, at p. 88:

“If [the tenants] shall have paid the rent hereby reserved and shall have reasonably performed and observed the several stipulations herein contained and on their part to be performed and observed up to the termination of the tenancy hereby created . . .”

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A There, on two occasions after service of a notice exercising the option, the tenants withheld rent for short periods in an attempt to put pressure on the landlord to repair a leaking roof. The rent was fully paid up when the original tenancy expired at the end of 1981. Both Waller L.J., at p. 91, and Griffiths L.J., at p. 93, adopted the “no subsisting breach” construction of the first limb of the condition regarding payment of rent and rejected the argument to the contrary advanced for the landlord.

B On the second limb of the condition, regarding performance and observance of the stipulations, they took the view that since one of the “stipulations herein contained” was for payment of rent, this limb imposed an additional requirement on the tenant in the case of rent. Under that requirement it was

C “permissible to look at the conduct of the tenants throughout the term to determine whether or not they have reasonably performed and observed the several stipulations.” *per* Griffiths L.J., at p. 92.

I do not read those judgments as casting any doubt on the established, conventional approach to the construction of conditions in break and renewal clauses. A notable feature of that case was the presence of the word “reasonably” in the second limb of the condition. As pointed out by Griffiths L.J., at p. 93 the word “reasonably” was introduced to mitigate the great hardship that would flow from the possibility that a very trivial breach of the stipulations might result in the loss of the option, but it did so by giving to the court a discretion. I can well understand, if I may respectfully say so, the disinclination of Waller L.J. and Griffiths L.J. to construe this clause in such a way that, in exercising this discretion (*viz.*, in determining whether the tenants’ stipulations had reasonably been performed), the court should not be able to have regard to the conduct of the tenants.

Those are the principal authorities. In attacking the “no subsisting breach” construction, Mr. Morgan submitted that to treat a covenant as performed and observed if at a particular date there is no outstanding cause of action in respect of a past breach, either for forfeiture or for damages (other than nominal damages), is an unworkable and impractical test. Applying this test, compliance would be a matter outside the tenant’s control, because in the event of a dispute the tenant could not ensure that the dispute would be determined by the court, and any appeal finally disposed of, before the relevant date. I do not find this persuasive. Difficulties may arise in particular cases, but this test was spelled out by Mellish L.J. in 1876 in *Finch v. Underwood*, 2 Ch.D. 310, 315, following the even earlier observations of Erle J. and Coleridge J. in *Grey v. Friar*, 4 H.L.Cas. 565, 599, 608, and the paucity of reported decisions on this point since then would suggest that fears in this direction may be exaggerated.

H Mr. Morgan further submitted that, in any event, the option clause in the present case was significantly different from the conventional renewal clause. Typically a renewal clause provides for the grant of a new lease of the same length as the original term and on the same terms (save as to the amount of rent), the option being exercisable towards the end of the original term, and the new term being consecutive to the original one. Here the initial lease was for 15 years and the new term was for 125 years; the new term would, in part, be concurrent with the original term (if the judge was right in his construction of the phrase “the date of the term hereby granted”); the transaction changed from

being a rental transaction to one of a capital nature (a premium of £300,000 was payable for the new lease, under which the rent was to be a peppercorn); the tenant's covenants in the new lease were modified so as to be appropriate for a long lease; and the option was exercisable at the beginning of the original term, not at the end. I agree that there are unusual features about this renewal clause. But I do not see how, considered separately or together, they lead to the conclusion, or even suggest, that in the present case the "never any breach" construction, and not the conventional "no subsisting breach" construction, is the true meaning of the relevant words in clause 9 (which, for convenience, I reproduce):

"If the tenant shall be desirous of taking a further lease of the demised premises for a further term of 125 years from the date of the term hereby granted and shall not later than 29 September 1985 give to the lessors notice in writing of such its desire and if it shall have paid the rent hereby reserved and shall have performed and observed the several stipulations on its part herein contained and on its part to be performed and observed up to the date thereof then the lessors will . . ."

In my view the condition in this clause is in a well established conventional form. It is indistinguishable in its essentials from the form considered in *Finch v. Underwood*, 2 Ch. D. 310, and regarding which Mellish L.J. made the observations, at p. 315, already quoted, over a century ago. One can but wonder how many leases have been entered into and implemented since then on the footing that this form of condition in a break clause or a renewal clause bears the "no subsisting breach" meaning and not the, even stricter, "never any breach" construction. Of course, questions of construction depend upon the particular language of the particular instrument, but this is a field in which the court should be slow to find that small, inexplicit differences in language lead to a clause being construed, contrary to the norm, as imposing a "never any breach" requirement.

Accordingly, and in entire agreement with the judge thus far, I would reject Mr. Morgan's submission that this is a "never any breach" condition.

Positive and negative covenants

Mr. Morgan's alternative submission was that not all covenants in leases are to be regarded as observed and performed once there is no longer any existing cause of action in respect of a past breach. Repairing covenants may be performed late, by the work being done. But, in ordinary speech, a positive covenant such as a covenant to carry on a particular business if broken over a lengthy period, would not be regarded as "performed and observed" by reason only of the tenant once more carrying on the business and paying damages for the past breaches. Again, with negative covenants: in ordinary speech, cessation of a user carried on in breach of a user covenant would be regarded as having the consequence that the covenant was currently being observed, but not that it had been observed.

Accordingly, submitted Mr. Morgan, the correct test is to ask in relation to each covenant, "Has the covenant been performed?" and to treat this, not as a question of law, but as a question of fact to be

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A answered having regard to the terms of the particular covenant and to what has occurred.

B Mr. Morgan's further alternative submission was to draw a distinction, accepted by the judge, between negative and positive covenants: once a negative covenant has been broken, a condition that requires performance and observation of all covenants, cannot be fulfilled. Although, hitherto, no suggestion has been made that, in applying the "no subsisting breach" construction, different covenants in a lease might fall to be treated in different ways, no case has previously arisen where the covenants which had been breached were negative.

C I am unable to accept either of these submissions, and it is at this point that I must, with respect, part company from the judge, for this reason. The question under consideration is the true construction of a condition, viz., a condition requiring for its fulfilment the performance and observance of the tenant's covenants. In adopting the "no subsisting breach" construction the court has given to the requirement that all the tenant's covenants must have been performed and observed a secondary meaning in preference to the literal meaning: strict observance and performance is not necessary, all that is needed is that at the material date any past breaches have been made good in the way which the law recognises as a discharge of the tenant's obligation under the covenant in question. "Either the thing contracted for has been done, or compensation instead thereof has been made," in the words of Erle J. in *Grey v. Friar*, 4 H.L.Cas. 565, 600. Depending upon the particular covenant and the particular breach, this secondary meaning will be more, or less, attractive. But if in accordance with what I have referred to as the conventional approach, the requirement of "performance and observance" of the tenant's covenants as a condition in a break clause or a renewal clause is given that secondary meaning, that secondary meaning must, in my view, then be applied to all the tenant's covenants. I can see no basis for construing words such as "perform and observe," appearing as a condition in a break clause or a renewal clause and expressly related without distinction to all the tenant's covenants, as bearing the secondary meaning in relation to some covenants but as bearing their literal, strict meaning in relation to other covenants.

For the same reason I do not think that the distinction, made in section 146(1) of the Law of Property Act 1925, between a breach of a covenant or condition which is "capable of remedy" and one which is not, is relevant in the present case.

G For these reasons, and it being common ground that the plaintiffs suffered no loss by reason of the defendants' applications for planning permission having been made in breach of covenant, I too would allow the defendants' appeal and answer "no" to the second of the two questions directed to be tried as preliminary issues.

The plaintiffs' appeal: the date of commencement of the 125 year term

H I am in complete agreement with the judge's conclusion and reasoning regarding the date on which, on the true construction of clause 9, the new 125 year term would commence. I add a few comments only out of deference to the arguments of counsel addressed to us. Of the three dates competing for the honour of being "the date of the term hereby granted" in clause 9, the date of expiry of the initial 15 year term (31 March 1997) is supported by the references in clause 9 to a "further" lease and a "further term." These suggest that the new term would be

consecutive and not (and, indeed, this would be very unusual with a renewal clause) a concurrent term. But in this case the new lease is to be granted on payment of £300,000 and for a peppercorn rent. The existing lease provides for a rental of £15,000 per annum until 1 April 1985, and a market rental thereafter. The option was exercisable until 29 September 1985. For the tenant to exercise his option and pay £300,000 in or before 1985, and then pay a market rental until 1997, and then enjoy a peppercorn rent for the next 125 years, does seem to be an improbable arrangement. When one couples with this the consideration that "the date of the term hereby granted" is not, in my view, a natural way to refer to the date of expiry of the original term, I am left in no doubt that in this case the new lease was not intended to run from 31 March 1997, even though the consequence of this construction is that the new term will run from a date earlier than the expiry of the original term.

This leaves two dates: 1 April 1982, which was the date from which the initial term of 15 years was measured, and 20 September 1982, which was the date borne by the lease. Two features support the first of these two dates. First, in the lease, including in the rent review provisions in clause 3, the term thereby granted was treated as having begun on 1 April 1982. Second, it seems unlikely that, in a lease that granted a 15 year term from a fixed, past date (1 April 1982), the parties would have intended that the new 125 year term should be calculated, not from that date, but from whatever might be the date on which, as events happened to turn out, the initial lease should actually be executed.

I too would give an affirmative answer to the first question raised as a preliminary issue and dismiss the plaintiffs' appeal.

BINGHAM L.J. Under clause 9 of the lease dated 20 September 1982, the defendants' right to require the grant of a new lease for 125 years was subject to fulfilment of two conditions precedent.

The first of these conditions related to the giving of notice not later than 29 September 1985. I agree with what the judge and Kerr and Nicholls L.J.J. have said about this. There is nothing I can usefully add.

The second condition was:

"and if [the tenant] shall have paid the rent hereby reserved and shall have performed and observed the several stipulations on its part herein contained and on its part to be performed and observed up to the date thereof" (i.e. up to the date of the notice).

Two principal questions arise in this appeal on the construction of this condition. The first is whether it requires the tenant, as a condition of its exercising the right to call for a new lease, to perform and observe all the covenants in the existing lease, whether positive or negative, up to the time of giving notice. The plaintiffs' primary submission is that it does, but that submission was not accepted by the judge. The second is whether it requires the tenant, as a condition of its exercising the right to call for a new lease, to perform and observe all negative covenants in the existing lease of which breaches, once committed, cannot be remedied, and to remedy all breaches of positive covenants before giving notice. This is the plaintiffs' alternative submission and it formed the basis of the judge's decision.

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Bingham L.J.

A The basic 1982 lease here was of a usual enough kind. It was for a 15 year term at a rack rent with three-yearly rent reviews. It contained covenants of the kind one would expect in a lease between a brewery company and a tenant of hotel or public house premises. But Mr. Morgan for the plaintiffs suggests, in my view rightly, that clause 9 makes this a very unusual transaction. On exercise of the option the tenant can acquire a lease some eight times longer than the original term. On payment of a premium the tenant acquires this long lease free from any rental obligation. And the option is one that can, apparently, be exercised at any time after the execution of the lease in September 1982 provided it is exercised before the specified terminal date of 29 September 1985. Mr. Morgan submits, again rightly in my view, that these novel features require the court to look at the language of this clause in this lease with care and, if necessary, a fresh eye.

C The judge summarised Mr. Morgan's main submissions in his judgment [1987] 2 W.L.R. 397, 403-404. Not surprisingly, Mr. Morgan makes very much the same submissions to us. The judge observed, at p. 404c: "If the condition is to be construed literally according to its strict language, Mr. Morgan's submissions are, in my view, correct." I agree. The words used, together with the future perfect tense employed, read quite literally, suggest to me that exact compliance with the terms of the lease up to the time of exercising the option is required as a condition of its exercise.

D Mr. Morgan urges that we should, in accordance with ordinary canons of construction, give effect to the plain meaning of what the parties have agreed. If the defendants doubt their ability to comply exactly with their covenants, they can give notice under clause 9 very shortly after executing the 1982 lease. If they choose, or are for any reason obliged, to delay in giving notice, they must pay the price of exact compliance meanwhile on pain of losing the right to exercise this potentially valuable option. Having chosen to give a series of detailed covenants the defendants cannot be heard to say that exact compliance with the covenants is impossible or unreasonable or oppressive.

F It is of course true that the law has intervened to mitigate the rigours of the landlord-tenant relationship, for example in providing for relief against forfeiture and restricting the damages recoverable for breach of covenant to repair. But an option of the present kind has little to do with the ordinary relationship of landlord and tenant, and if the matter were free from authority I should see very great force in the argument that the effect of this option should be determined on ordinary contractual principles. Unfortunately for the plaintiffs, however, questions closely related to the present have been intermittently litigated for 200 years and the current of authority has been against the plaintiffs' contention.

G Of the leading cases, the first two concerned a tenant's right to determine a lease before expiry of the contractual term. This is of significance, because the context coloured the judicial approach to the question of construction. Where a tenant wished to take advantage of a break clause, the landlord was not greatly concerned with the history of the tenant's performance before the break. The worse the tenant's performance, the readier the landlord might reasonably be to get rid of him. But whatever the tenant's defaults in the past, the landlord would be very much concerned that at the time of the break the rent should be fully paid (because he could no longer distrain) and the covenants fully

H

observed (so that the property could be re-let or sold without delay or additional expenditure). A

In *Porter v. Shephard*, 6 Durn. & E. 665, the lease was for seven years with a right for the tenant to determine after three or five years subject to giving notice and

“payment of all rents and arrears of rent and duties on the tenant’s part to be paid, and performance of the covenants contained on the part of the lessee until the expiration of the said first three or five years . . .” B

The case largely turned on whether this provision was a condition precedent, as it was held to be. But the trend of the court’s thinking is reflected in the judgment of Lawrence J., at p. 670:

“It seems to me that it would be unjust as against the landlord, if this were not considered to be a condition precedent; for if it were not, the lessee, after neglecting to pay the duties which are a charge on the estate, after suffering the house to be out of repair, and the rest of the premises to lie waste, might give them up to the landlord in that state, and the landlord would be left without any remedy.” C

Thus attention was firmly concentrated on the state of affairs at the time of the break. D

I need not rehearse the curious and tortured history of *Grey v. Friar* (1850) 5 Ex. 584, (1854) 4 H.L.Cas. 565. Most of the difficulty in that case arose from the apparently contradictory terms of the break clause in question. The issue was again whether the clause contained a condition precedent. In the result it was held to do so. There was no ruling on the question in issue here. Among the judges summoned to advise the House of Lords, however, a large majority supported the Court of Exchequer Chamber’s ruling that the clause did contain a condition precedent, and in some of their opinions there are clear and influential expressions of view on the present point. The most telling passages are in the opinions of Talfourd J., Alderson B., Erle J. and Coleridge J. The judge has cited these passages in his judgment [1987] 2 W.L.R. 397, 404–406, and I will not repeat them. All very plainly make the point (undoubtedly influenced by the form of the clause in question) that past breaches do not matter provided that these have been fully remedied or compensated for when the break clause is exercised. E

Finch v. Underwood, 2 Ch. D. 310 is a significant case for several reasons. First, it concerned a renewal clause, which is in substance closer to the present clause than is a break clause. Secondly, the wording of the clause was not dissimilar from the present: “(in case the covenants and agreements on the said tenants’ part shall have been duly observed and performed).” Thirdly, the tenants’ performance in paying rent had been highly unsatisfactory. During a seven-year term the landlords had levied a distress on four occasions, and on two others the bailiff had gone to distrain but the rent had been paid before the levy had actually been made. The case, however, turned on the fact that when the tenant sought to exercise his right to renew there was an extant breach of a repairing covenant, the estimated cost of remedying which was some £13. Malins V.-C. at first instance held that the landlord was bound by the terms of the covenant to renew and that as the want of repair was trifling it furnished no grounds of defence. He appears to have attached no significance to the earlier breaches of the covenant to F

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Bass Ltd. v. Morton Ltd. (C.A.)

Bingham L.J.

A pay rent. The Court of Appeal took a different view of the failure to repair. [His Lordship referred to passages in the judgments of James and Mellish L.JJ., at pp. 315–316 quoted by the judge [1987] 2 W.L.R. 397, 406, (see ante, p. 562A–C) and continued:] No member of the Court of Appeal referred to the earlier and (as one would have thought) serious breaches of the rental covenant, clearly regarding these as irrelevant.

B *Bastin v. Bidwell*, 18 Ch. D. 238 also concerned an option to renew, conditional upon the lessees paying the rent and performing and observing the covenants of this present lease.” According to Kay J., at pp. 250–251:

C “It is obvious the meaning was this: the landlord must have intended by a covenant worded like this to say: ‘I shall have the term in which to see whether you are such a tenant as I shall think it right and expedient to grant a new lease to, and the test I propose in words is this, whether when you come for your new lease, or whether at some time or other (I will not at the present moment say what time) you have paid your rent and performed your covenants.’”

D There was argument in that case (which the judge did not have to resolve) whether the relevant time for testing performance was the date of the notice or the date of its expiry, but consistently with earlier cases it was not suggested that reliance could be placed on breaches existing before either of those dates.

In *Simons v. Associated Furnishers Ltd.* [1931] 1 Ch. 379, Clauson J. construed a break clause, of which the condition was that the tenant

E “shall up to the time of such determination pay the rent and perform and observe the covenants and conditions on their part hereinbefore contained.”

He held himself, at p. 386:

F “bound by a very heavy weight of judicial opinion to hold that the true meaning of that clause is this, that it will have been complied with, if at the end of the five years ‘there should not exist any cause of action in respect of performance of covenants:’ or, I may put it this way, the condition must be understood as ‘requiring that the account between the parties must, both as to rents and covenants, be clear; the rent need not have been always paid on the day; but all arrears, if any, must have been paid up; the covenants must have been strictly kept, or, if broken, must have been satisfied.’”

G These were quotations from Erle J. and Coleridge J. in *Grey v. Friar*, 4 H.L.Cas. 565, 599, 608. Although Clauson J. made his decision at first instance, it has stood unquestioned (so far as I know) for over half a century.

H The only decision which runs against the current of authority I have mentioned is *Bassett v. Whiteley*, 45 P. & C.R. 87, a decision of this court. The tenants in that case were entitled to renew the lease:

“if they shall have paid the rent hereby reserved and shall have reasonably performed and observed the several stipulations herein contained and on their part to be performed and observed up to the termination of the tenancy hereby created.” see p. 88.

Save for the important word “reasonably” this covenant is not very different from that in *Simons v. Associated Furnishers Ltd.* [1931] 1 Ch.

379. The facts were that rent was fully paid both when notice was given and when the original lease expired, but between those dates the tenants delayed payment of rent to encourage the landlords to mend a badly leaking roof. Waller L.J. held that in the circumstances the tenants had reasonably performed and observed their covenants. Griffiths L.J. agreed with the approach of Waller L.J. It is plain that Griffiths L.J. did not think it was correct simply to look at the position at the date of determination of the original lease and I think that Waller L.J., although less explicitly, took the same view. But the crux of the decision was the word “reasonably.” It was plain that the tenants had acted altogether reasonably, whichever period or point of time was looked at. This made it unnecessary for the court to decide on the precise time to which the obligation related and I do not think the decision is binding authority on that point. The plaintiffs in this appeal understandably rely heavily on this case, but I do not think it can of itself stem or divert the flow of previous authority.

The judge said [1987] 2 W.L.R. 397, 408–409:

“I would respectfully accept that, in the end, the questions raised in the present case turn on the construction of clause 9 of the lease. Nonetheless, it does seem to me that the line of authorities to which I have referred do establish that a condition precedent which requires that there shall have been performance and observance of a tenant’s covenants does not fail simply on account of there having been a past, but remedied, breach of covenant. It would be possible to formulate a condition precedent which did require that there should not at any time have been any breach of a tenant’s covenants. But the fairly common form of condition precedent that is to be found in clause 9, not materially different from the corresponding conditions precedent contained in the respective leases in *Grey v. Friar*, 4 H.L.Cas. 565; *Finch v. Underwood*, 2 Ch. D. 310; *Bastin v. Bidwell*, 18 Ch.D. 238 and *Simons v. Associated Furnishers Ltd.* [1931] 1 Ch. 379, does not, in my judgment, fail on account of a past breach of covenant provided that the breach has been remedied.”

I agree. Whether this is the rule which, starting from scratch, one would devise, I do not know but rather doubt. It does, however, appear that the rule stated by the judge is one which has over a very long period been understood by practitioners as representing the law on this subject. It would in my opinion be a source of mischief if this court were to disturb an assumption, reasonable on the authorities, on which very many landlords and tenants may have based their conduct and their agreements. I am, up to this point, very much in agreement with the judge.

But the judge distinguished between positive and negative covenants. A covenant to do something can be substantially performed, even if late. A covenant not to do something, once broken, is broken for ever. As Lady Macbeth, referring to her breach of the sixth (negative) commandment, observed: “what’s done is done.” The judge held that the rule established by the authorities should not be extended to cover negative covenants. In reaching that conclusion he derived help from the authorities on section 146 of the Law of Property Act 1925.

I part company with the judge at this point, and for several reasons. First, the distinction is not one which in this context emerges from the

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A authorities on break and renewal clauses which I have mentioned. They were, it is true, concerned with breaches of positive covenants to pay rent and to repair, but the cases contain much reasoning of a general nature in which this distinction is never mentioned. Secondly, in a detailed lease such as the present there are numerous covenants, some positive and some negative, and it would in my view be unwieldy and unnecessary to differentiate between them for this purpose. Many of these covenants could be expressed in either a negative or a positive way and even if regard is had to the substance rather than the words used there is sometimes a positive and a negative element in the covenants. Thirdly and most importantly, I consider that this distinction in the present context distracts attention from the commercial core of the contract and directs it towards what may often be matters of form. One can take for examples the covenants not to sublet the premises or permit them to be used for an unlawful or immoral purpose. Once a breach of such a covenant has occurred, nothing can in a literal sense wipe the slate clean; and, on principles already discussed, it is plain that a tenant who seeks to exercise the option during the currency of a breach or without making proper compensation for a previous breach will be rightly refused. Suppose, however, that an unlawful subletting or an improper user has been brought to an end, and suitable undertakings proffered and appropriate compensation paid, in circumstances such that the landlord could show no continuing damage. It would seem to me highly and undesirably formalistic to hold that the tenant was forever debarred by those breaches from exercising the option, even though breaches of positive covenants at an earlier time could have been committed and made good. The present facts vividly illustrate the point. The defendants should not have applied for planning permission on two occasions, without consent. These were plain, and perhaps indefensible, breaches of covenant. But they have caused the plaintiffs no harm of any kind and would not (I think) have done so even if the applications had not been refused. This whole matter was investigated on the defendants' application for relief from forfeiture, and undertakings were given. There was no reason to apprehend a further breach. When the option was exercised, the account between the parties in this respect was (in the words of Coleridge J. in *Grey v. Friar*, 4 H.L.Cas. 565, 608) clear; a covenant had been broken, but it had been satisfied for. In my judgment these breaches do not have the effect, simply because the covenant was negative, of preventing the tenant from exercising the option.

G On these grounds I would allow the appeal.

Appeal allowed with costs.

Solicitors: Nutt & Oliver; Nabarro Nathanson.

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A. R.

[1987]

[HOUSE OF LORDS]

A

PRESIDENT OF INDIA APPELLANT

AND

LIPS MARITIME CORPORATION RESPONDENTS

1987 June 8, 9, 10, 11;
July 29Lord Keith of Kinkel, Lord Fraser
of Tullybelton, Lord Brandon of Oakbrook,
Lord Griffiths and Lord Mackay of Clashfern

B

*Shipping—Charterparty—Demurrage—Demurrage calculated in U.S.
dollars—Payment in sterling at rate of exchange ruling on date of
bill of exchange—Dispute as to time ship on demurrage—Whether
term to be implied that demurrage payable within two months of
discharge—Depreciation of sterling—Whether currency exchange
loss recoverable as special damages*

C

Ships' Names—Lips

Greek owners chartered their vessel to the charterer under a charterparty which provided, by clause 9, that if the ship should be detained beyond the lay days demurrage should be paid at the rate of U.S. \$6,000 per day and, by clause 30, that the amount of demurrage should be paid in British sterling at the exchange rate at the date of the bill of lading. The vessel completed discharge of the cargo after considerable delay. A dispute as to the period of time for which demurrage was payable was referred to arbitration. The umpire determined the amount of demurrage payable and, on the basis that the charterer had been under an obligation to settle and pay for demurrage within two months of completion of discharge, he held that the owners were entitled to recover, as damages for late payment of the outstanding demurrage, the loss suffered by them by reason of sterling having depreciated by the date of the award. He awarded the owners £15,746. The charterer appealed to the High Court. Lloyd J. remitted the award to the umpire for further consideration because it was not clear from his reasons whether the award consisted of general or special damage, with only the latter being recoverable. The umpire published his further award stating that the currency exchange loss suffered by the owners was special damage. Thereafter the charterer's appeal came before Staughton J., who held that the umpire had been wrong in law to conclude that the currency exchange loss amounted to special damage, and he varied the award to exclude the damages element, thereby limiting the award to demurrage payable in sterling in accordance with clause 30 of the charterparty. On the owners' appeal, the Court of Appeal held that the currency exchange loss was recoverable as special damage for breach of contract and that the owners' claim for damages was not precluded by the determination of rate of exchange provision in clause 30, in that the clause did not apply when the paying party was in breach of contract by failing to pay within two months of completion of discharge.

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On the charterer's appeal:—

Held, allowing the appeal, that demurrage was the sum payable as damages for breach of the contract in detaining the ship beyond the lay days and under the terms of the charterparty those damages were fixed at \$6,000 for each day beyond the contractual period for loading the vessel; that no term could be implied into the charterparty that those liquidated damages for breach of contract had to be paid within two months of the discharge of the cargo; and that, accordingly, since there was no basis for the finding that the charterer was in further breach of

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- A contract by not paying the demurrage within two months, the judge's decision that the owners were entitled to demurrage converted into sterling in accordance with the provisions of clause 30 would be restored (post, pp. 574D–F, 580G–581A, 582D–E, F–G, 584H, 585D–F, G).

London, Chatham and Dover Railway Co. v. South Eastern Railway Co. [1893] A.C. 429, H.L.(E.); *Aruna Mills Ltd. v. Dhanrajmal Gobindram* [1968] 1 Q.B. 655 and *President of India v. La Pintada Navigacion S.A.* [1985] A.C. 104, H.L.(E.) considered.

Decision of the Court of Appeal [1987] 2 W.L.R. 906; [1987] 1 All E.R. 957 reversed.

The following cases are referred to in their Lordships' opinions:

- C *Aktieselskabet Reidar v. Arcos Ltd.* [1927] 1 K.B. 352, C.A.
Aruna Mills Ltd. v. Dhanrajmal Gobindram [1968] 1 Q.B. 655; [1968] 2 W.L.R. 101; [1968] 1 All E.R. 113
Despina R. The [1979] A.C. 685; [1978] 3 W.L.R. 804; [1979] 1 All E.R. 421, H.L.(E.)
Dias Compania Naviera S.A. v. Louis Dreyfus Corporation [1978] 1 W.L.R. 261; [1978] 1 All E.R. 724; [1978] 1 Lloyd's Rep. 325, H.L.(E.)
Hadley v. Baxendale (1854) 9 Exch. 341
- D *Loh Wai Lian v. Sea Housing Corporation Sdn. Bhd.* (unreported), 3 March 1987, P.C.
London, Chatham and Dover Railway Co. v. South Eastern Railway Co. [1893] A.C. 429, H.L.(E.)
Monrovia Tramp Shipping Co. v. President of India [1978] 2 Lloyd's Rep. 193; [1979] 1 W.L.R. 59; [1979] 1 All E.R. 380; [1979] 1 Lloyd's Rep. 123, C.A.
- E *Naylor (Isaac) & Sons Ltd. v. New Zealand Co-operative Wool Marketing Association Ltd.* [1981] 1 N.Z.L.R. 361
Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.)
President of India v. La Pintada Compania Navigacion S.A. [1985] A.C. 104; [1984] 3 W.L.R. 10; [1984] 2 All E.R. 773, H.L.(E.)
- F The following additional cases were cited in argument:
Barry v. Van Den Hurk [1920] 2 K.B. 709
Celia (S.S.) (Owners) v. S.S. Volturmo (Owners) [1921] 2 A.C. 544, H.L.(E.)
Czarnikow (C.) Ltd. v. Koufos [1969] 1 A.C. 350; [1967] 3 W.L.R. 1491; [1967] 3 All E.R. 686, H.L.(E.)
Di Ferdinando v. Simon, Smits & Co. Ltd. [1920] 3 K.B. 409, C.A.
- G *Federal Commerce and Navigation Co. Ltd. v. Tradax Export S.A.* [1978] A.C. 1; [1977] 3 W.L.R. 126; [1977] 2 All E.R. 849; [1977] 2 Lloyd's Rep. 301, H.L.(E.)
Fletcher v. Tayleur (1855) 17 C.B. 21
Hammond & Co. v. Bussey (1887) 20 Q.B.D. 79, C.A.
International Minerals & Chemical Corporation v. Karl O. Helm A.G. [1986] 1 Lloyd's Rep. 81
- H *Mehmet Dogan Bey v. G.G. Abdeni & Co. Ltd.* [1951] 2 K.B. 405; [1951] 2 All E.R. 162; [1951] 1 Lloyd's Rep. 433
Miliangos v. George Frank (Textiles) Ltd. [1976] A.C. 443; [1975] 3 W.L.R. 758; [1975] 3 All E.R. 801; [1976] 1 Lloyd's Rep. 201, H.L.(E.)
Minerals and Metals Trading Corporation of India Ltd. v. Encounter Bay Shipping Co. Ltd. [1986] 2 Lloyd's Rep. 603
Monarch Steamship Co. Ltd. v. A/B Karlshamns Oljefabriker [1949] A.C. 197; [1949] 1 All E.R. 1, H.L.(Sc.)
Mosvolds Rederi A/S v. Food Corporation of India [1986] 2 Lloyd's Rep. 68

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Union of India v. E.B. Aaby's Rederi A/S [1975] A.C. 797; [1974] 3 W.L.R. 269; [1974] 2 All E.R. 874; [1974] 2 Lloyd's Rep. 57, H.L.(E.)

Veflings (George) Rederi A/S v. President of India [1979] 1 W.L.R. 59; [1979] 1 All E.R. 380; [1979] 1 Lloyd's Rep. 123, C.A.

Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B. 528; [1949] 1 All E.R. 997, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the appellant, the President of India, from the order of the Court of Appeal [1987] 2 W.L.R. 906 (Neill and Nicholls L.JJ. and Sir Roualeyn Cumming-Bruce) allowing an appeal by the respondents, Lips Maritime Corporation, from an order of Staughton J. [1985] 2 Lloyd's Rep. 180 varying the award of an umpire of 22 February 1983 made in arbitration proceedings concerning a claim by the respondents, the owners of m.v. *Lips* for discharge-port demurrage under a charterparty dated 1 July 1980.

The facts are set out in the opinion of Lord Brandon of Oakbrook.

Anthony Diamond Q.C. and *Peregrine Simon* for the appellant.
Anthony Grabiner Q.C. and *Steven Gee* for the respondents.

Their Lordships took time for consideration.

29 July. LORD KEITH OF KINKEL. My Lords, I have had the opportunity of reading the speech to be delivered by my noble and learned friend Lord Brandon of Oakbrook. I agree with it and for the reasons he gives would allow the appeal.

LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Mackay of Clashfern, and I share his difficulty in departing from the umpire's holding to the effect that the charterer was contractually bound to pay the demurrage by 11 December 1980. But I agree with my noble and learned friend that it would be inappropriate either to remit the case to the umpire or to decide the appeal upon a legal basis which is unsound. In these circumstances I agree that the appeal should be allowed and should be disposed of in the way proposed by my noble and learned friend Lord Brandon of Oakbrook.

LORD BRANDON OF OAKBROOK. My Lords, this is an appeal by leave of your Lordships' House from an order of the Court of Appeal (Neill and Nicholls L.JJ. and Sir Roualeyn Cumming-Bruce) [1987] 2 W.L.R. 906 made on 31 October 1986. By that order the court allowed an appeal from an order of Staughton J. [1985] 2 Lloyd's Rep. 180 made in the Commercial Court on 4 April 1985, by which he had varied an award of 22 February 1983 made in arbitration proceedings in London by an umpire, Mr. Frank Rehder.

The appellant ("the charterer") was the charterer of the m.v. *Lips* ("the ship") owned by the respondents ("the owners") under a voyage charterparty dated 1 July 1980 ("the charter"). Pursuant to the charter the ship loaded a cargo of di-ammonium phosphate at Donaldsville, Louisiana, and carried it to India. There she discharged part of the cargo, for lightening purposes, at Visakhapatnam, and the remainder of it at Calcutta. After the completion of the voyage disputes arose concerning, among other things, the amount of the charterer's liability to the owners in respect of demurrage. It is with the way in which the

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A umpire dealt with the owners' claim in respect of demurrage that the proceedings in the courts below and the present appeal is concerned.

B The charter provided, so far as material, as follows. By clause 9, that if the ship should be detained beyond the lay days demurrage should be paid at the rate of U.S. \$6,000 per day and pro rata, and despatch money for all working time saved at half the demurrage rate per working day and pro rata. By clause 13, that the owners should have a lien on the cargo for demurrage. By clause 15, that general average should be settled in London. By clause 17, that any dispute arising under the charter should be settled by arbitration in London. By clause 18, that the freight should be paid in London in British sterling: 90 per cent. within seven days of submission of the necessary freight bill and the balance after completion of settlement of demurrage/despatch. By C clause 19, that freight should be calculated at various rates in U.S. dollars per ton of cargo depending on the charterer's choice of ports for loading and discharge. By clause 28, how lay time should be calculated and that lay time for loading and discharging should be reversible.

Clause 30 of the charter further provided:

D “(A) Freight . . . is payable in British external sterling . . . in London . . . at the mean exchange rate ruling on bill(s) of lading date. (B) The mean exchange rate ruling on bill of lading date will also apply to other related payments/settlements including demurrage/despatch settlements under this charterparty and will apply in all cases where payments/settlements are effected in currency other than the currency in which the rates of freight and demurrage/despatch are indicated in the charterparty. (C) In cases E where there is more than one bill of lading in respect of a shipment the mean exchange rate as above will be applicable to the calculation of freight under each bill of lading. For the purpose of demurrage/despatch and other related payments, the exchange rate applicable will be the simple average of the mean exchange rates adopted for freight calculations. (D) Demurrage/despatch and any F other payments under this charterparty shall also be made in British external sterling.”

G By his award the umpire decided as follows. (1) That the ship had been on demurrage for 28 days 1 hour and 47 minutes of which only 24 days and 47 minutes had been admitted and paid for by the charterer, leaving 4 days and 1 hour still to be paid for by him. (2) That the amount of demurrage payable in respect of this period of 4 days and 1 hour, calculated at the prescribed rate of \$6,000 per day and pro rata, was \$24,250. (3) That the rate of exchange on the date of the bills of lading was \$1.54 = £1 (4) That the charterer was under an obligation to settle and pay for demurrage within two months of the completion of discharge. (5) That the owners were entitled to recover, as damages for H late payment of the outstanding demurrage, the loss suffered by them by reason of sterling having depreciated from a rate of \$2.37 = £1 at the bills of lading date to \$1.54 = £1 at the date of the award. (6) That, in order to give effect to this right of recovery, the sum of \$24,250 referred to earlier should be converted into sterling, not at the rate of \$2.37 = £1 prevailing at the bills of lading date, but at the rate of \$1.54 = £1 prevailing at the date of the award, producing a sum payable by the charterer of £15,746.75 to which interest should be added.

While the above represents a summary of what the umpire decided, I think that I should set out in full two passages from the reasons for his award given by him. Paragraph 4.2 of the reasons reads:

“On the date of the bills of lading the rate of exchange was about \$2.37 = £1.00. At the present time it is about \$1.54 = £1.00. Thus, if, as charterers contended, conversion of the amount awarded is made at the rate as at the bill of lading date, owners will suffer a considerable loss. Charterers were in breach in not making payment at the proper time, and the damages for that breach is the difference between the respective rates of exchange, and I have awarded accordingly.”

Paragraph 8.2 of the reasons reads: “The demurrage should have been settled and paid within two months of the completion of discharge, i.e. by 11 December 1980”

It was common ground between the parties before your Lordships that the sum of £15,746.75 awarded by the umpire in respect of demurrage, though not so expressly described in the award, must be regarded as comprising two separate elements: first, \$24,250 converted at \$2.37 = £1, which comes to £10,232.07 (“the demurrage element”), and, secondly, the difference between \$24,250 converted at \$1.54 = £1 and at \$2.37 = £1, which comes to £5,514.68 (“the damages element”).

The charterer’s case before your Lordships was that the umpire was wrong in law in deciding that demurrage should have been settled and paid for two months after completion of discharge, and, on that ground, in adding the damages element to the demurrage element. It was, however, also common ground that, assuming that the umpire was right in law about these two matters, he should have calculated the damages element by reference to the rate of exchange prevailing two months after completion of discharge, i.e. 11 December 1980, rather than the rate of exchange prevailing on the bills of lading date. The rate of exchange prevailing on 11 December 1980 was \$2.32 = £1. If that rate is taken, the damages element is reduced from £5,514.68 to £5,294.16, and the total of both elements from £15,746.75 to £15,526.23.

My Lords, by order dated 15 July 1983 Hobhouse J. gave the charterer leave to appeal on a question of law which was, in effect, whether the umpire was right in law, in dealing with the owners’ claim in respect of demurrage, to add the damages element to the demurrage element.

On 26 July 1984 the appeal came before Lloyd J. [1985] 2 Lloyd’s Rep. 180. He took the view that the principle laid down by your Lordships’ House in *President of India v. La Pintada Compania Navigacion S.A.* [1985] A.C. 104; [1984] 3 W.L.R. 10 in relation to claims to recover interest as damages for late payment applied equally in relation to claims to recover currency exchange losses as damages for late payment. That principle was that interest could be recovered as damages for late payment if it was special damage which could be brought within the second part of the rule in *Hadley v. Baxendale* (1854) 9 Exch. 341, but not if it was general damage which could only be brought within the first part of that rule. Lloyd J., being of that opinion and considering also that the umpire’s reasons for his award left it in doubt whether he regarded the owners’ currency exchange loss as coming within the first or second part of the rule in *Hadley v. Baxendale*, by order dated 30 July 1984 allowed the appeal to the extent of

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A remitting the award to the umpire in order that he should reconsider the matter and resolve that doubt.

B As a result of the remission the umpire made a further award dated 23 November 1984. In it he set out a series of further findings of fact on the basis of which he said that, in his view, the currency exchange loss suffered by the owners was special damage coming within the second part of the rule in *Hadley v. Baxendale*. Paragraph 15 of his further award reads:

“The provisions of clause 30 apply, for better or for worse, where the contract is correctly performed; but they do not apply to a breach. I have already found that charterers were in breach in not making payment timeously.”

C It appears to me that this passage involves some confusion of thought. In arriving at the amount of the demurrage element, the umpire did apply the provisions of clause 30; but he counteracted that application by adding the damages element. The result is, mathematically, the same; but the rationale is different. What I think that the umpire was really trying to say was that, although clause 30 was applicable to the calculation of the demurrage element, it did not preclude the addition to the latter of the damages element.

D Following the making of the umpire's further award, the charterer's appeal came back for further hearing before Staughton J. [1985] 2 Lloyd's Rep. 180. He held that, having regard to the further findings of fact made in the further award, the umpire had been wrong in law to conclude that the owners' currency exchange loss came within the second part of the rule in *Hadley v. Baxendale*; he should instead have concluded that it came within the first part of that rule. He accordingly made an order dated 4 April 1985, the effect of which was to vary the umpire's award in respect of demurrage by excluding from it the damages element.

E The owners appealed to the Court of Appeal [1987] 2 W.L.R. 906 constituted as stated earlier. That court allowed the appeal on two grounds. The first ground was that the currency exchange loss suffered by the owners came within the second part of the rule in *Hadley v. Baxendale* and was therefore recoverable as special damage for breach of contract. The second ground was that clause 30 of the charter determined the rate of exchange applicable when the contract was performed, i.e. when demurrage was settled and paid for within two months of the completion of discharge, but did not do so when the paying party was in breach of the contract by failing to pay within that time. The clause did not, therefore, preclude the owners' claim for damages.

F Here again there seems to have been some confusion of thought. If clause 30 did not apply to determine the rate of exchange applicable in the case of a late payment, then there was no provision for conversion in that case at all. It would follow for reasons given later that, in such a case, demurrage would be payable in dollars. The Court of Appeal, however, held that, since the owners had not contended for payment in dollars before the umpire, it was too late for them to do so at that stage.

G My Lords, it will be apparent from the account which I have given of the proceedings in the courts below that this case has been dealt with throughout on two basic assumptions. The first assumption has been that the umpire was right in law in deciding that the charterer

was under a contractual obligation to settle and pay for demurrage within two months of the completion of discharge. The second assumption has been that the principle laid down by your Lordships' House in the *La Pintada* case [1985] A.C. 104 in relation to claims to recover interest as damages for late payment applied equally in relation to claims to recover currency exchange losses as damages for late payment. For reasons which I shall give later, I am of the opinion that both these assumptions were fallacious. I also think that, because the assumptions were fallacious, the courts below were led into two errors. The first error was to apply themselves to deciding a question which, on what I consider to be a true view of the law, did not need to be decided. The second error, which was linked with the first, was to approach the construction of clause 30 of the charter on a wrong basis. Your Lordships are faced with the difficulty that the charterer does not appear to have disputed the correctness of either of the assumptions to which I have referred in the courts below. It seems to me, however, that this circumstance, while it may in certain events be relevant to questions of costs, should not inhibit your Lordships from deciding this appeal on a correct legal basis. The real issue in the appeal is the true construction of the provisions relating to demurrage contained in the charter, which your Lordships were given to understand were in a form commonly used by the charterer in his chartering transactions. That being so, it would, in my view, be wrong to allow fallacious assumptions of law, which were allowed to go unchallenged in the courts below, to affect the way in which your Lordships decide the matters of construction which are really in issue.

I consider first the assumption that the umpire was right in law in deciding that the charterer was under a contractual obligation to settle and pay for demurrage within two months of the completion of discharge. This part of the umpire's decision appears to have been treated below as if it were a finding of fact, whereas it was plainly a holding in law. The question whether it was right or wrong must be dealt with on that basis.

It is essential to the decision of that question to have in mind the legal nature of demurrage: both what it is and what it is not. I deal first with what demurrage is not. It is not money payable by a charterer as the consideration for the exercise by him of a right to detain a chartered ship beyond the stipulated lay days. If demurrage were that, it would be a liability sounding in debt. I deal next with what demurrage is. It is a liability in damages to which a charterer becomes subject because, by detaining the chartered ship beyond the stipulated lay days, he is in breach of his contract. Most, if not all, voyage charters contain a demurrage clause, which prescribes a daily rate at which the damages for such detention are to be quantified. The effect of such a clause is to liquidate the damages payable: it does not alter the nature of the charterer's liability, which is and remains a liability for damages, albeit liquidated damages. In the absence of any provision to the contrary in the charter the charterer's liability for demurrage accrues *de die in diem* from the moment when, after the lay days have expired, the detention of the ship by him begins. These propositions of law are so well established that the citation of authority for them is perhaps unnecessary. However, if authority is required, it is to be found in such cases as *Aktieselskabet Reidar v. Arcos Ltd.* [1927] 1 K.B. 352, a decision of the Court of Appeal, and *Dias Compania Naviera S.A. v. Louis Dreyfus*

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A *Corporation* [1978] 1 W.L.R. 261, a decision of your Lordships' House. In the latter case Lord Diplock said, at pp. 263-264:

"If laytime ends before the charterer has completed the discharging operation he breaks his contract. The breach is a continuing one; it goes on until discharge is completed and the ship is once more available to the shipowner to use for other voyages. But unless the delay in what is often, though incorrectly, called re-delivery of the ship to the shipowner, is so prolonged as to amount to a frustration of the adventure, the breach by the charterer sounds in damages only. The charterer remains entitled to continue to complete the discharge of the cargo, while remaining liable in damages for the loss sustained by the shipowner during the period for which he is being wrongfully deprived of the opportunity of making profitable use of his ship. It is the almost invariable practice nowadays for these damages to be fixed by the charterparty at a liquidated sum per day and pro rata for part of a day (demurrage) which accrues throughout the period of time for which the breach continues."

D The charter with which this appeal is concerned contained no express provision that demurrage, instead of being payable *de die in diem* from the moment detention of the ship beyond the lay days began, should only be payable within two months after the completion of discharge. Nor can I see any basis for implying any such provision. It is no doubt true that, because there has to be a general settlement of accounts between the charterer and the shipowner after the completion of the charter voyage, and because time is needed to agree the calculation of the amount of demurrage where a liability for it has been incurred, demurrage will not in practice be settled and paid for until a reasonable time, which may well be of the order of two months, has elapsed after the completion of discharge. This circumstance, however, does not afford a basis for implying a term that the charterer's liability to pay demurrage does not accrue until such a reasonable time has elapsed. I would, therefore, hold that the umpire's decision that the charter here concerned was subject to such a term, adopted without dispute by the courts below, though not without some expression of surprise by Staughton J. [1985] 2 Lloyd's. Rep. 180, 183, was wrong in law.

I turn to the second assumption that the principle laid down by your Lordships' House in *President of India v. La Pintada Compania Navigacion S.A.* case [1985] A.C. 104 in relation to claims to recover interest as damages for late payment of a debt applied equally in relation to claims to recover currency exchange losses as damages for such late payment. In the *La Pintada* case the House was invited to depart from its earlier decision in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] A.C. 429. In that case it was held that, under English common law, interest could not be given as damages for late payment of a debt. Two matters were decided by the House in the *La Pintada* case. The first matter was that the application of the principle established in the *London, Chatham and Dover Railway Co.* case was limited to claims to recover interest as general damage under the first part of the rule in *Hadley v. Baxendale*, 9 Exch. 341, and did not extend to claims to recover interest as special damage under the second part of that rule. The second matter was that it would be inappropriate for the House, pursuant to the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234, of 26 July 1966 to depart from the

principle established in the *London, Chatham and Dover Railway Co.* case as so limited. The reason for not so departing, and the only reason, was that the legislature had, since the *London, Chatham and Dover Railway Co.* case had been decided, intervened on more than one occasion to confer on courts a discretionary power to award interest on unpaid debts and that a departure would produce an undesirable conflict between the right to recover interest at common law and the statutory entitlement to recover interest on a discretionary basis so conferred.

The *London, Chatham and Dover Railway Co.* case was concerned, and concerned only, with the recovery of interest as damages for late payment of a debt. It was in no way concerned with the recovery of currency exchange losses as damages for such late payment. It follows necessarily that the scope of the *La Pintada* case, in so far as it differentiated between claims for the recovery of interest as general damage on the one hand and as special damage on the other, was similarly limited. The House had no reason in the *La Pintada* case to consider claims to recover currency exchange losses and did not do so. Such claims differ significantly from claims to recover interest in two ways. First, there is no previously established law, comparable to that laid down in the *London, Chatham and Dover Railway Co.* case, precluding the recovery of currency exchange losses as damages for late payment of a debt. Secondly, there are no statutory provisions relating to the recovery of such losses which could conflict with any right of recovery at common law. In these circumstances it appears to me that claims to recover currency exchange losses as damages for breach of contract, whether the breach relied on is late payment of a debt or any other breach, are subject to the same rules as apply to claims for damages for breach of contract generally. This view is supported by *Isaac Naylor & Sons Ltd. v. New Zealand Co-operative Wool Marketing Association Ltd.* [1981] 1 N.Z.L.R. 361. For these reasons I would hold that the assumption that the principle laid down by your Lordships' House in the *La Pintada* case in relation to claims to recover interest as damages for late payment of a debt applied equally to claims to recover currency exchange losses as damages for late payment, an assumption which was again made without dispute in the courts below, was also wrong in law.

My Lords, I shall now consider the charterer's case that the umpire was wrong, in dealing with the owners' claim in respect of demurrage, to add the damages element to the demurrage element. I shall, moreover, do this untrammelled by the two assumptions made in the courts below which I have held to have been wrong in law.

Once it is recognised that a claim for demurrage sounds in damages rather than in debt, it becomes apparent that the two concepts, first, of a contractual date for the payment of such damages, and, secondly, of a claim for damages for breach of contract in not paying them by such date, have no basis in law. As I said earlier an owner's cause of action for demurrage, being one for damages, albeit liquidated damages, accrues *de die in diem* from the moment when the ship is detained beyond the stipulated lay days. There is no such thing as a cause of action in damages for late payment of damages. The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute. It follows that the umpire's decision in the present case, in dealing with the owners' claim in respect of demurrage, to add the damages element to the demurrage element, was wrong in

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A law, and was so irrespectively of the provisions of clause 30 of the charter. The umpire was, however, right in principle to award interest (though not compound interest: see the *La Pintada* case) on the amount of the demurrage payable by the charterer. Further, on the basis that demurrage is usually settled and paid for within two months of the completion of discharge, as I infer that the umpire found, he was also right to make interest payable only from the day following the expiry of that period, i.e. from 12 December 1980, as he did.

B The owners, in support of their case that the umpire was right to add the damages element to the demurrage element, relied strongly on *Aruna Mills Ltd. v. Dhanrajmal Gobindram* [1968] 1 Q.B. 655. In that case sellers contracted with buyers to ship goods under a c.i.f. contract on or before a stipulated date. The price of the goods was to be a sum in Indian rupees, and there was an express provision in the contract that any difference in the rates of exchange between the Indian rupee and the pound sterling prevailing on the date of the contract and on the date when the price was paid should be borne and paid for by the buyers. The sellers shipped the goods later than the contractual date and during the period of delay in shipment the Indian rupee was devalued in relation to the pound sterling. As a result the buyers had to pay an increased price for the goods. A dispute between the parties was referred to arbitration and subsequently a special case was stated for the opinion of the court on the question whether the buyer was entitled to recover the increase in the price of the goods resulting from the devaluation as damages for the sellers' breach of contract in shipping the goods late. It was held by Donaldson J., applying the principles laid down in *Hadley v. Baxendale* and later authorities on the recovery of damages for breach of contract, that the loss claimed was not too remote and was therefore recoverable by the buyers, so as to entitle them to set it off against the increased price.

E The *Aruna Mills* case is, in my opinion, clearly distinguishable from the present case. In the *Aruna Mills* case the sellers committed a breach of contract in shipping goods later than the contractual date of shipment, and the only question was whether the loss suffered by the buyer in having to pay an increased price for the goods was within the contemplation of the parties at the time of contracting so as to make such loss recoverable as damages for the breach. Donaldson J. decided that it was and I see no reason to doubt the correctness of his decision. In the present case, however, for reasons which I gave earlier, there was no breach of the charter by the charterer in respect of the payment of demurrage. All that happened was that the charterer did not pay liquidated damages for the detention of the ship at the time when the cause of action in respect of such damages accrued, or indeed at any time up to and including the date of the umpire's award. For that non-payment the only remedy which the law affords to the owners is interest on the sum remaining unpaid. In my view, therefore, the *Aruna Mills* case does not assist the owners.

H My Lords, there remains for consideration the effect of clause 30 of the charter. According to the findings contained in the umpire's further award, the currency in which the owners carried on their business was U.S. dollars. Clause 9 of the charter further provided that demurrage should be calculated at the rate of \$6,000 per day and pro rata. In these circumstances, were it not for the inclusion of clause 30 in the charter, the owners would have been entitled to an award in respect of their

claim for demurrage expressed in dollars: see *The Despina R* [1979] A.C. 685. In that situation the owner would not have suffered the currency exchange loss which led the umpire to add the damages element to the demurrage element. Clause 30, however, expressly changed what would otherwise have been the situation. It did so in two ways. First, it provided that demurrage calculated in dollars under clause 9 should, for the purposes of payment, be converted into pounds sterling. Secondly, it provided that such conversion should take place at the rate of exchange prevailing on the bills of lading date. These provisions, by the express terms of the clause, apply whenever demurrage is settled or paid for. Further it is clear that the expression "settlement," as used in clause 30, includes settlement by an award in arbitration proceedings as well as settlement by agreement between the parties. I reach that conclusion after considering the use of the expression "settled" in relation to general average in clause 15 of the charter and in relation to disputes referred to arbitration in clause 17. In any case, I did not understand the owners to be disputing that this was the meaning of the expression "settlement" in clause 30. Their acceptance of the division of the arbitrators' award in respect of demurrage into two elements, the demurrage element and the damages element, is inconsistent with their doing so.

My Lords, for the reasons which I have given I would allow the appeal, set aside the order of the Court of Appeal [1987] 2 W.L.R. 906 and restore the order of Staughton J. [1985] 2 Lloyd's Rep. 180 except in so far as it relates to costs. As will be apparent, however, the grounds on which I think that the substantive part of the order of Staughton J. was right differ fundamentally from those on which he relied in making it.

LORD GRIFFITHS. My Lords, I have had the advantage of reading the speeches of my noble and learned friends, Lord Brandon of Oakbrook and Lord Mackay of Clashfern. I should for myself have preferred to reach a result which did not enable the charterer by delaying payment to take advantage of the decline of the pound against the dollar. For the reasons given by Lord Mackay of Clashfern this result would be achieved only if the charterparty is subject to the implied term as to payment found by the arbitrator. Despite the fact that this term as to payment was not challenged until the hearing in your Lordships' House I have been reluctantly persuaded by the reasoning of Lord Brandon of Oakbrook that no sufficient grounds exist to support such a term and that for the reasons he gives this appeal must be allowed.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Brandon of Oakbrook. I gratefully adopt his account of the facts and the history of these proceedings.

As my noble and learned friend has pointed out the umpire decided that the charterer was under an obligation to pay the demurrage within two months of the completion of discharge. The breach of contract alleged by the owners was failure on the part of the charterer to comply with this obligation and the damages element is the quantum of damages said to arise from that breach. If there was no such contractual obligation payment more than two months after the completion of discharge was not a breach of contract and accordingly no damages for breach of

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Lord Mackay
of Clashfern

A contract could be successfully claimed. Sfaughton J. said of the umpire's holding on this point [1985] 2 Lloyd's Rep. 180, 183:

"Quite why the charterer is allowed two months grace is not clear to me, and was not explained by counsel. But there has been no challenge to that conclusion."

B This remained the position in the Court of Appeal [1987] 2 W.L.R. 906. The petition by the charterer for leave to appeal to your Lordships' House included a submission "that it is not a breach of contract to fail to pay damages/demurrage promptly such as to entitle the payee to damages rather than interest." In argument before your Lordships counsel for the charterer made it plain that he was not submitting that there had been no breach of contract by late payment in the present case although his submission was that the contractual term breached was that the demurrage should have been paid from day to day as it arose.

C If there was a contractual provision requiring the charterer to pay the demurrage by 11 December 1980, in my opinion, this appeal should be dismissed.

Briefly, my reasons are that failure to perform this contractual term would involve a breach of contract entitling the owner to damages for that breach, measured by the amount of loss caused to them by the breach. Clause 30, in my opinion, applies whenever payment is made and accordingly applies to a late payment just as much as to a timeous payment. The business of the owner was carried on in U.S. dollars and on receipt of timeous payment in accordance with clause 30 in British external sterling the owner would be expected to convert it as at that date into U.S. dollars at the prevailing exchange rate. If instead of paying on the due date the charterer deferred payment to a later date and if on that later date the same amount in British sterling converted into U.S. dollars would yield a smaller amount than if converted at the due date the difference in U.S. dollars would be a loss to the owners for which they were entitled, in my opinion, to compensation. I see nothing in the words of clause 30 to preclude such a claim. In my opinion, the reasoning of Donaldson J. in *Aruna Mills Ltd. v. Dhanrajmal Gobindram* [1968] 1 Q.B. 655 would apply in this situation. Counsel for the charterer sought to distinguish the *Aruna Mills* case on the basis that the reason the payment in the *Aruna Mills* case was later than it would have been if the contract was performed was not because there was a breach of contract by late payment but because a breach of contract in failing to ship at the proper time resulted in payment being due later than otherwise it would have been. I cannot see why this makes any difference in principle. In both the *Aruna Mills* case and the present case on the basis which I am now discussing the payment was later than it should have been with resulting loss to the payee in consequence of breach of contract on the part of the payer.

H It was submitted for the charterer that the word "settlement" in clause 30 somehow showed that clause 30 precluded the owner's claim. Clause 30 is dealing with an account between the charterer and the owners which may include items such as demurrage payable by the charterer to the owners and items such as despatch payable by the owners to the charterer. Where one is thinking of an account in which it is desired to bring out the balance payable by the charterer to the owners it is natural to regard amounts payable by the charterer to the owners as payments whereas amounts due in the opposite direction

will not require to be paid but to be accounted for by deduction. Clause 30 provides not only that payments are to be subject to the exchange rate regime of the clause but that amounts to be allowed by way of deduction are also to be calculated under the same regime and, in my opinion, the word "settlement" is a convenient expression to use for this process of allowing an item as a deduction in an account. The express distinction taken between demurrage on the one hand and despatch on the other is, in my view, in the structure of the clause mirrored by the distinction between payment on the one hand and settlement on the other. In *Monrovia Tramp Shipping Co. v. President of India* [1978] 2 Lloyd's Rep. 193, 196, Donaldson J. records a submission by Mr. Hobhouse in a somewhat similar context to the present "that settlement in this context means calculation and not payment, and he says that dispatch would be settled by deduction from the freight," which Donaldson J. adds "may well be right."

It is true that elsewhere in the charterparty the word "settlement" occurs in the context of settlement of disputes but I cannot regard it as related to dispute in the context of clause 30. Clause 30 is a clause which has to be applied in reaching a determination of the amount to be paid by the charterer to the owners. If the directions in clause 30 are followed and the amount brought out by the charterer following that direction is the same as the amount brought out by the owners no dispute would arise. The clause as a whole would be put into effect. If, however, a dispute arose about the payment those responsible for determining the dispute would require to apply the rules for determination of the amount to be paid set out in clause 30. It would be strange indeed if the rules to be followed differed according to whether parties were agreed on how they should be applied or differed on how they should be applied. In both cases the true construction of the rules set out in clause 30 would be applicable. In this context I think it is worth noting that clause 30(d) provides "demurrage/despatch and any other payments under this charterparty shall also be made in British external sterling." The word "settlement" is not present in that part of the clause and even after a dispute is determined what is ultimately made is an order for payment of the amount found due. It would not, I think, be correct to describe it as an order for "settlement" of an amount found due. What is settled by the arbitration procedure is the amount of the payment to be made.

If I am right so far, the owner had a claim for damages for breach of contract by reason of late payment of an amount equal to the exchange losses sustained by him in consequence of that breach. I agree with my noble and learned friend Lord Brandon of Oakbrook that the decision of this House in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] A.C. 429 was limited to claims to recover interest as general damage under the first part of the rule in *Hadley v. Baxendale*, 9 Exch. 341 and therefore has no application to the present claim. The reasoning of this House in *President of India v. La Pintada Compania Navigacion S.A.* [1985] A.C. 104 makes it clear that damages other than interest may be recovered for breach of contract by late payment. Accordingly, on this basis the owners' claim in the present case was a valid claim.

However, there is no express term in this charterparty obliging the charterer to pay the demurrage within two months of the completion of discharge and the umpire's finding must depend upon implication.

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Lord Mackay
of Clashfern

A As a practical matter I can see some attraction in having a term providing for a date on which payment is due which allows sufficient time for making up the necessary account but there is nothing in this charterparty or in the circumstances so far as disclosed in this appeal which would render necessary an implication of such a clause in the present case but would not produce a similar necessity in many other cases which have been reported.

B In general, contracts do not contain provisions regulating the amount or the manner or due date of payment of damages for their breach. A contract may contain a clause quantifying damages and this charterparty is an example in that it provides for demurrage as liquidated damages for breach of the obligation to complete loading and discharge within the lay days provided. But that does not deal with the time of payment. No doubt, it is possible to make a provision which has the effect that in respect of failure to perform a particular contractual term, a party becomes liable to pay a specified amount on a particular day to the other party. An example in which that was held to be the result is afforded by the decision of the Privy Council in *Loh Wai Lian v. Sea Housing Corporation Sdn. Bhd.* (unreported), 3 March 1987, although in that case the date on which payment of the sum was due was not expressly provided although the Board held that it was implied.

D I have felt considerable difficulty in departing completely from this aspect of the umpire's holding which was unchallenged in the two courts below and in respect of which it was expressly accepted by counsel for the charterer before your Lordships that a breach of contract had occurred by reason of late payment, although the breach
E counsel accepted was of a term different from that upon which the umpire's decision rested, without giving an opportunity to the umpire to state the justification for his holding. Having regard to the amount at stake and to the issues of general importance which the parties sought to litigate I consider it would be most unfortunate to remit the case to the umpire now. I also agree that it would not be proper for
F this House to act on the assumption that the necessary contractual term was to be implied in this charterparty where no basis has been suggested on which that could happen. I am further persuaded that difficult questions are posed by this assumption. For example, the lien provided to the owner in respect of demurrage is a formidable though perhaps not completely insurmountable obstacle to the implication of
G any term in this contract on the lines suggested in the umpire's holding. Such questions have not been examined. In that situation I have reached the conclusion that the course proposed by my noble and learned friend Lord Brandon of Oakbrook is the proper one to follow, and I agree with his conclusion that this appeal should be allowed.

H

Appeal allowed.
No order as to costs.

Solicitors: Zaiwalla & Co.; Richards Butler.

C. T. B.

[1987]

[COURT OF APPEAL]

A

JACKMAN v. CORBETT

[1981 J. No. 110]

1987 March 30;
May 13

Fox, Lloyd and Stocker L.JJ.

B

Damages—Earnings, loss of—Social security benefits—Statutory deduction of half value of benefits—Assessment of damages for personal injuries—Deduction of sum for benefits received during period of five years—Whether credit to be given for further period—Law Reform (Personal Injuries) Act 1948 (11 & 12 Geo. 6, c. 41), s. 2(1) (as amended by National Insurance Act 1971 (c. 50), Sch. 5, para. 1 and Social Security (Consequential Provisions) Act 1975 (c. 18), Sch. 2, para. 8)

C

The plaintiff, who was about 40 years old, had not worked since 1980 but had been receiving an invalidity benefit as a result of personal injuries which he sustained in a road accident, for which the defendant admitted liability. The judge held that, in computing the damages, one half of the invalidity benefit for the five years following the accrual of the cause of action was to be deducted from the amount of the plaintiff's loss, under section 2(1) of the Law Reform (Personal Injuries) Act 1948,¹ as amended, but no further account was to be taken of the invalidity benefit.

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On the defendant's appeal:—

Held, dismissing the appeal, that on its true construction section 2(1) of the Act of 1948, as amended, was a comprehensive provision exhaustively defining the amount of the deductions to be made on account of the specified benefits and that, accordingly, nothing more than one half of the invalidity benefit received by the plaintiff in the specified five years was to be deducted from the damages (post, pp. 588G, 589A, 590H—591A, B, E–F, H—592B).

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Hultquist v. Universal Pattern and Precision Engineering Co. Ltd. [1960] 2 Q.B. 467, C.A. applied.

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Eley v. Bedford [1972] 1 Q.B. 155; *Haste v. Sandell Perkins Ltd.* [1984] Q.B. 735 and *Denman v. Essex Area Health Authority* [1984] Q.B. 735 approved.

Decision of Swinton Thomas J. affirmed.

The following cases are referred to in the judgments:

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Bradburn v. Great Western Railway Co. Ltd. (1874) L.R. 10 Ex. 1

Denman v. Essex Area Health Authority [1984] Q.B. 735; [1984] 3 W.L.R. 73; [1984] 2 All E.R. 621

Eley v. Bedford [1972] 1 Q.B. 155; [1971] 3 W.L.R. 563; [1971] 3 All E.R. 285

Haste v. Sandell Perkins Ltd. [1984] Q.B. 735; [1984] 3 W.L.R. 73; [1984] 2 All E.R. 615

H

Hultquist v. Universal Pattern and Precision Engineering Co. Ltd. [1960] 2 Q.B. 467; [1960] 2 W.L.R. 886; [1960] 2 All E.R. 266, C.A.

Palfrey v. Greater London Council [1985] I.C.R. 437

Parry v. Cleaver [1970] A.C. 1; [1969] 2 W.L.R. 821; [1969] 1 All E.R. 555, H.L.(E.)

Redpath v. Belfast and County Down Railway [1947] N.I. 167

¹ Law Reform (Personal Injuries) Act 1948, s. 2(1), as amended: see post, p. 588A–B.

A The following additional cases were cited in argument:

Auty v. National Coal Board [1985] 1 W.L.R. 784; [1985] 1 All E.R. 930, C.A.

Foster v. Tyne and Wear County Council [1986] 1 All E.R. 567, C.A.

Hussain v. New Taplow Paper Mills Ltd. [1987] 1 W.L.R. 336; [1987] I.C.R. 28; [1987] 1 All E.R. 417, C.A.

Lincoln v. Hayman [1982] 1 W.L.R. 488; [1982] 2 All E.R. 819, C.A.

B

APPEAL from Swinton Thomas J.

By a writ dated 5 May 1981 and a statement of claim, the plaintiff, Barry James Jackman, claimed damages against the defendant, Sebastian Anthony Corbett, for personal injuries sustained in a road accident. Judgment was given for the plaintiff.

C

The defendant appealed on the grounds that the judge was wrong in law in holding that the plaintiff's invalidity benefit should not be deducted for the purpose of assessing his loss of future earnings and loss of earnings to trial after the period of five years from the date of the accident; and that the multiplier chosen by the judge for the purpose of assessing the plaintiff's future loss of earnings, namely, $8\frac{1}{2}$ years, was too great.

D

The facts are stated in the judgment of Fox L.J.

R. L. Denyer for the defendant.

J. G. Ross for the plaintiff.

Cur. adv. vult.

E

13 May. The following judgments were handed down.

F

Fox L.J. This is an appeal by the defendant from a decision of Swinton Thomas J. The case arises from a road accident in September 1980, when the plaintiff was riding a motor cycle and was struck by a car driven by the defendant and badly hurt. The liability of the defendant is not in dispute. The issue relates to two aspects of the computation of damages. The plaintiff was born in 1945. He has not worked since the accident. The judge awarded him the following damages:

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General damage.....	£30,000
Loss of earnings to date of judgment	15,699.94
Special damages.....	838
Loss of future earnings.....	37,017.50
Total.....	£83,555.44

H

The first question is one of statutory interpretation. It arises in this way. If the plaintiff had continued in his employment, his loss was at the rate of £83.75 per week, which is £4,355 per year. It is contended by the defendant, however, that the continuing loss and part of the loss of earnings to the date of judgment should be reduced by reason of the receipt of invalidity benefit by the plaintiff at the rate of £46.35 per week. The plaintiff was in receipt of that sum prior to the trial, and will continue to receive it, or other invalidity benefit for the time being. The plaintiff's contention, however, is that no deduction should be made after the end of the five-year period referred to in section 2(1) of the Law Reform (Personal Injuries) Act 1948, as amended, which provides:

"In an action for damages for personal injuries . . . there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of any of the following benefits under the Social Security Act 1975 . . . namely—sickness benefit, invalidity benefit, non-contributory invalidity pension, injury benefit, disablement benefit for the five years beginning with the time when the cause of action accrued."

By section 12 of the Social Security Act 1975, invalidity benefit is listed as a contributory benefit, but by section 13 entitlement to invalidity benefit is not dependent upon contributory conditions being satisfied. The defendant's case is that it is proper that invalidity benefit should be deducted in order (a) to reflect the plaintiff's true loss, and (b) to avoid overcompensating the plaintiff. It is said, further, that deductibility would not offend against (i) the common law rules against the deduction of the proceeds of private insurance policies: *Bradburn v. Great Western Railway Co.* (1874) L.R. 10 Ex. 1; (ii) the common law rules against the deduction of payments from a charitable fund as, for example, often happens in the case of a mine or rail or ship disaster: *Redpath v. Belfast and County Down Railway* [1947] N.I. 167; and (iii) the decision in *Parry v. Cleaver* [1970] A.C. 1 that pensions must be disregarded. And, in general, it is said that the modern approach to assessment of damages is in favour of deductibility rather than against it. We are concerned here with the construction of the Act of 1948. We must give effect to its meaning determined upon ordinary principles of construction. It has, of course, been amended since 1948, but the amendments cannot have changed its original meaning on the present point.

The enactment (section 2(1)) is specifying a mode of computation. The computation is made up of two elements. The first is "any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries." That is unlimited in the sense that it states the entirety of the loss of earnings or profits present and future, without restriction of time. From that figure there has to be deducted the second element in the computation, namely:

"one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of [the specified benefits] for the five years beginning with the time when the cause of action accrued."

I read the provision as being comprehensive in relation to the deductions to be made in respect of receipts on account of the specified benefits. I think that the draftsman having, in the first element, stated without limit of time the entirety of the amount from loss of earnings from which deductions are to be made is, in the second element, stating the entirety of the deductions to be made therefrom, on account of the specified benefits whenever arising. The subsection contains no indication of any kind at all that the draftsman was either creating or preserving any right to a further deduction on account of the specified benefits.

It seems to me that, as a matter of drafting, if the draftsman had contemplated that the restriction to one half was to operate in respect of the five-year period only, and that thereafter there should be an

A unrestricted deduction operating under the common law, he would have introduced some words to ensure the wider deductibility. The language actually employed is, as a matter of ordinary English usage, inapt to achieve that. In my opinion, therefore, as a matter of construction section 2(1) defines exhaustively the amount which is to be deducted on receipt of the specified benefits. The precise policy basis for that we do not know. Presumably it was just a compromise. In *Parry v. Cleaver* [1970] A.C. 1, 34, Lord Pearce said:

B “Strict causation seems to provide no satisfactory line of demarcation. It would only lead one to a compromise like that contained in the Law Reform (Personal Injuries) Act 1948, whereby both a plaintiff and a defendant were given some advantage from national insurance benefits. This was quite a sensible compromise, but it is difficult to find any legal principle to justify it.”

C Lord Wilberforce also referred, at p. 39, to section 2 of the Act of 1948 as a “compromise” solution. Benefit to either side from such a compromise would depend upon what, at law, would have been brought into account.

D It is common ground that the construction which I have indicated is that which has been applied in practice since 1948: see *Palfrey v. Greater London Council* [1985] I.C.R. 437, 441. The authorities are to the same effect. In *Eley v. Bedford* [1972] 1 Q.B. 155, 158, MacKenna J. said:

E “I regard section 2 as an exhaustive statement of the circumstances in which a plaintiff’s damages may be reduced by reason of national insurance benefits.”

F In *Haste v. Sandell Perkins Ltd.* [1984] Q.B. 735, Hirst J. held that no deduction could be made in respect of benefits received or likely to be received after the end of the five-year period. He said, at p. 741:

G “I hold that section 2(1) of the Law Reform (Personal Injuries) Act 1948 on its proper construction covers the whole period past and future from the date the cause of action arose, and not merely the first five years. I support that conclusion by noting that it contains the mandatory word ‘shall’ and that ‘loss of earnings or profits’ comprises money which has accrued or probably will accrue to the injured person—i.e., with no limitation of time. In other words, the five-year limitation only applies to the benefit, but does not apply to the expectation of earnings or profits. If the defendants’ approach was correct, I think Parliament would have expressly applied the five years’ restriction not only to the benefits but also to the profits and earnings.”

H I respectfully agree that the absence of restriction in time upon the earnings and profits is of significance in the construction of the subsection. I do not myself derive much assistance from the word “shall,” since it seems to me that the provisions are mandatory, whatever their ambit. Hirst J. also relied upon the decision of the Court of Appeal in *Hultquist v. Universal Pattern and Precision Engineering Co. Ltd.* [1960] 2 Q.B. 467, to which I will return later. In *Denman v. Essex Area Health Authority* [1984] Q.B. 735, which was decided four weeks or so after the *Haste* case [1984] Q.B. 735 but without reference to it, Peter Pain J. reached the same conclusion as to the effect of section 2(1)

as Hirst J. He was principally influenced by the *Hultquist* case, to which I now turn.

A

The plaintiff in that case had been injured in consequence of a breach by his employers of their duties under the Factories Act 1937. The degree of his injury was assessed under section 12 of the National Insurance (Industrial Injuries) Act 1946, as 14 per cent. for life. Accordingly, he received a lump sum gratuity of £210. At the date of the injury he was aged 30 and his expectation of life was 35 years. In proceedings brought by the plaintiff against his employers he was awarded £550 general damages, but the judge deducted from the agreed special damages one half of the disablement gratuity of £210. He made that deduction upon his view of the construction of section 1 of the Act of 1948. Section 2(6) of the Act provided that, for the purposes of section 2:

B

C

“an industrial disablement gratuity shall be treated as benefit for the period taken into account by the assessment of the extent of the disablement in respect of which it is payable.”

It was held by the Court of Appeal that the amount of a disablement gratuity “for life” which the court had to take into account under section 2(1) of the Act of 1948 was one half of such proportion of the gratuity as the five-year period (or the unexpired portion thereof) bore to the injured person’s expectation of life (or to any lesser period specified for the duration of the gratuity). The result was that, on the agreed expectation of life of 35 years, the proper deduction from the £210 would be one half of £30 (since five years was one-seventh of 35 years and £30 was one-seventh of £210).

D

E

The decision is consistent with the construction of section 2(1) which I have adopted since, if the defendant’s construction is right, the deduction should not have been restricted to £15. That is because the gratuity was to be treated as benefit for the whole period of disablement, i.e. the expectation of life of 35 years. It is right to say that the present point is not referred to in the judgments or in the report of the arguments, but the judgments proceed upon the basis that nothing can be deducted except the one half referred to in section 2(1). The fact that the gratuity was to be treated as benefit for the whole of the relevant period of 35 years was fully before the court, and indeed central to the arguments and the decision. There is no suggestion in the judgments that anything beyond the £15 was deductible.

F

G

Mr. Denyer emphasises that the case turned largely upon the provisions of section 2(6) of the Act of 1948. That is right. But that only underlines the fact that the court allowed no deduction beyond the £15, even though section 2(6)(c) provides:

“an industrial disablement gratuity shall be treated as benefit for the period taken into account by the assessment of the extent of the disablement in respect of which it is payable” (i.e., in this case 35 years).

H

In the circumstances, I find nothing in the authorities which leads me to any different conclusion from that which I have reached, as set forth above, as a matter of construction of the language of section 2(1). Swinton Thomas J. in the present case followed the decisions in the

A *Haste* and *Denman* cases [1984] Q.B. 735 and held that, after the expiration of the five-year period, no further deduction fell to be made. In my view he was right in so deciding, and I would reject the defendant's submissions on this point.

B The second question relates to the multiplier of $8\frac{1}{2}$. [His Lordship considered the defendant's ground of appeal that the multiplier was too high, held that there was no basis upon which the court could interfere with the judge's decision, and continued:] I would therefore reject the defendant's contention on this point also and would dismiss the appeal.

C STOCKER L.J. I agree. This case is concerned solely with invalidity benefit, one of the classes of benefit specified in section 2(1) of the Law Reform (Personal Injuries) Act 1948, as amended. Despite the interesting argument of Mr. Denyer with regard to the question whether or not this type of benefit would be deductible from an award for loss of earnings were it not for the effect of the section, I have no doubt that this appeal raises solely questions of construction of that section and is not concerned with the wider issues which would arise outside the ambit of the section.

D The fact that, on the plaintiff's submissions, and upon the finding of the judge, the deductions to be set against the lost earnings are very seriously limited, and that, thus, the plaintiff, in effect, receives a windfall in the form of double recovery, is not particularly startling, to my mind, in view of the fact that double recovery occurs in many other instances, such as pensions: see *Parry v. Cleaver* [1970] A.C. 1.

E In my view the reasoning which impelled the judge to the conclusion that he reached, that this case is indistinguishable from that of this court in *Hultquist v. Universal Pattern and Precision Engineering Co. Ltd.* [1960] 2 Q.B. 467, is correct. In that case the court held that where an injured plaintiff was awarded an industrial disablement gratuity "for life," only that part of the lump sum so awarded as related to the remainder of the five-year period should be taken into account, the balance which could not be so apportioned being not deductible. This seems to me to support precisely the proposition which the judge accepted, that only that part of the invalidity benefit as related to the five-year period was deductible. For my part, I am unable to accept either of the distinctions which Mr. Denyer sought to draw between this case and the decision in the *Hultquist* case, namely, that the lump sum in the *Hultquist* case was to be regarded as a "one off" payment, and thus not deductible, or that such a payment was of a nature of a solatium for the pain and suffering and general disability which the injured person would sustain over the remainder of his life, or the period over which the payments might continue. Such a lump sum was not, and cannot be, regarded as such a solatium against general damages.

G It was a payment which fell within the ambit of section 2(1), and is of the nature specifically referred to in section 2(6) of the Act.

H

I share Peter Pain J.'s difficulty, expressed by him as part of his judgment in *Denman v. Essex Area Health Authority* [1984] Q.B. 735, as to how meaning can be given to this subsection if the construction of section 2(1) is that for which the defendant contends. Accordingly, I

agree with the construction of section 2(1) expressed by Fox L.J. and Lloyd L.J., reinforced as that construction is, it seems to me, by the authorities cited, and, in particular, by the decision of this court in the *Hultquist* case. I agree that this appeal should be dismissed.

LLOYD L.J. I agree that the appeal should be dismissed for the reasons given by Fox and Stocker L.JJ.

Appeal dismissed with costs.

Solicitors: Hatchett Jones & Kidgell for Lyons Davidson, Bristol; Townsends, Swindon.

B. O. A.

[CHANCERY DIVISION]

WEDDELL AND ANOTHER v. J. A. PEARCE & MAJOR AND ANOTHER

[1986 W. No. 385]

1987 Feb. 16, 17, 18, 19, 20;
March 9

Scott J.

Bankruptcy—Property passing to trustee—Chose in action—Claim in negligence by bankrupt—Trustee assigning cause of action back to bankrupt—Failure to obtain requisite permission for assignment—Writ issued before notice of assignment given to defendants—Whether writ nullity—Whether bankrupt having locus standi to prosecute action—Whether limitation period interrupted by writ—Whether action to be set aside—Bankruptcy Act 1914 (4 & 5 Geo. 5, c. 59) ss. 55(1), 56(4)¹

In May 1980, the plaintiffs instructed a firm of solicitors, the first defendant, to advise whether a contract of sale was enforceable against them. Advice was obtained from counsel, the second defendant, who gave his opinion on 20 May 1980. The first defendant continued to act for the plaintiffs until 24 September 1981. In 1984, both plaintiffs were declared bankrupt. On 7 February 1986 the trustee in bankruptcy assigned to the plaintiffs all claims and legal rights of action which the trustee might have had against the defendants, the plaintiffs covenanting

¹ Bankruptcy Act 1914, s. 55: "Subject to the provisions of this Act, the trustee may do all or any of the following things:— (1) Sell all or any part of the property of the bankrupt . . ."

S.56: "The trustee may, with the permission of the [Department of Trade and Industry] do all or any of the following things:— . . . (4) Accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time . . ."

to account to the trustee for so much of the proceeds of the intended action as might be necessary to discharge outstanding debts and costs in the bankruptcies. On 11 April 1986 the defendants each received a letter from the plaintiffs alleging (for the first time) professional negligence, and a writ was issued on 2 May 1986 when the defendants had no notice of the assignment which they were given by a letter dated 4 June 1986. On 21 and 22 August 1986 summonses were issued by the defendants under R.S.C., Ord. 18, r. 19 seeking to set aside the writ on the ground that the plaintiffs lacked the necessary locus standi to bring the action. The registrar accepted the defendants' contentions that the action when commenced was a nullity, since the plaintiffs' causes of action were then in law vested in the trustee in bankruptcy; that that defect was not cured when the plaintiffs became legal assignees of the causes of action on notice being given to the defendants on 4 June 1986; and that, further, since the trustee had not obtained permission for the assignment from the Department of Trade and Industry, as required by section 56(4) of the Bankruptcy Act 1914, the assignment was void, and he set the writ aside. On the plaintiffs' appeal, the judge directed that the locus standi of the plaintiffs to prosecute the action should be before the court as a preliminary issue.

On the appeal and the preliminary issue:—

Held, (1) allowing the appeal against the registrar's order striking out the action, that the issues involved were wholly unsuitable to be dealt with on a striking out application under R.S.C., Ord. 18, r. 19; and that the plaintiffs' action was neither scandalous, frivolous or vexatious, nor, unless and until the difficult issues relating to their locus standi were decided against them, an abuse of process (post, p. 597B–C).

(2) Giving judgment for the plaintiffs on the preliminary issue, that on the plaintiffs' bankruptcies their causes of action in negligence became vested in law in their trustee in bankruptcy, without any need for written notice of the bankruptcies to be given to the persons subject to the choses in action; that the assignment of the causes of action by the trustee in bankruptcy back to the plaintiffs was a transaction of sale falling within both section 55(1) and section 56(4) of the Bankruptcy Act 1914; that those provisions had to be read together, where the consideration for a transaction, if payable, was to be payable at a future time, and that, so read, the permission of the Department of Trade and Industry to the assignment was required; but that the failure of the trustee in bankruptcy to obtain the necessary permission did not prevent the deed of assignment of the causes of action from taking effect on execution as an equitable assignment, and on 4 June 1986 as a legal assignment to the plaintiffs; that an equitable assignee of a chose in action had locus standi to sue on the chose in action; that the assignor in whom the legal title was vested ought to be a party to such an action, but an action commenced without him was not a nullity, though it was liable to be stayed and that the equitable assignee could not recover damages or a perpetual injunction until the assignor had been joined; that, accordingly, the writ was not a nullity, and as from 4 June 1986, when the plaintiffs became legal assignees of the causes of action, the defect that would previously have prevented the plaintiffs from obtaining judgment against the defendants was removed; and that, accordingly, the plaintiffs had locus standi to prosecute the action (post, pp. 597D–F, 599G, 600G–601C, 602B–C, 603F–G, 606C–D, 610E–G).

Weddell v. Pearce & Major (Ch.D.)

[1987]

William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd. [1905] A.C. 454, H.L.(E.) and *Ramsey v. Hartley* [1977] 1 W.L.R. 686, C.A. applied.

Lee v. Sangster (1857) 2 C.B.N.S. 1 and *Clark v. Smith* [1940] 1 K.B. 126, C.A. considered.

(3) That, as when the writ was issued the plaintiffs had locus standi as equitable assignees to sue on the cause of action in negligence and would have been entitled, if the circumstances had warranted, to obtain an interlocutory injunction, time for the purposes of the Limitation Act 1972 stopped running on 2 May 1986, and, accordingly, the plaintiffs' claims were not time barred (post, p. 610E-G).

Compania Colombiana de Seguros v. Pacific Steam Navigation Co. [1965] 1 Q.B. 101 distinguished.

The following cases are referred to in the judgment:

Atkinson, In re (1852) 2 De G.M. & G. 140

Barr's Trusts, In re (1858) 4 K. & J. 219

Beall, In re, Ex parte Official Receiver [1899] 1 Q.B. 688

Bowden's (E.M.) Patents Syndicate Ltd. v. Herbert Smith & Co. [1904] 2 Ch. 86

Brandt's (William) Sons & Co. v. Dunlop Rubber Co. Ltd. [1905] A.C. 454, H.L.(E.)

Branson, In re, Ex parte The Trustee [1914] 2 K.B. 701

Clark v. Smith [1940] 1 K.B. 126; [1939] 4 All E.R. 59, C.A.

Cohen v. Mitchell (1890) 25 Q.B.D. 262, C.A.

Compania Colombiana de Seguros v. Pacific Steam Navigation Co. [1965] 1 Q.B. 101; [1964] 2 W.L.R. 484; [1964] 1 All E.R. 216

Dearle v. Hall (1828) 3 Russ. 1

Debtor (No. 26A of 1975), In re A [1985] 1 W.L.R. 6; [1984] 3 All E.R. 995

Lee v. Sangster (1857) 2 C.B.N.S. 1

Manchester Diocesan Council for Education v. Commercial & General Investments Ltd. [1970] 1 W.L.R. 241; [1969] 3 All E.R. 1593

Mercer v. Vans Colina (1897) 67 L.J.Q.B. 424

National Provincial Bank Ltd. v. Hastings Car Mart Ltd. [1965] A.C. 1175; [1965] 3 W.L.R. 1; [1965] 2 All E.R. 472, H.L.(E.)

Palmer v. Locke (1881) 18 Ch.D. 381, C.A.

Performing Right Society Ltd. v. London Theatre of Varieties Ltd. [1922] 1 K.B. 539; [1922] 2 K.B. 433, C.A.; [1924] A.C. 1, H.L.(E.)

Ramsey v. Hartley [1977] 1 W.L.R. 686; [1977] 2 All E.R. 673, C.A.

Richards (Michael) Properties Ltd. v. St Saviours Parish, Southwark, Corporation of Wardens [1975] 3 All E.R. 416

Stone's Will, In re (1893) 37 S.J. 354

Stuart v. Cockerell (1869) L.R. 8 Eq. 607

INTERLOCUTORY APPEAL and PRELIMINARY ISSUE

By a writ dated 2 May 1986 the plaintiffs, David Brading Weddell and Florence Ruby Weddell, claimed against the defendants, J.A. Pearce & Major, a firm of solicitors, and Robin Miller, damages for professional negligence in respect of the defendants' failure, following their retainer on or after 6 May 1980 as solicitors and counsel, to exercise all reasonable care, skill, diligence and competence in advising and acting for the plaintiffs in respect of, inter alia, the purchase of a property at Tintagel, Cornwall, and in particular as to whether they could legally withdraw from a contract for the purchase of the property. On summonses dated 21 and 22 August 1986, issued by the second and first defendants, respectively, the registrar set aside the writ. The

3 W.L.R.

Weddell v. Pearce & Major (Ch.D.)

- A plaintiffs appealed and Scott J. directed the trial, with the hearing of the appeal, of a preliminary issue as to the plaintiffs' locus standi to bring the action, namely: Whether the writ ought to be set aside on the grounds that (1) at the date of issue thereof no notice had been given to the defendants of the assignment of the causes of action dated 7 February 1986 and made between the trustee in bankruptcy of the plaintiffs and the plaintiffs; and (2) the permission of the Department of Trade and Industry was not given for the assignment pursuant to sections 56(4) and 20(10) of the Bankruptcy Act 1914.
- B

The case was heard in chambers, and judgment was given in open court.

The facts are stated in the judgment.

- C *John Matthew Bowyer* for the plaintiffs.
Andrew Simmonds for the first defendant.
Edward Davidson for the second defendant.

Cur. adv. vult.

- D 9 March. SCOTT J. read the following judgment. The matter before me began as an appeal by the plaintiffs against an order made by Mr. Registrar Trayhurn in the Plymouth District Registry setting aside the writ as being frivolous or vexatious or an abuse of the process of the court. The plaintiffs are Mr. and Mrs. Weddell. There are two defendants. The first defendant is a firm of solicitors, J. A. Pearce & Major. The second defendant is Mr. Robin Miller.

- E In May 1980 the plaintiffs gave the first defendant instructions to advise whether a contract of sale was enforceable against them. The advice of counsel, the second defendant, was taken. The second defendant was instructed on one occasion only. His opinion was dated 20 May 1980. The first defendant continued to act for the plaintiffs until 24 September 1981. Nothing thereafter was heard by either defendant about the matter until each received a letter dated 11 April 1986 from solicitors acting for the plaintiffs. Each letter made an allegation of negligence. As against the first defendant it was alleged that they had been negligent in advising the plaintiffs in May 1980 and subsequently in connection with the contract of sale. As against the second defendant it was alleged that the advice given by his opinion of 20 May 1980 was negligent. Although not yet time barred, these were stale claims.
- F

- G On 2 May 1986 a writ was issued. It was served on the defendants on 6 May 1986 and was followed on 1 July 1986 by a statement of claim. The writ and statement of claim raised the allegations of negligence to which I have referred. On 21 August 1986 the second defendant issued a summons under R.S.C., Ord. 18, r. 19 seeking an order setting aside the writ. On 22 August 1986 the first defendant issued a like summons. The ground on which this relief was sought related to the locus standi of the plaintiffs to bring the action.
- H

The relevant facts are these. On 18 September 1984 Mr. Weddell was adjudicated bankrupt. On 30 November 1984 Mrs. Weddell was adjudicated bankrupt. Each of them had the same trustee in bankruptcy. By deed of assignment dated 7 February 1986 the trustee in bankruptcy assigned to the plaintiffs

"all claims and legal rights of action which the trustee may have against Messrs. Pearce & Major, Mr. Robin Miller and all debts

due therefrom for the benefit of the property and estate of each of the bankrupts and the bankrupts jointly . . .”

A

The deed contained covenants by the plaintiffs to account to the trustee for all or so much of the net proceeds of the intended action as might be necessary to discharge the outstanding debts and costs of the bankruptcies. Notice of the assignment had not been given to the defendants when the writ was issued on 2 May 1986. Notice thereof was eventually given to the defendants by a letter dated 4 June 1986 from the plaintiffs’ solicitors. It is not in dispute that, at the date of that notice, the cause of action against the second defendant and some, at least, of the causes of action against the first defendant were time barred.

B

The defendants submit, first, that the effect of the adjudications was to vest the plaintiffs’ causes of action in their trustee in bankruptcy; secondly, that the assignment of the causes in action by the trustee to the plaintiffs took effect as a legal assignment only when written notice thereof was, on 4 June 1986, given to the defendants: see section 136(1) of the Law of Property Act 1925; thirdly, that when the writ was issued the causes of action remained vested in the trustee; and, consequently, that the plaintiffs lacked locus standi to commence the action. It is contended that the action when commenced was a nullity and was not cured when, on 4 June 1986, the plaintiffs became legal assignees of the causes of action.

C

D

The defendants have a further point. It is the fact that the trustee in bankruptcy entered into the transaction effected by the deed of assignment without having obtained permission, pursuant to section 56 of the Bankruptcy Act 1914, to do so. Since in neither bankruptcy is there a committee of inspection, the requisite permission, if permission was needed, was that of the Department of Trade and Industry: see section 20(10) of the Bankruptcy Act 1914. The defendants contend that in the absence of the requisite permission the trustee had no power to assign the causes of action to the plaintiffs, that the assignment was void and that, for that reason also, the plaintiffs lacked locus standi to commence the action.

E

F

The registrar accepted the defendants’ submissions and set aside the writ. The plaintiffs appealed. The appeal raised the preliminary question whether notice of appeal had been given before time for appeal expired and, if not, whether an extension of time should be granted. I dealt with this preliminary question in a judgment which I gave on 16 February 1987. I held that the notice of appeal was not out of time and that an extension of time was not necessary. I must now deal with the substance of the matter.

G

Argument on the issues raised by the appeal began on Monday, 16 February 1987, and continued until Friday, 20 February 1987. A number of difficult points of law were debated. On some there was no clear authority. On others there was conflicting authority. At the conclusion of argument I reserved my judgment. In the course of the hearing I formed the strong view, first, that the nature of the issues being debated made the matter inappropriate for a striking out application under R.S.C., Ord. 18, r. 19; but, secondly, that it was highly desirable that the locus standi of the plaintiffs to prosecute the action should be settled as a preliminary to the further progress of the action. I was, therefore, receptive to an application made by Mr. Davidson, for the second defendant, for leave to bring the issue of locus standi before the court as

H

3 W.L.R.

Weddell v. Pearce & Major (Ch.D.)

Scott J.

A a preliminary issue in case I should be of opinion that the appeal should be allowed on procedural rather than substantive grounds. He drafted a preliminary issue and, on his undertaking to issue a pro-forma summons, I directed the trial of that issue as a preliminary issue and treated that issue as before me. Mr. Simmonds, for the first defendant, and Mr. Bowyer, who appeared for the plaintiffs, agreed with this procedure.

B At the conclusion of argument I indicated that the appeal against the order of the registrar would be allowed. I allow the appeal on the ground that the issues are wholly unsuitable to be dealt with on a striking out application under R.S.C., Ord. 18, r. 19. Without prejudice to my conclusions on the issues of law that have been argued before me, I regard the plaintiffs' action as neither scandalous, frivolous nor vexatious. Nor, unless and until the difficult issues relating to their locus standi are decided against the plaintiffs, is their action an abuse of process.

C The preliminary issue is in these terms:

D "Whether the writ in this action ought to be set aside on the grounds that:— (1) At the date of issue thereof no notice had been given to the defendants of the assignment dated 7 February 1986 and made between the trustee in bankruptcy of the plaintiffs of the one part and the plaintiffs of the other part. (2) The permission of the Department of Trade and Industry was not given for the said assignment pursuant to sections 56(4) and 20(10) of the Bankruptcy Act 1914."

E Mr. Bowyer's first submission on behalf of the plaintiffs was that a legal chose in action vested in a bankrupt at the commencement of the bankruptcy did not vest in law in the trustee in bankruptcy until written notice of the bankruptcy had been given to the person or persons subject to the chose. Until that notice had been given, the trustee's title to the chose in action was, Mr. Bowyer submitted, an equitable title only. The legal title remained in the bankrupt who had, therefore, locus standi to maintain an action. This submission contradicts a number of provisions contained in the Bankruptcy Act 1914 and is, in my view, wholly misconceived. Section 18(1) of the Bankruptcy Act 1914 provides:

G "Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not approved in pursuance of this Act within 14 days after the conclusion of the examination of the debtor or such further time as the court may allow, the court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee."

Section 48(5) provides:

H "Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee."

Section 53(3) provides:

"The property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being

during his continuance in office, without any conveyance, assignment, or transfer whatever.”

A

Mr. Bowyer's submission is, in effect, that the plaintiffs' causes of action against the defendants were not duly assigned to the trustee and did not vest in him. Very clear and binding authority would be necessary in order to support a submission so at variance with the statutory provisions. There is none.

B

Mr. Bowyer referred me to a number of cases dealing with assignments of equitable choses in action. Those cases establish that an equitable interest belonging to a bankrupt at the commencement of the bankruptcy vests in the bankrupt's trustee subject to the equitable rules as to priorities established by *Dearle v. Hall* (1828) 3 Russ. 1: see *In re Atkinson* (1852) 2 De G.M. & G. 140; *In re Barr's Trusts* (1858) 4 K. & J. 219; *Palmer v. Locke* (1881) 18 Ch.D. 381 and *In re Stone's Will* (1893) 37 S.J. 354. But in none of those cases was there any suggestion that anything less than the bankrupt's full and complete interest in the chose in action became vested in the trustee. The notice that the trustee had to give to perfect his title was necessary in order to prevent other equitable interests obtaining priority; it was not necessary in order to perfect his title vis-à-vis the bankrupt. This is expressly made clear by Chitty J. in *In re Stone's Will*. The report of his judgment in the Solicitors' Journal commences thus:

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“Chitty, J., said the question was one of general importance under the Bankruptcy Act 1883. It was plain that the property vested in the trustee, but he had failed, without any fault of his own, to give notice to the trustees of the fund. Now where a person entitled to an equitable chose in action such as a share in a trust fund assigned it, the property passed, and on the assignment the equitable interest vested in the assignee, and the assignor had no interest left. But a rule had long prevailed in equity, not in favour of the assignor, but in favour of subsequent assignees, that the assignee must give notice to the holders of the fund, in order to perfect his title, not as against the assignor, but as against subsequent assignees.”

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Those cases, in my judgment, are of no assistance to Mr. Bowyer. Mr. Bowyer referred me also to cases which establish that a trustee in bankruptcy can obtain no better title to a chose in action than was held by the bankrupt: see, e.g., *Stuart v. Cockerell* (1869) L.R. 8 Eq. 607. These cases, too, do not assist him.

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Finally, Mr. Bowyer referred me to two decisions of Wright J., *Mercer v. Vans Colina* (1897) 67 L.J. Q.B. 424 and *In re Beall, Ex parte Official Receiver* [1899] 1 Q.B. 688. In each case, the bankrupt, after the commencement of the bankruptcy, had acquired a legal chose in action and had purported to assign the chose for value to a third party. Wright J. had to decide who had priority—the trustee in bankruptcy or the third party. He held that priority depended on whether the third party had perfected his title by notice to the debtor before the trustee had intervened to claim the fund. These decisions, submitted Mr. Bowyer, show that a trustee in bankruptcy has to give notice before a legal title to a chose in action can vest in him. The cases show nothing of the sort. The cases were concerned with after-acquired property and Wright J. was applying the rule in *Cohen v. Mitchell* (1890) 25 Q.B.D. 262, in which Lord Esher M.R. said, at p. 266:

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A "Of course all the property which belongs to the bankrupt at the time of the bankruptcy becomes at once the property of the trustee. But does all the property acquired by the bankrupt after his bankruptcy belong to the trustee absolutely, so that the bankrupt is divested of all interest and property in it, or does it remain the property of the bankrupt, so that at any rate he can deal with it until the trustee interferes?"

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He then stated this principle, at p. 267:

"until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee."

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Fry L.J. said, at p. 268:

"The clause in the Bankruptcy Act which vests the property in the trustee for distribution amongst the creditors includes all such property as shall belong to or may be vested in the bankrupt at the commencement of the bankruptcy, and also which may be acquired by or devolve upon him before his discharge. If one merely confined one's attention to the words of the section, the reader might suppose that both those kinds of property vested absolutely in the trustee—vested in him in precisely the same manner. But the inconvenience of such a conclusion has been apparent not only from the present statute, but from many statutes which have preceded it, which contain substantially the same language. It is obvious that there is no difficulty in divesting out of the bankrupt and vesting in the trustee the whole of the property which was in the bankrupt at the commencement of the bankruptcy; but, unless (to use the language of Lord Mansfield) the bankrupt is to be made the slave of the trustee, it is obvious that he may have dealings with his fellow-men, and, in the exercise of his industry, he may acquire rights and he may acquire property, and therefore there is the greatest difficulty in supposing that every right acquired and every piece of property devolving upon the bankrupt after his bankruptcy and before his discharge vests in the trustee, in the same manner in which the property at the commencement of the bankruptcy has vested in the trustee."

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G Those passages make Mr. Bowyer's use of Wright J.'s two decisions in *Mercer v. Vans Colina*, 67 L.J.Q.B. 424 and *In re Beall, Ex parte Official Receiver* [1899] 1 Q.B. 688 wholly impermissible.

In my judgment, the plaintiffs' causes of action in negligence became vested in their trustee in bankruptcy and, in law, remained so vested until written notice of the assignment thereof back to the plaintiffs was given to the defendants on 4 June 1986.

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Mr. Bowyer's second submission was that under the deed of assignment of 7 February 1986 the plaintiffs became equitable assignees of the causes of action and thereby acquired a sufficient locus standi to issue the writ. This submission raises two points. First, it requires a view as to the effect on the assignment of the failure of the trustee in bankruptcy to obtain the permission of the Department of Trade and Industry. Mr. Bowyer submitted that permission was not needed and, alternatively, that the absence of permission had no effect on the

efficacy of the assignment. Secondly, there is the question as to the competency of an equitable assignee of a cause of action in damages to sue on the cause of action. As to the first point, I should start with the relevant provisions of the Bankruptcy Act 1914. Section 55 of the Act contains five subsections. Each specifies some transaction or act that the trustee may enter into or do. Subsection (1) permits the trustee to:

“Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels: . . .”

I need not read the other four subsections. Section 56 specifies transactions and acts that the trustee may enter into or do with the permission of the committee of inspection or, as the case may be, the Department of Trade and Industry. The section provides:

“The trustee may, with the permission of the committee of inspection, do all or any of the following things:—(1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same; (2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt; . . . (4) Accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee think fit; (5) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts; . . . (8) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person; . . .”

It has been submitted by Mr. Simmonds for the first defendant and Mr. Davidson for the second defendant that the powers of a trustee in bankruptcy to dispose of assets of the estate are, save for the power to disclaim onerous property conferred by section 54, to be found in one or other of these two sections. A disposition by a trustee of assets of the estate which could not be justified under one or other of the provisions of these sections would, they submitted, be ultra vires and void. They submitted that the transaction effected by the deed of assignment fell within section 56(4) and so required the permission of the Department of Trade and Industry. The permission of the department was not obtained and consequently, they submitted, the transaction was ultra vires the trustee, and the deed of assignment was void. If that is right, then plainly the plaintiffs had no locus standi to issue the writ.

All counsel agreed that the transaction between the plaintiffs and the trustee represented a sale of the causes of action to the plaintiffs and fell within section 55(1). An assignment of a cause of action in consideration of a covenant by the assignee to pay all or part of the net proceeds to the assignor would not generally be regarded as a transaction of sale, and, in the absence of authority, I would not myself so regard it. There is, however, Court of Appeal authority that a transaction of this character does represent a sale within section 55(1): see *Ramsey v. Hartley* [1977] 1 W.L.R. 686. That decision is binding on me and

A requires me to treat the transaction in the present case as a sale falling within section 55(1). I would otherwise, I confess, have regarded the transaction not as a sale within section 55(1) but as an "arrangement" falling within section 56(8).

B A sale under section 55(1) does not require anyone's permission. But Mr. Simmonds and Mr. Davidson point out that the consideration payable to the trustee under the deed of assignment will, if it becomes payable at all, be payable at a future time and that, accordingly, the transaction comes within section 56(4) and requires the permission of the Department of Trade and Industry. I agree. In a transaction of sale where the consideration is to be payable at a future time, section 55(1) and section 56(4) must, in my view, be read together, and, so read, require the requisite permission to be given to the transaction. I reject
C Mr. Bowyer's submission that permission was not needed in the present case.

In *Ramsey v. Hartley* it was assumed that the trustee in bankruptcy had obtained the requisite permission to enter into the transaction: see *per* Megaw L.J., at p. 695. In the present case it is common ground that the trustee did not do so. So what was the effect of the absence of the requisite permission? Mr. Bowyer submitted that the purpose of permission being required for the section 56 transactions was to protect the bankrupt's estate and that a failure to obtain the requisite permission did not provide a ground of defence to third parties dealing with the trustee. I readily accept his submission as to the purpose of section 56. It is supported by the cases he cited: *Lee v. Sangster* (1857) 2 C.B.N.S. 1; *In re Branson, Ex parte the Trustee* [1914] 2 K.B. 701; *Clark v. Smith* [1940] 1 K.B. 126 and *In re A Debtor (No. 26A of 1975)* [1985] 1
E W.L.R. 6. But none of these cases, save perhaps *Clark v. Smith* [1940] 1 K.B. 126 in an incidental respect, involved dispositions by the trustee of assets of the estate. In the first two cases the trustee in bankruptcy had commenced legal proceedings without the requisite permission. The omission did not, it was held, constitute a point which the defendant could take as a defence. In *Lee v. Sangster*, 2 C.B.N.S. 1, Williams J.,
F delivering the judgment of the court, said, at p. 6:

"On consideration, however, we are satisfied that the statute intended to make the obtaining of the requisite leave a matter only between the assignees and the court of bankruptcy, and not at all between the assignees and the other party to the suit."

G In *In re Branson, Ex parte The Trustee* [1914] 2 K.B. 701 Horridge J. said, at p. 704:

"My ruling is that the obtaining of the consent of the committee of inspection to the taking of proceedings is merely a provision for the protection of the estate and is not one which the respondent or the defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings."

H In *Clark v. Smith* [1940] 1 K.B. 126 a trustee had, with the permission of the committee of inspection, carried on the business of the bankrupt and had been given by the defendant a guarantee indemnifying the estate against any loss thereby incurred. It was held that the case did not come within section 56(1) in that the business was being carried on as a speculative trading venture and not for the purpose of winding up the estate. But the contract of guarantee was nonetheless enforceable. The

impropriety being committed by the trustee did not constitute a ground of defence available to the defendant. In *In re A Debtor (No. 26A of 1975)* [1985] 1 W.L.R. 6 a trustee, without the requisite permission, engaged solicitors to conduct legal proceedings. He was liable to the solicitors under the contract of retainer he had entered into.

Those cases were not dealing with the question as to the effect of the disposition of assets made by a trustee in bankruptcy without permission, in circumstances that required permission. The cases do, however, establish that the lack of the requisite permission does not have the consequence that the action taken by the trustee is a nullity. In *Lee v. Sangster*, 2 C.B.N.S. 1 and in *In re Branson, Ex parte The Trustee* [1914] 2 K.B. 701 the trustee had commenced proceedings without the requisite permission. The action was nevertheless held to be properly constituted.

Mr. Davidson and Mr. Simmonds have submitted that where the disposition of assets is concerned, a trustee in bankruptcy has only the powers given to him by the Act. If the trustee enters into some transaction purporting to dispose of assets and cannot find authority for the transaction in some enabling provision of the Act, the transaction is, they submitted, ultra vires and the disposition a nullity.

In my judgment, these arguments confuse vires with propriety. If an asset of the estate is vested in the trustee then the trustee has, in my judgment, power, in the strict sense, to divest himself of it. Whether it is proper for him to divest himself of the asset is another matter. It may be that if a trustee in bankruptcy entered into a transaction that was outside his powers under the Act and in the course of so doing disposed of assets of the estate, the disposition could, in suitable circumstances, be set aside. But unless and until set aside it would, in my judgment, stand. Whether or not it would be voidable, it would not be void.

Mr. Simmonds sought to draw an analogy between section 56 of the Bankruptcy Act 1914 and section 29(1) of the Charities Act 1960. Under the latter section the consent of the Charity Commissioners to sales of certain charity land is necessary. It is well settled that a sale made without the requisite consent is void: see, e.g., *Manchester Diocesan Council for Education v. Commercial & General Investments Ltd.* [1970] 1 W.L.R. 241 and *Michael Richards Properties Ltd. v. St. Saviour's Parish, Southwark, Corporation of Wardens* [1975] 3 All E.R. 416. So, Mr. Simmonds argued, a section 56 transaction entered into without the requisite permission should be held to be void. I do not think, however, that the analogy is apt. Section 29(1) of the Charities Act 1960 provides that "no property . . . shall, without an order of the court, or of the commissioners . . . be sold . . ." This is the language of prohibition. It is very different from the language of sections 55 and 56 of the Act of 1914, "The trustee may . . . do all or any of the following things:— . . ." This is enabling language, allowing the trustee to do with safety the things described in the sections.

Section 56(1) authorises the trustee, with permission, to carry on the bankrupt's business with a view to winding it up. *Clark v. Smith* [1940] 1 K.B. 126 was a case where the trustee was carrying on the business for a different purpose. The case did not fall within section 56(1). The trustee's actions were not authorised under any section of the Act. But it could not, in my view, sensibly have been argued that dispositions of assets made by the trustee in the course of carrying on the business were void. Indeed, Slessor L.J. said, at p. 136:

A “as against the world, the carrying on of the business by the trustee can create legal relations between him and third parties, either as debtor or creditor, incurred in the carrying on of the business, notwithstanding that it is carried on otherwise than solely for the beneficial winding up of the estate. . . . it cannot be said that this contract or the carrying on of the business thereunder is illegal in the sense in which the learned judge has used the word. I do not think it can be said that it is void as being ultra vires, because the trustee is in my opinion competent to carry on the business and to create legal liabilities as between himself and third persons with whom he deals in carrying on the business, whether he does or does not do so for the purpose of the beneficial winding up of the estate.”

C Test the point also by reference to section 56(5). Suppose a trustee, with the requisite permission, mortgages part of the property of the bankrupt. What is the position of the mortgagee if the purpose of the trustee is to raise money for a purpose other than the payment of the bankrupt's debts? The arguments of Mr. Simmonds and Mr. Davidson would have the mortgage be a nullity. In my judgment that cannot be so. What concern would it be of the mortgagee what use the trustee proposed for the mortgage money?

E In my judgment, a disposition of assets by a trustee in bankruptcy passes title to the donee whether or not the transaction is authorised under some provision of the Act and whether or not a permission made requisite by section 56 is absent. If the transaction were tainted by breach of trust on the part of the trustee, the transaction might, under the general law, be liable to be set aside except against a bona fide purchaser for value without notice. The position would be no different, in my view, from that in which any trustee had committed a breach of trust. But if the only impropriety were the absence of permission made requisite by section 56, the transaction would not, in my opinion, be liable on that account alone to be set aside. Strangers to the bankruptcy cannot raise as a defence the absence of permission; it must follow that they can deal safely with the trustee without concern as to whether permission has or has not been obtained.

G Accordingly, in my judgment, failure of the plaintiffs' trustee in bankruptcy to obtain the permission of the Department of Trade and Industry to his transaction with the plaintiffs did not prevent the deed of assignment taking effect on execution as an equitable assignment and on 4 June 1986 as a legal assignment. On this point the defendants, in my judgment, fail.

H I now come to the second point. The deed of arrangement was executed on 7 February 1986. Written notice thereof was not given to the defendants until 4 June 1986. In the intervening period, the causes of action remained at law vested in the trustee in bankruptcy. The causes of action were vested in the plaintiffs in equity but not in law. The writ was issued on 2 May 1986. So these questions arise. Does an equitable owner of a cause of action in damages have locus standi to sue on the cause of action as plaintiff, if he joins the legal owner of the cause of action as a defendant? If the answer is “Yes,” what is the status of such an action if the legal owner is not joined as a defendant? Is it a nullity? Is it effective to stop time running for the purposes of the statutes of limitation?

There are three cases to which I have been referred which bear on these questions. First, there is the very well known case *William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd.* [1905] A.C. 454. This case is usually cited as authority on the nature of a valid equitable assignment. It bears also, however, on the question with which I am concerned. The facts are important. Brandt's were bankers and had advanced money to a client to enable the client to purchase goods. The client sold the goods to Dunlop and delivered them to Dunlop with an invoice requesting Dunlop to remit the purchase price to Brandt's. On delivery of the goods to Dunlop, the client sent Brandt's a written document authorising payment of the purchase price to Brandt's. Brandt's sent this document to Dunlop with a covering letter. On these facts it was held by the House of Lords, differing from the Court of Appeal, that there had been an equitable assignment to Brandt's of the purchase price due from Dunlop. It was also held by the House of Lords that the covering letter and the enclosed document gave notice to Dunlop of the equitable assignment. In the event, however, Dunlop paid the purchase price to the client, not to Brandt's. Shortly thereafter the client became insolvent, so Brandt's sued Dunlop for the price. Brandt's were equitable assignees. But the client, in whom legal title to the chose in action remained, was not joined as a party to the action. Nonetheless Brandt's action succeeded. Lord Macnaghten, with whose judgment the Earl of Halsbury L.C. and Lord Lindley concurred, said, at p. 462:

"Strictly speaking, Kramrisch & Co., or their trustee in bankruptcy, should have been brought before the court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' bar, the Dunlops disclaimed any wish to have him present, and in both courts below they claimed to retain for their own use any balance that might remain after satisfying Brandt's."

Lord James said, at p. 464, "The defect in the parties to the suit can be remedied." This case seems to me clear authority for the view that an equitable assignee of a chose in action has locus standi to sue on the chose in action; that, strictly, the person in whom the chose in action is in law vested ought to be a party; but that the absence of that person does not render the action a nullity. The same conclusion can be derived from *Performing Right Society Ltd. v. London Theatre of Varieties Ltd.* [1922] 2 K.B. 433, C.A.; [1924] A.C. 1, H.L.(E.). In that case the plaintiff was equitable assignee of the copyright in a certain song. The defendant, a music hall proprietor, permitted the song to be sung in its music hall. There was a clear infringement of copyright. The plaintiff sued for an injunction and damages. The owner at law of the copyright was not a party to the action. Branson J., at first instance, gave judgment for the plaintiff for an injunction and damages [1922] 1 K.B. 539. The Court of Appeal, however, held that the plaintiff, the equitable owner of the copyright, could not obtain either damages or a perpetual injunction without adding the legal owner of the copyright as a party to the action. So the appeal was allowed and the judgment of Branson J. set aside. But the action was not dismissed. Instead, the Court of Appeal gave the plaintiff leave to amend the writ and subsequent pleadings by adding the legal owner as co-plaintiff. It is clear, therefore, that the action was not a nullity. The House of Lords upheld the view

3 W.L.R.

Weddell v. Pearce & Major (Ch.D.)

Scott J.

A taken of the matter by the Court of Appeal. Viscount Cave L.C. said, at p. 14:

B “That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt; but it was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that, in general, when a plaintiff has only an equitable right in the thing
C demanded, the person having the legal right to demand it must in due course be made a party to the action: . . . If this were not so, a defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied.”

Viscount Finlay expressed the same view. He referred to *Brandt's* case [1905] A.C. 454 and said, at p. 19:

D “Except under very special circumstances the ordinary rule should be observed,* that the legal owner should be a party to the proceedings. There may possibly be cases in which a person who has made an equitable assignment might by a subsequent assignment have transferred the legal interest in the same work to a purchaser for value without notice, whose title would prevail over the merely equitable right, and such a possibility is one reason for the rule of making the legal owner a party. But whatever may be the balance of convenience, the established rules of practice should be adhered
E to, even in cases, of which I think the present is one, when their observance in all probability will serve no useful purpose.”

And he said, at p. 20:

F “Some observations made by Lord Macnaghten in *William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd.* [1905] A.C. 454, 462, were, it was argued, inconsistent with the claim of the defendant in the present case to have the suit dismissed owing to the non-joinder of the owner of the legal estate. I do not think that these observations should be read as overruling the general rule of practice as to the necessity of joining the owner of the legal estate and the right of the defendant to have the suit dismissed if the plaintiff refuses or neglects to join him in any case not falling within the recognised
G exceptions to the rule.”

On the same point, Lord Sumner said, at p. 30:

H “It was indeed suggested by the appellants that the passage at the end of the opinion of Lord Macnaghten in *Brandt's Sons & Co. v. Dunlop Rubber* supported and indeed decided the point in issue in their favour, on the ground that the same objection was taken then as is taken by the respondents here, and that your Lordships' House refused to give effect to it. The question is whether it was really the same objection, for certainly the House did not give effect to it. The subject of the dispute was the right to be paid a debt which was due to the assignor till it was by him equitably assigned to the appellants. There was accordingly a possibility of the debtors being exposed to duplicate claims. Lord Macnaghten accepts the rule, for which the respondents now contend, that the assignor ought to be

made a party in order that he might be bound, but points out that *Brandt's* case was an exception to it. Plainly the House did not consider itself to be departing from established rules of practice, nor has the case ever been so regarded. It has, therefore, now to be shown that the present case is within the principle of the exception to which effect was then given. If the assignor, Kramrisch, was not made a party, he would not be bound; was it not possible that the debtors, the Dunlop Company, might be exposed to claims by him or his trustee in bankruptcy? Kramrisch, however, had already been settled with and the Dunlop Company held his receipt. It appears on reference to the arguments in the courts below that this fact was relied on. Kramrisch was therefore bound already. The respondents admitted that what they wanted was not the presence but the absence of the assignor, and that they did not propose to pay the assignor but desired to pay nobody, and this mere non-joinder of parties was not allowed to relieve them. *Brandt's* case is thus distinguishable, for the present case is otherwise."

It seems, therefore, that an equitable assignee can sue in his own name. He cannot, however, recover damages or a perpetual injunction without joining as a party the assignor in whom legal title to the chose in action is vested. The same would apply to recovery of a debt. The reason for this is, however, a pragmatic one. The debtor must not be at risk of suit by the legal owner of the chose. To put the point another way, the debtor must, if he is adjudged liable, be in a position to obtain a complete discharge from his liability by paying the plaintiff, the equitable assignee. In the special circumstances of *Brandt's* case [1905] A.C. 454, where, wrongly, the legal owner of the chose had already been paid, the problem did not arise. Dunlop had already obtained, by payment, a discharge from any liability to Kramrisch. In most cases, however, if the legal owner of the chose were not a party to the action, the defendant might, notwithstanding he had paid the successful plaintiff, the equitable assignee, nevertheless remain liable to the legal owner. The legal owner, after all, might dispute the validity of the equitable assignment, or might disclose a prior equitable interest in some third party. Reasons on these lines for requiring the legal owner of the chose to be a party were expressed in *Performing Right Society Ltd. v. London Theatre of Varieties Ltd.* [1924] A.C. 1 by Viscount Cave L.C. at p. 14, by Viscount Finlay at p. 19, and by Lord Sumner at p. 31.

In neither of the authorities to which I have referred was the action, begun by an equitable assignee without the assignor being joined as a party, treated as a nullity. In *Brandt's* case [1905] A.C. 454, final judgment on the chose in action was obtained. In the *Performing Right Society* case [1924] A.C. 1, an opportunity was given to the plaintiff to join the assignor. It is, I think, a common practice for an action commenced by an equitable assignee to be stayed pending joinder, either as co-plaintiff or as co-defendant, of the assignor. *E. M. Bowden's Patents Syndicate Ltd. v. Herbert Smith & Co.* [1904] 2 Ch. 86 is an example of a case where that was done. The practice is endorsed by the terms of R.S.C., Ord. 15, r. 6(2)(b)(i) which authorises the joinder of

"any person . . . whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon . . ."

3 W.L.R.

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A In *The Supreme Court Practice 1985*, vol. 1, p. 177, at 15/6/2 there is a note:

“The addition of a co-plaintiff may be made where the original plaintiff’s cause of action is defective, e.g. where the legal owner is required to be added (*The Charlotte* [1908] P. 206). Thus the legal owner of a patent will be added in an action for infringement brought by the equitable owner [*Bowden’s Patents Syndicate v. Smith* [1904] 2 Ch. 86, 122] so in the case of copyright (see *Performing Right Society v. London Theatre of Varieties* [1924] A.C. 1).”

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In my judgment, therefore, it is clearly established that an action commenced by an equitable assignee without joining the assignor is not a nullity. It may be liable to be stayed until the proper parties have been joined, but it is not a nullity.

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Mr. Simmonds and Mr. Davidson argued the contrary. The action commenced by the plaintiffs on 2 May 1986 was, they submitted, a nullity. They relied on the decision of Roskill J. in *Compania Colombiana de Seguros v. Pacific Steam Navigation Co.* [1965] 1 Q.B. 101. The facts of that case were highly complex but the relevant question for present purposes was whether an action for damages, commenced by an insurance company in England on 7 January 1960, was time barred. The cause of action had accrued on 12 December 1954. The insurance company was assignee of the cause of action. By reason of rule 6 of article III of the Schedule to the Carriage of Goods by Sea Act 1924, the cause of action was time barred unless brought within one year after it had accrued. So the action brought in England in 1960 was, apparently, time barred. An action had, however, been commenced in New York on 2 November 1955 by, in effect, although not in name, the insurance company. On 2 November 1955 the insurance company was equitable assignee only. Notice of the assignment was, for the purposes of section 136 of the Law of Property Act 1925, given on 5 November 1955. The New York action was dismissed on 16 May 1956, but it was argued that the effect of the New York action having been instituted within a year from 12 December 1954 was to stop time running. Roskill J. rejected that argument and held the action in England to be time barred. He so held on the ground that an action commenced in some other court could not prevent the English action from being time barred. But Roskill J. also made some remarks about the status of the New York action, and it is on these remarks that Mr. Simmonds and Mr. Davidson rely. Roskill J. said, at p. 127:

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“There remains the further question on this branch of the case, namely, whether, even if the insurance company could have otherwise relied upon the New York suit to defeat the provisions of article III, rule 6, they could, on the facts of this case, have relied upon it, inasmuch as the notice of the assignment was only given after the New York suit had been begun. That the chronology of events is that notice was given after the suit had been begun, is undoubted. What is the effect? Had the New York suit been brought in England, it seems clear that it must have failed, all else apart, for want of notice satisfying the requirements of section 136 of the Law of Property Act 1925. Mr. Kerr says that this is a further fatal bar to reliance upon the New York suit as satisfying article III, rule 6. Mr. Littman says that suit was brought by the

right party, the insurance company, and the fact that there was a valid defence is irrelevant.”

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Roskill J. noted, at p. 128, that the proper law of the chose in action was English law and said, at p. 129:

“Antecedent notice to the debtor before action brought is clearly required by the proper law of the debt, namely, English law. . . . only the assignor could sue at the time when the New York suit was brought and, therefore, that suit was brought by the wrong party, if one applies English law either as the proper law of the chose in action or (by presumption) as the proper law of the assignment or of the *lex fori*. ‘Suit brought’ must mean suit brought by the person properly entitled to bring it. On the facts as to notice, which I have related, the insurance company had no right to bring that suit in New York at the time when it was brought. Only the telephone company could have brought it, and they did not do so.”

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Those remarks were not necessary to the decision of the case but represent the considered opinion of Roskill J., expressed in a reserved judgment, on assumed facts which seem, for relevant purposes, very like the facts of the present case. Roskill J. held, in effect, that the action commenced by the equitable assignee was a nullity. He so held notwithstanding that three days after the action had been commenced the assignment became, by reason of written notice thereof given to the debtor, a legal assignment. I find myself unable to accept that that can be right. *Brandt's* case [1905] A.C. 454 and the *Performing Right Society* case [1924] A.C. 1, establish beyond any argument that an action commenced by an equitable assignee and to which the assignor is not a party is not a nullity. It will not be struck out until the plaintiff has had an opportunity to join as a party the assignor. It may be stayed until that has been done. Even this is not an invariable practice. In a case where the protection of the defendant debtor from claims by the legal owner of the chose in action can be seen to be unnecessary, the equitable assignee can prosecute the action to final judgment without joining the assignor as a party: see *Brandt's* case [1905] A.C. 454. All this I take to be established by the two House of Lords cases in question. Those authorities were not cited to Roskill J. and I do not think he could have decided the equitable assignee point as he did if they had been.

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There is a final point made by Mr. Simmonds and Mr. Davidson on this part of the case that I must deal with. Whatever may be the *locus standi* of an equitable owner of a chose in action in general to bring an action, the position of an equitable assignee of a cause of action in damages is, it was said, different. Indeed, Mr. Davidson submitted that there was really no such thing as an equitable assignee of a cause of action in damages. A bare right to sue cannot be assigned, he submitted. A debt may be assigned, copyright may be assigned, but not a bare right to sue. I do not accept the contrast which this submission seeks to draw between a debt on the one hand and a cause of action in damages on the other hand. There is no such thing as a cause of action in *vacuo*. In the present case the plaintiffs allege that immediately before the bankruptcy the defendants were liable to them in damages. The right to unliquidated damages is an asset just as a debt is an asset. Subject to the law regarding maintenance and champerty, a right to unliquidated

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3 W.L.R.

Weddell v. Pearce & Major (Ch.D.)

Scott J.

A damages can, in law, be sold or assigned as readily as a debt. The bringing of an action is the means of enforcing the right to unliquidated damages. But the asset that vested in the trustee in bankruptcy and was assigned on 7 February 1986 to the plaintiffs was the right to damages. The plaintiffs' entitlement as equitable assignees to bring an action to enforce that right was, in my judgment, no different from the right of an equitable assignee of a debt to bring an action to recover the debt.

B The writ in this action was issued by the plaintiffs, as equitable assignees, on 2 May 1986. The trustee in bankruptcy, the assignor, was not a party. This writ was not, in my judgment, a nullity. The state of affairs immediately after its issue was that if the defendants had applied for the action to be stayed pending the joinder of the trustee in bankruptcy, the assignor, the application would have succeeded. Also, if
C immediately after the issue of the writ the plaintiffs had sought the joinder of the trustee in bankruptcy, that application, too, would, in my view, have succeeded. The joinder would have been authorised by R.S.C., Ord. 15, r. 6(2)(b)(i). That remained the position at least until 20 May 1986.

The significance of 20 May 1986 is that it was the date on which, apparently, the cause of action against the second defendant became time barred. It may also have been the date on which causes of action against the first defendant began to become time barred. But the state of the action remained, in my judgment, the same after 20 May 1986 as it had been before. The joinder of the trustee in bankruptcy would have required sub-rules (5)(a) and (6)(a) to be complied with; but neither would, in my view, have presented any difficulty. It would have been
E "necessary for the determination of the action that the new party should be added," sub-rule (5)(a), and the case would have fallen squarely within sub-rule (6)(a).

The position did, however, change on 4 June 1986. That was the date on which the plaintiffs' equitable assignment became, by reason of the written notice to the defendants, a legal assignment. As from that date, the defendants did not need to be protected against claims by the
F trustee in bankruptcy or anyone claiming through the trustee in bankruptcy. The trustee could have made no claims against them. A stay of the action pending the joinder of the legal owner of the chose in action was not thereafter necessary. The plaintiffs were the legal owners. The trustee in bankruptcy could not be joined as a party. Apart from the objection that his joinder would be pointless, the case could no longer be brought within sub-rule (6)(a). In my judgment, on 4 June
G 1986 the defect which would previously have prevented the plaintiffs obtaining judgment against the defendants was removed.

There are two other questions which arise from what I have decided. First, since the permission of the Department of Trade and Industry to the assignment of the causes of action ought to have been but was not obtained (see section 56(4) of the Bankruptcy Act 1914) there remains a
H theoretical possibility that someone with locus standi to do so might apply to have the assignment set aside. Does that possibility render the plaintiffs' action in any way defective or require the joinder of the trustee in bankruptcy? For the reasons which I have already given, the absence of a requisite permission is not, in my judgment, ground by itself for a transaction to be set aside. Strangers to a bankruptcy are not concerned with whether or not permission has been given. But, of course, the plaintiffs are not strangers to the bankruptcy: they are the

bankrupts. It may be thought to be arguable that, as against them, some creditor or other person with sufficient locus standi might be able, on the ground of lack of requisite permission, to have the assignment set aside. But even if that were a correct view, nonetheless, in my judgment, it would not assist the defendants. The right to have the assignment set aside for want of the requisite permission would be no more than a mere equity. It would not, in my judgment, prevent the plaintiffs from giving the defendants, on payment of any damages found to be due or agreed to be due, a complete discharge. If the action proceeds to judgment, whether in the plaintiffs' favour or the defendants' favour, the causes of action will be extinguished. As Lord Upjohn commented in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175, 1238, "a mere 'equity' naked and alone is, in my opinion, incapable of binding successors in title even with notice; it is personal to the parties." This conclusion is entirely consistent with the authorities to which I have already referred, which establish that want of the requisite permission pursuant to section 56 does not constitute a point of which a stranger to the bankruptcy can take advantage. The defendants are plainly strangers to the bankruptcy.

Finally there is the question whether, for the purposes of the Limitation Act 1972, time was interrupted by the issue of the writ on 2 May 1986 or continued running until the plaintiffs' assignment became a legal assignment on 4 June 1986. If the latter answer were correct, it might be necessary to dismiss the second defendant from the action on the footing that, as against him, the action would be bound to fail. This is a point on which there is apparently no authority save for the judgment of Roskill J. in *Compania Colombia de Seguros v. Pacific Steam Navigation Co.* [1965] 1 Q.B. 101 to which I have referred and which, for the reasons I have given, I do not feel able to accept. As a matter of principle, however, I conclude that time was interrupted by the issue of the writ. The plaintiffs are suing on the cause of action in negligence. They had locus standi as equitable assignees to do so. They were not suing on some different cause of action from that which in law remained vested in their assignor. There was and is only one cause of action, namely a cause of action to the benefit of which the plaintiffs were, on 2 May 1986, in equity entitled and are now in law entitled, and in respect of which they were entitled to issue a writ and obtain, if the circumstances warranted it, an immediate interlocutory injunction. In my judgment, therefore, time stopped running on 2 May 1986.

Accordingly, on the preliminary issue I propose to answer "No" to both questions.

*Declaration accordingly.
Leave to appeal.*

*Solicitors: Lovell Son & Pitfield for Pethybridges & Best, Torrington;
Hewitt, Woollacott & Chown.*

T. C. C. B.

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[PRIVY COUNCIL]

SOLOMON BECKFORD

APPELLANT

AND

THE QUEEN

RESPONDENT

B

[APPEAL FROM THE COURT OF APPEAL OF JAMAICA]

1987 May 12, 13;
June 15Lord Keith of Kinkel, Lord Elwyn-Jones,
Lord Templeman, Lord Griffiths and
Lord Oliver of Aylmerton

C

Crime—Self-defence—Homicide—Defendant police officer killing man believing him to be dangerous gunman firing at police—Jury directed that test for self-defence based on defendant's belief in necessity to resist attack being reasonable—Whether misdirection—Whether honest belief correct test

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The defendant, a police officer, was charged with murder. The prosecution case was that the defendant and another armed officer had chased the deceased, who was unarmed, shooting at him and eventually killing him when he had his hands raised and was begging them not to shoot him. The defendant made a statement from the dock stating that he and other armed officers had been sent to a house to investigate a report that the deceased was a dangerous gunman terrorising someone there, and that on arrival at the house he saw the deceased running away with what appeared to be a gun. He said that while he and other officers were chasing the deceased he saw the deceased firing at them and they returned fire killing the deceased. In his summing up in relation to self-defence the judge directed the jury that a man who was attacked in circumstances where he reasonably believed his life to be in danger, or that he was in danger of serious bodily injury, might use such force as on reasonable grounds he thought necessary to resist the attack, and if in using such force he killed his assailant he was not guilty of any crime. The defendant was convicted of murder and sentenced to death. The Court of Appeal of Jamaica dismissed his appeal against conviction holding that the jury had been properly directed with regard to self-defence.

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On the defendant's appeal to the Judicial Committee:—

Held, allowing the appeal, that the common law of England was applicable in Jamaica to determine whether the defendant had acted in self-defence; that the prosecution had to prove that the violence used by the defendant was unlawful; that, therefore, if the defendant honestly believed the circumstances to be such as would, if true, justify his use of force to defend himself or another from attack and the force used was no more than was reasonable to resist the attack, he was entitled to be acquitted of murder, since the intent to act unlawfully would be negated by his belief, however mistaken or unreasonable, although the reasonableness of the alleged belief was material in deciding whether the defendant had a genuine belief; that, accordingly, the trial judge misdirected the jury as to self-defence; and that, as it could not be concluded with the utter certainty required in a case of capital murder that the jury properly directed would necessarily have returned the same verdict, the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act could not be applied and the conviction would be quashed (post, pp. 616A–B, 619B–E, 620F–G, 621H).

Reg. v. Morgan [1976] A.C. 182, H.L.(E.) and *Reg. v. Williams (Gladstone)* (1983) 78 Cr.App.R. 276, C.A. applied.

Per curiam. There is an obvious danger that a jury may be unwilling to accept that an accused held an "honest" belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination (post, p. 622B).

Decision of the Court of Appeal of Jamaica reversed.

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The following cases are referred to in the judgment of their Lordships:

Albert v. Lavin [1982] A.C. 546; [1981] 2 W.L.R. 1070; [1981] 1 All E.R. 628, D.C.; [1982] A.C. 546; [1981] 3 W.L.R. 955; [1981] 3 All E.R. 879, H.L.(E.)

Foster's Case (1825) 1 Lew. 187

Palmer v. The Queen [1971] A.C. 814; [1971] 2 W.L.R. 831; [1971] 1 All E.R. 1077, P.C.

Reg. v. Barrett (Arthur) (unreported), 31 May 1985, Court of Appeal of Jamaica (Supreme Court Criminal Appeal No. 133/84)

Reg. v. Chisam (1963) 47 Cr.App.R. 130, C.C.A.

Reg. v. Fennell [1971] 1 Q.B. 428; [1970] 3 W.L.R. 513; [1970] 3 All E.R. 215, C.A.

Reg. v. Kimber [1983] 1 W.L.R. 1118; [1983] 3 All E.R. 316, C.A.

Reg. v. Morgan [1976] A.C. 182; [1975] 2 W.L.R. 913; [1975] 2 All E.R. 347, H.L.(E.)

Reg. v. Pheko [1981] 1 W.L.R. 1117; [1981] 3 All E.R. 84, C.A.

Reg. v. Rose (1884) 15 Cox C.C. 540

Reg. v. Weston (1879) 14 Cox C.C. 346

Reg. v. Williams (Gladstone) (1983) 78 Cr.App.R. 276, C.A.

The following additional cases were cited in argument:

Reg. v. Ashbury (unreported), 8 November 1985; Court of Appeal (Criminal Division), Transcript No. 2320/B1/85, C.A.

Reg. v. Caldwell [1982] A.C. 341; [1981] 2 W.L.R. 509; [1981] 1 All E.R. 961, H.L.(E.)

Reg. v. Gordon (Denroy) (unreported), 16 January 1986, Court of Appeal of Jamaica (Supreme Court Criminal Appeal No. 55/83)

Reg. v. Taaffe [1983] 1 W.L.R. 627; [1983] 2 All E.R. 625, C.A.; [1984] A.C. 539; [1984] 2 W.L.R. 326; [1984] 1 All E.R. 747, H.L.(E.)

Reg. v. Tolson (1889) 23 Q.B.D. 168

Sweet v. Parsley [1970] A.C. 132; [1969] 2 W.L.R. 470; [1969] 1 All E.R. 347, H.L.(E.)

Thorne v. Motor Trade Association [1937] A.C. 797; [1937] 3 All E.R. 157, H.L.(E.)

APPEAL (No. 9 of 1986) by the defendant, Solomon Beckford, with leave of the Court of Appeal of Jamaica, from the judgment of the Court of Appeal of Jamaica (Rowe P., Carey and Campbell J.J.A.) given on 10 October 1985 dismissing his appeal against his conviction of murder on 28 March 1985 before Woolf J. and a jury in the Manchester Circuit Court. He was sentenced to death.

At the close of the hearing before the Judicial Committee Lord Keith of Kinkel announced that their Lordships allowed the appeal for reasons to be delivered later.

The facts are stated in their Lordships' judgment giving the reasons for their decision.

A *Michael Burton Q.C., Daniel Serota and John Perry* (of the English and Jamaican Bars) for the defendant.

Ian X. Forte Q.C., Director of Public Prosecutions, Jamaica, and *Kent Pantry*, Deputy Director of Public Prosecutions, Jamaica, for the Crown.

Cur. adv. vult.

B 15 June. The judgment of their Lordships was delivered by LORD GRIFFITHS.

On 28 March 1985 the defendant was convicted of murder and sentenced to death. On 10 October 1985 the Court of Appeal of Jamaica dismissed his appeal against conviction, and gave leave to appeal certifying the following question as of exceptional public importance:

C "1. (a) Must the test to be applied for self-defence be based on what a person reasonably believed on reasonable grounds to be necessary to resist an attack or should it be what the accused honestly believed? (b) Where, in the instant case, on a trial of an indictment for murder the issue of self-defence is raised is it a proper direction in law for the jury to be told by the trial judge: a man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily injury may use such force as on reasonable grounds he thinks necessary in order to resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing is intentional."

E At the conclusion of the hearing their Lordships indicated that they would humbly advise Her Majesty that the appeal ought to be allowed, and the conviction quashed, and that they would give their reasons later. This they now do.

F The facts out of which the conviction arose present a confused pattern with many loose ends which might with advantage have been dealt with by further evidence. The defendant was a police officer who on 8 March 1983 was issued with a shotgun and ammunition and sent with a number of other armed police officers to a house at Greenvale Park in Manchester. The prosecution called no evidence to explain the circumstances in which this armed posse was sent out that morning but according to the defendant, in a statement he made from the dock, he and other police officers, including a Police Constable Reckord, were told by Deputy Superintendent Wilson that a report had been received from Heather Barnes that her brother Chester Barnes was terrorising her mother with a gun and that the police must come immediately to save her life. The defendant said that they were warned that the man appeared to be a dangerous gunman and that they must take special care. Heather Barnes, however, who was the first witness called by the prosecution, denied in cross-examination that she had made a telephone call to the police or that her brother Chester Barnes was armed. It is to be regretted that the prosecution called no evidence to explain why these armed police were sent to the Barnes' house. If in fact Heather Barnes had telephoned for assistance it might have thrown grave doubt upon her testimony that her brother was unarmed; if she had not telephoned, the jury were surely entitled to know why so many armed police officers were sent to the house. The inference is obviously that

the police must have believed that they were dealing with a dangerous armed man, but in a capital murder charge such matters should be dealt with by evidence not inference.

The prosecution case, based primarily on the evidence of Heather Barnes and a witness named Peart, was that the defendant armed with a shotgun and Police Constable Reckord armed with a revolver had aggressively entered the house whereupon the unarmed Chester Barnes had fled from the house, run across the yard, jumped over a wall and tried to hide by a pigsty on the adjoining common. Heather Barnes said the defendant had fired at her brother in the yard and then he and Police Constable Reckord had pursued him over the wall on to the common from whence she heard more shots. Peart said he saw Chester Barnes jump the wall pursued by the police. Later he saw Barnes hiding by a pigsty, he put his hands in the air and both police officers fired at him. He heard Barnes say "do officer, don't shoot me, because me a cook." He said Barnes had nothing in his hands, and when he fell after the first shots the defendant shot the deceased in the belly.

The evidence of the pathologist showed that the deceased had been shot three times, once in the head by the handgun and twice by the shotgun, once in the chest and lower neck and once on the inner side of the left forearm. There were no burn marks and this indicated that the shots were fired at more than 18 inches from the deceased's body.

The police evidence established that prior to the incident the defendant had been issued with a shotgun and nine cartridges and after the incident he returned the shotgun, seven cartridges and one spent cartridge. Police Constable Reckord handed in the revolver, nine cartridges and three spent shells.

On the prosecution evidence therefore this was a case of two police officers shooting at and pursuing an unarmed man and finally killing him when he was pleading with them with his hands up. On this version of events both police officers were equally guilty of murder and the only reason why Police Constable Reckord did not also stand trial was that he had died since the incident.

After an inevitably unsuccessful submission of no case to answer the defendant presented his defence in a statement from the dock which was summarised thus in the judgment of the Court of Appeal:

"The [defendant] made a statement from the dock, the gist of which was, that he and other men from Mandeville Police Station were ordered to a house in Greenvale Park where, he was told, a gunman was menacing the occupant. He was informed, he said, that Heather Barnes had reported that her brother Chester Barnes who had arrived from Kingston that morning armed with a firearm, was terrorising her. He said further that the deputy superintendent who had despatched them, cautioned that Barnes was a dangerous gunman. On arrival at the house, they took up positions as instructed. The [defendant] said he saw a man run from the back door with an object which appeared to be a firearm. This man first hid behind a wall and took aim as if to fire. The [defendant] fired in his direction, whereupon the man ran off, jumped a wall and went into a common where the [defendant] lost sight of him. The police party went in the direction the man had taken. He heard gunshots and as he neared the location from which the shots were being fired, he saw the same man firing at the police. He returned the fire

A as did other police officers. The man ran off and was pursued. He continued by saying: 'We went in trace of him and still hear shots coming from a tree root in the common. Other policemen went in that direction, and I saw when Constable Reckord discharged three rounds at the man that morning, and he fell. We were looking around for the gun that we saw the man with in the bushes—
B searching and looking for the gun but we didn't find it. I went and searched the man and took from his pockets a kerchief and two live rounds of .38 cartridges was wrapped into a kerchief.' Finally the [defendant] said that later that day when other policemen and himself returned to the scene, they were informed that relatives of the slain man recovered the gun but had thrown it away.

C "On the Crown's case, this amounted to a callous killing, an execution of Barnes by the [defendant] and another police officer, for the slain man had his hands raised in surrender but was nevertheless cut down. On the defence side, this was a plain case of self-defence. Policemen who were instructed to investigate a report of a dangerous gunman in their neighbourhood allegedly committing a breach of the peace, were fired upon and had returned the fire resulting in his death."

D At the conclusion of the defence case the only live issue for the jury was whether the prosecution had proved that the defendant had not killed in self-defence. The first ground of appeal before the Court of Appeal in Jamaica, and the only ground with which their Lordships are concerned, was that the trial judge had misdirected the jury on the issue of self-defence. No criticism can be made of the trial judge; his direction
E to the jury was in accordance with a recent decision of the Court of Appeal in Jamaica. The Court of Appeal likewise considered themselves bound by their previous decision and dealt succinctly with the defendant's submission:

F "A ground of appeal, which may be dealt with shortly, challenged the trial judge's directions to the jury with respect to self-defence. Mr. Phipps submitted that the trial judge's direction that—'A man who is attacked in circumstances where he reasonably believes his life to be in danger or that [he] is in danger of serious bodily injury may use such force as on reasonable grounds he thinks necessary in order to resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing is intentional'—was wrong in law as being against the weight of
G current authorities in the United Kingdom. The test suggested in the extract was the reasonable man's assessment of circumstances that would make defensive action necessary. He submitted that the true principle of law is that the test is the [defendant's] assessment of all the circumstances and the question of what is reasonable is merely to be used in determining whether the [defendant's] assertion as to the belief he holds is honest or not.

H "We accept that there appears to be two schools, the 'reasonable belief' on the one hand and the 'honest belief' on the other. Be that as it may, in our judgment this point is concluded by a recent decision of the court, *Reg. v. Barrett (Arthur)* (unreported) (Supreme Court Criminal Appeal No. 133/84), delivered on 31 May 1985, in which the same point was canvassed by the same counsel. We can see no warrant whatever to depart from that decision or to amplify

or alter the reasons on which it is based. We are content to say that the directions of the trial judge on this aspect of the case are in keeping with the law as we conceive it to be in this jurisdiction. This ground of appeal therefore fails.”

It is accepted by the prosecution that there is no difference on the law of self-defence between the law of Jamaica and the English common law and it therefore falls to be decided whether it was correctly decided by the Court of Appeal in *Reg. v. Williams (Gladstone)* (1983) 78 Cr.App.R. 276 that the defence of self-defence depends upon what the accused “honestly” believed the circumstances to be and not upon the reasonableness of that belief—what the Court of Appeal in Jamaica referred to as the “honest belief” and “reasonable belief” schools of thought.

There can be no doubt that prior to the decision of the House of Lords in *Reg. v. Morgan* [1976] A.C. 182 the whole weight of authority supported the view that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. No elaborate citation of authority is necessary but counsel for the Crown rightly drew attention to such 19th century authorities as *Foster's Case* (1825) 1 Lew. 187; *Reg. v. Weston* (1879) 14 Cox C.C. 346 and *Reg. v. Rose* (1884) 15 Cox C.C. 540 in which the judges charged the jury that self-defence provided a defence to a charge of murder if the accused honestly and on reasonable grounds believed that his or another's life was in peril. It is however to be remembered that it was not until 1898 that an accused was able to give evidence in his own defence and it is natural that the judges in the absence of any direct statement of his belief from the accused should have focused attention upon the inference that could be drawn from the surrounding circumstances. Nevertheless, even after 1898 the law of self-defence continued to be stated as propounded by the judges in the 19th century: see *Reg. v. Chisam* (1963) 47 Cr.App.R. 130 in which Lord Parker C.J., at p. 133, approved the following statement of the law in *Halsbury's Laws of England*, 3rd ed., vol. 10 (1955) (Criminal Law), p. 723, para. 1382:

“Where a forcible and violent felony is attempted upon the person of another, the party assaulted, or his servant, or any other person present, is entitled to repel force by force, and, if necessary, to kill the aggressor. There must be a reasonable necessity for the killing, or at least an honest belief based upon reasonable grounds that there is such a necessity.”

In *Reg. v. Fennell* [1971] 1 Q.B. 428, 431, Widgery L.J., who was soon to succeed Lord Parker C.J. as Lord Chief Justice, said:

“Where a person honestly and reasonably believes that he or his child is in imminent danger of injury it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact.”

The question then is whether the present Lord Chief Justice, Lord Lane, in *Reg. v. Williams (Gladstone)*, 78 Cr.App.R. 276 was right to depart from the law as declared by his predecessors in the light of the decision of the House of Lords in *Reg. v. Morgan* [1976] A.C. 182. *Reg.*

- A *v. Morgan* was a case of rape and counsel for the Crown had submitted that the decision of the majority turned solely upon their view of the specific intention required for the commission of that crime and accordingly had no relevance to the law of self-defence. It was further submitted that the question now before their Lordships was settled by an earlier decision of the Privy Council in *Palmer v. The Queen* [1971] A.C. 814. This submission is founded upon the fact that Lord Morris of Borth-y-Gest in giving the judgment of the Board set out a very lengthy passage from the summing up of the judge and commented, at p. 824:
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- C “Their Lordships conclude that there is no room for criticism of the summing up or of the conduct of the trial unless there is a rule that in every case where the issue of self-defence is left to the jury they must be directed that if they consider that excessive force was used in defence then they should return a verdict of guilty of manslaughter. For the reasons which they will set out their Lordships consider there is no such rule.”

- The only question raised for the determination of the Board was that stated by Lord Morris of Borth-y-Gest. It is true that, in the passage quoted from the summing up the judge had stated the ingredients of self-defence in the then conventional form of reasonable belief; but it was not this part of his summing up that was under attack nor did it receive any particular consideration by the Board. Their Lordships are unable to attach greater weight to the approval of the summing up than as indicating that it was in conformity with the practice of directing juries that the accused must have reasonable grounds for believing that self-defence was necessary.
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- E In *Reg. v. Morgan* [1976] A.C. 182 each member of the House of Lords held that the mens rea required to commit rape is the knowledge that the woman is not consenting or recklessness as to whether she is consenting or not. From this premise the majority held that unless the prosecution proved that the man did not believe the woman was consenting or was at least reckless as to her consent they had failed to prove the necessary mens rea which is an essential ingredient of the crime. Lord Edmund-Davies in his dissent, at pp. 221–235, referred to the large body of distinguished academic support for the view that it is morally indefensible to convict a person of a crime when owing to a genuine mistake as to the facts he believes that he is acting lawfully and has no intention to commit the crime and therefore has no guilty mind. He expressed his preference for this moral approach but felt constrained by the weight of authority, including the cases on self-defence, to hold that the law required the accused’s belief should not only be genuine but also based upon reasonable grounds.
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- H In *Reg. v. Kimber* [1983] 1 W.L.R. 1118 the Court of Appeal applied the decision in *Reg. v. Morgan* to a case of indecent assault and held that a failure to direct the jury that the prosecution had to make them sure that the accused had never believed that the woman was consenting was a misdirection. Lawton L.J. in the course of his judgment rejected the submission that the decision in *Reg. v. Morgan* was confined to rape and clearly regarded it as of far wider significance. Commenting upon an obiter dictum in *Reg. v. Pheko* [1981] 1 W.L.R. 1117, 1127, he said, at p. 1123:

“the court went on, after referring to *Reg. v. Morgan*, to say, clearly obiter, *per* Hollings J. at p. 1127H: ‘It seems to us clear that

this decision was confined and intended to be confined to the offence of rape.' We do not accept that this was the intention of their Lordships in *Morgan's* case. Lord Hailsham of St. Marylebone started his speech by saying that the issue as to belief was a question of great academic importance in the theory of English criminal law."

In *Reg. v. Williams (Gladstone)*, 78 Cr.App.R. 276 the decision in *Reg. v. Morgan* [1976] A.C. 182 was carried a step further and in their Lordships' view to its logical conclusion. The facts and the grounds of the decision are adequately summarised in the headnote, at p. 276:

"One M. saw a black youth rob a woman in a street. He caught the youth and held him, but the latter broke from M.'s grasp. M. caught the youth again and knocked him to the ground. The appellant, who had only seen the later stages of the incident, was told by M. that he, M., was arresting the youth for mugging a woman. M. said that he was a police officer, which was untrue, so when asked by the appellant for his warrant card, he could not produce one. A struggle followed and the appellant assaulted M. by punching him in the face and was charged with assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861. His defence was that he honestly believed that the youth was being unlawfully assaulted by M. The jury were directed that, on the assumption that M. was acting lawfully, the appellant's state of mind on the issue of defence of another was to be determined by whether the appellant had an honest belief based on reasonable grounds that reasonable force was necessary to prevent a crime. The appellant was convicted and appealed on the ground that the judge had misdirected the jury.

"*Held*, that the jury should have been directed that, first, the prosecution had the burden of proving the unlawfulness of the appellant's actions; secondly, if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellant's belief was material to the question whether the belief was held by him at all. If the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant. Accordingly, the appeal must be allowed and the conviction quashed."

In the course of his judgment Lord Lane C.J. discussing the offence of assault said, at p. 280:

"The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more."

And later in the judgment, at p. 280, he expressly disapproved the decision of the Divisional Court in *Albert v. Lavin* [1982] A.C. 546 in which it was said that the word "unlawful" was tautologous and not part of the definitional element of assaulting a police officer in the course of his duty. In so doing Lord Lane C.J. was expressing the same view of *Albert v. Lavin* that had been previously expressed by Lawton L.J. in *Reg. v. Kimber* [1983] 1 W.L.R. 1118, 1122-1123.

A The common law recognises that there are many circumstances in which one person may inflict violence upon another without committing a crime, as for instance, in sporting contests, surgical operations or in the most extreme example judicial execution. The common law has always recognised as one of these circumstances the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict violence on another in so doing. If no more force is used than is reasonable to repel the attack such force is not unlawful and no crime is committed. Furthermore a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.

B It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that self-defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful.

C If then a genuine belief, albeit without reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully. Their Lordships therefore approve the following passage from the judgment of Lord Lane C.J. in *Reg. v. Williams (Gladstone)*, 78 Cr.App.R. 276, 281, as correctly stating the law of self-defence:

E “The reasonableness or unreasonableness of the defendant’s belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. F In other words the jury should be directed first of all that the prosecution have the burden or duty of proving the unlawfulness of the defendant’s actions; secondly, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; thirdly, that is so G whether the mistake was, on an objective view, a reasonable mistake or not.

H “In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant’s alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it.”

Looking back, *Reg. v. Morgan* [1976] A.C. 182 can now be seen as a landmark decision in the development of the common law returning the law to the path upon which it might have developed but for the inability of an accused to give evidence on his own behalf. Their Lordships note that not only has this development the approval of such distinguished criminal lawyers as Professor Glanville Williams and Professor Smith: see *Textbook of Criminal Law*, 2nd ed. (1983), pp. 137–138, and *Smith and Hogan, Criminal Law*, 5th ed. (1983), pp. 329–330; but it also has the support of the Criminal Law Revision Committee: see Fourteenth Report on Offences against the Person (1980) (Cmnd. 7844) and of the Law Commission: see A Report to the Law Commission on Codification of the Criminal Law (1985) (Law Com. No. 143).

There may be a fear that the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self-defence. The English experience has not shown this to be the case. The Judicial Studies Board with the approval of the Lord Chief Justice has produced a model direction on self-defence which is now widely used by judges when summing up to juries. The direction contains the following guidance:

“Whether the plea is self-defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view, a reasonable mistake or not.”

Their Lordships have heard no suggestion that this form of summing up has resulted in a disquieting number of acquittals. This is hardly surprising for no jury is going to accept a man's assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances. In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held.

Their Lordships therefore conclude that the summing up in this case contained a material misdirection and answer question 1(a) by saying that the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another. It follows from this that their Lordships answer the second part of the question 1(b) in the negative.

Their Lordships received a powerful submission from the prosecution that notwithstanding the misdirection they should nevertheless apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act and dismiss the appeal on the ground that no substantial miscarriage of justice had actually occurred. It was submitted that the jury must have accepted the evidence of Peart that the deceased had been shot down in the act of surrender and rejected the defendant's account that he was killed in a gun battle, which the judge had clearly directed them would amount to self-defence. Their Lordships have given anxious consideration to this submission for there is much force in it. If on the facts as they appear from the summing up the judge had left the matter to the jury on the basis of a choice between the two accounts then any misdirection

A as to the reasonableness or otherwise of the defendant's belief would have been of only academic interest.

B However the judge did not leave it to the jury as a choice between the two accounts, for he clearly thought that there was a further possibility, namely that the defendant mistakenly believed that the deceased was armed and would shoot him if he did not shoot first. It is not readily apparent why the judge regarded this as a possible view of the facts, but their Lordships have no transcript of the evidence and must accept the view of the judge that the facts were open to such an interpretation. Directing the jury on this alternative the judge said:

C "The other situation is this, if you say you don't find that he had a gun, but we are satisfied that the accused reasonably believed that the man had a gun and that he reasonably apprehended danger to himself because of the belief which he held, and if in those circumstances he used reasonable force to prevent that danger which he reasonably apprehended, in those circumstances he would also be entitled to acquittal. And if you are in doubt about that as well, he must also be acquitted. If you are in doubt about whether or not he reasonably believed that the man had a gun, you must acquit him as well. I don't think I can put it any plainer.

D "So then, what are the verdicts which are open to you on this case? There are only two, namely, guilty of murder as charged, or not guilty of murder. Those are the only two verdicts that I leave to you on these facts.

E "One other thing before I ask you to retire, when you come to consider—remember I told you that you must consider all circumstances of the case, all the circumstances of the case includes all the circumstances that exist in the Jamaica of today, you cannot divorce that from your mind, because when you come to consider the question of reasonableness, that is a factor to be considered; the Jamaica today that we live in. But when I tell you that, you must consider that, it doesn't mean that a man is entitled to say that because the Jamaica in which we live today many people are armed with guns and many people are out there with guns, a man can just come and say I believe because we live in Jamaica today and so many guns are around and firing willy-nilly, he must reasonably, that is the test, reasonably believe and he must believe that he had reasonable cause to act as he did. So it is not just a matter of saying to yourselves, plenty man have gun in Jamaica today, so when I see a man running I believe him have a gun and shoot him down. That is not the test, the test is reasonableness, but of course, you consider it, the situation in the country today when you come to consider the reasonableness of his belief."

H In this passage the judge is emphasising time and again that the defendant's belief had to be held on reasonable grounds, and it was the final passage of his summing up before the jury retired. As counsel for the defendant said, the jury retired with the test of reasonable belief ringing in their ears. In these circumstances their Lordships cannot feel with that utter certainty that is required in a case of capital murder that the jury would necessarily have returned the same verdict if they had been directed in terms of "honest" as opposed to "reasonable" belief.

Before parting with this appeal there is one further matter upon which their Lordships wish to comment. The defendant chose not to

give evidence but to make a statement from the dock which, because it cannot be tested by cross-examination, is acknowledged not to carry the weight of sworn or affirmed testimony. Their Lordships were informed, to their surprise, by counsel for the Crown, that it is now the practice, rather than the exception, in Jamaica for an accused to decline to give evidence in his own defence and to rely upon a statement from the dock, a privilege abolished in this country by section 72 of the Criminal Justice Act 1982. Now that it has been established that self-defence depends upon a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an "honest" belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination.

Solicitors: Philip Conway Thomas & Co.; Charles Russell & Co.

S. S.

[COURT OF APPEAL]

TURTON v. TURTON

1987 Jan. 13;
March 12

Kerr and Nourse L.JJ.

Trust for Sale—Family home—Valuation date for shares—House bought in joint names of unmarried couple—No financial contribution by woman—Express trust in conveyance—Parties entitled to one half share of sale proceeds—Parties ceasing to live together—Whether shares to be valued at date of separation or disposal of house

The defendant and the plaintiff, who had been living together as husband and wife for some time, bought a house in 1972. The conveyance contained an express trust to sell the house with provision for the proceeds of sale to be held in trust for them as joint tenants beneficially. The joint tenancy was later severed and they held the house as tenants in common. The defendant contributed £3,000 of the purchase price of £8,500. The rest was raised by a mortgage to a building society. Although the plaintiff contributed nothing it was accepted that the express declaration of trust in the conveyance defined her beneficial interest in the house at the date of its acquisition. The plaintiff left the house in August 1975. She brought an action in the county court in August 1983 seeking a declaration that the house was held on trust for sale for the parties as beneficial tenants in common in equal shares and for an order for sale. The judge made the declaration, ordered sale and further ordered that the plaintiff's half share was to be valued as at August 1975 when the parties separated.

On appeal by the plaintiff:—

Held, allowing the appeal, that where the parties' respective interests in the property could be defined at the date of its

B as the separation of an unmarried couple, and that, accordingly, the plaintiff was entitled to the value of her half share at the date of the sale of the house (post, pp. 629A-B, 630E-F, H—631A, G-H, 632B-C, 633B-D, G—634A).

Hall v. Hall (1981) 3 F.L.R. 379, C.A. disapproved in part.

Per Nourse L.J. It is undesirable that in a case of this kind an order of the court should be drawn up in such a way that it embodies the whole of the judgment (post, pp. 626H—627A).

Bernard v. Josephs [1982] Ch. 391; [1982] 2 W.L.R. 1052; [1982] 3 All E.R. 162. C.A.

D *Burns v. Burns* [1984] Ch. 317; [1984] 2 W.L.R. 582; [1984] 1 All E.R. 244, C.A.

Goodman v. Gallant [1986] Fam. 106; [1986] 2 W.L.R. 236; [1986] 1 All E.R. 311, C.A.

Hall v. Hall (1981) 3 F.L.R. 379, C.A.

E *Hall v. Hall* (1981) 3 F.L.R. 379, C.A.
Munday v. Robertson (unreported), 18 April 1973; Court of Appeal (Civil Division) Transcript No. 169 of 1973. C.A.

Leake (formerly Bruzzi) v. Bruzzi [1974] 1 W.L.R. 1528; [1974] 2 All E.R. 1196, C.A.

F 1196, C.A.

The plaintiff, Carol Ann Turton, issued an originating application in county court against the defendant, Edward Sydney Turton, seeking, *inter alia*, (1) a declaration that on its true construction the conveyance dated 20 January 1972 of the house known as 64, Ludlow Road, Itchen, Southampton, conveyed the house on trust for sale for the plaintiff and defendant as beneficial tenants in common in equal shares and (2) an order for sale of the house and further ancillary relief. The house was bought by the parties in their joint names when they were living together but had not married. The plaintiff left the house in August 1975.

G dated 20 January 1972 of the house known as 64, Ludlow Road, Itchen, Southampton, conveyed the house on trust for sale for the plaintiff and the defendant as beneficial tenants in common in equal shares and (2) an order for sale of the house and further ancillary relief. The house was bought by the parties in their joint names when they were living together but had not married. The plaintiff left the house in August 1975.

H On 13 May 1986 Judge McKinney made the declaration sought and ordered the sale of the house. She further declared that the relevant date to value the plaintiff's one half share in the house and the net proceeds of sale thereof was August 1975, when the parties separated.

By a notice of appeal dated 5 June 1986 the plaintiff appealed on the grounds that (1) the proper date to value her one half share in the house and the net proceeds of sale thereof and the net rents and profits thereof until sale, to which she was entitled was the date of sale or, if earlier,

the date of any purchase by the defendant of the plaintiff's share; (2) the judge was wrong in law in holding that the relevant date to value the plaintiff's share was, or ought to be, August 1975, when the parties separated; and (3) the judgment of the judge so far as it concerned the date on which the plaintiff's one half share in the house and in the net proceeds of sale thereof and the net rents and profits thereof until sale ought to be valued was wrong and ought to be set aside.

The facts are set out in the judgment of Nourse L.J.

Geoffrey Jaques for the plaintiff.

Keith Cutler for the defendant.

Cur. adv. vult.

12 March. The following judgments were handed down.

NOURSE L.J. This is an appeal from a decision of Judge McKinney given on 13 May 1986 in the Southampton County Court in a dispute between an unmarried couple as to the beneficial ownership of a house in which they formerly lived together.

The conveyance of the house made express provision for the proceeds of its sale to be held in trust for the parties as beneficial joint tenants. That tenancy was afterwards severed. The man contended that the woman's beneficial interest had been obtained by fraud, alternatively that there had been a total failure of consideration, but those contentions were rejected on the facts. The judge declared that the parties held the property on trust for themselves as tenants in common in equal shares. She also made an order for its sale. However, in seeming reliance on the decision of this court in *Hall v. Hall* (1981) 3 F.L.R. 379, she directed that the woman's share of the proceeds of sale should be quantified by reference to the value of the property when the parties ceased to live together in 1975. That would mean that her share of the net proceeds would be far less than one half. The woman has now appealed to this court, contending that the judge's direction was not one which could properly be made.

The absence of any cross-appeal against the judge's findings enables the material facts to be stated with some brevity. The appellant, Carol Ann Turton ("the plaintiff"), and the defendant, Edward Sydney Turton, met in the late 1960's and a relationship developed between them. From about December 1969 or January 1970 until August 1975 they lived together as man and wife at various addresses in and around Southampton. The judge found that marriage between them was never contemplated. When they started to live together the plaintiff was aged about 28 and the defendant about 37. The plaintiff was then married to another. That marriage, of which there were no children, was dissolved in 1972 or 1973. At about the time of the divorce the plaintiff took the defendant's surname by deed poll. The defendant was a bachelor.

By a conveyance dated 20 January 1972 the property in dispute, No. 64, Ludlow Road, Itchen, Southampton, was conveyed to the plaintiff and the defendant for an estate in fee simple. So far as material, clause 2 of the conveyance was in the following terms:

"The purchasers hereby declare as follows: (a) the purchasers shall stand possessed of the premises hereby conveyed upon trust to sell

A the same . . . and shall stand possessed of the net proceeds of sale . . . and of the net rents and profits until sale . . . in trust for the purchasers as joint tenants beneficially."

The property consisted of a shop with living accommodation above. The purchase included the goodwill of the business of a grocery and general stores which was then carried on from the shop, and also certain shop equipment, fixtures and fittings. The purchase price was £8,500, apportioned as to £7,500 to the property and £1,000 to the goodwill and assets of the business. The defendant found £3,000 (and, it is to be assumed, the additional amount required to discharge the expenses of the purchase) out of his own resources. The balance of £5,500 was raised on a mortgage of the property with the Portsmouth Building Society which was executed by the plaintiff and the defendant on the same day. Although the plaintiff contributed nothing to the purchase, the defendant now accepts that the express declaration of trust contained in the conveyance conclusively defined the parties' respective beneficial interests in the property at the date of its acquisition. Any lingering doubts which there may have been on that score have finally been dispelled by the recent decision of this court in *Goodman v. Gallant* [1986] Fam. 106.

In or about August 1975 the plaintiff left the property and the parties ceased to live together. All the instalments payable under the mortgage, both before and after 1975, were paid by the defendant. The mortgage was redeemed on 30 December 1981. By a notice in writing dated 18 September 1982 and given by the plaintiff to the defendant pursuant to the proviso to section 36(2) of the Law of Property Act 1925, the beneficial joint tenancy in the property was duly severed.

By her originating application issued in the county court on 15 August 1983 the plaintiff claimed the following relief: (1) a declaration that the plaintiff and the defendant hold no. 64, Ludlow Road upon trust for sale and in trust for themselves as beneficial tenants in common in equal shares; (2), (3) and (4) an order for sale and orders ancillary thereto; (5) (i) an account of the mortgage instalments paid by the defendant between August 1975 and 30 December 1981 and (ii) an inquiry whether the defendant ought to pay a rent, and if so what rent, in respect of his occupation of the property between August 1975 and his vacation thereof; and (6) an order that the net proceeds of sale be paid to the plaintiff and the defendant in equal shares, subject to such deduction as may become appropriate on the taking and making of the account and inquiry respectively.

The trial took place before Judge McKinney on 27 and 28 January 1986. We were told by Mr. Jaques, who has appeared for the plaintiff both here and below, that it was agreed between counsel that the judge should be asked to deal first with the plaintiff's claims for a declaration and an order for sale. Thus, no evidence was led in relation to the account and inquiry and there was no argument either as to those matters or as to any consequential adjustments to the shares of the net proceeds of sale. Most important of all for present purposes, there was no argument as to whether the plaintiff's share of the proceeds, assuming that she was found to have one, should be quantified by reference to the value of the property at some date other than that on which it was realised.

The judge's reserved judgment was delivered on 13 May 1986. It had been typed up beforehand and copies of it were handed to the parties after it had been read. Having carefully considered the evidence and having rejected the defendant's contentions on the facts, the judge said:

"I find that the plaintiff is entitled to the declaration that she seeks that she and the defendant hold the property upon trust for themselves as beneficial tenants in common in equal shares. The relevant date for valuing those shares in my view is August 1975 when the parties ceased cohabitation because in the circumstances of the case this in my view is when the purpose of the trust expired. This is not a case where, for example, the property continued to be a family home after the parties had separated or where the plaintiff had contributed financially to the purchase of the property after separation when post-separation circumstances might have become relevant for consideration. The defendant through his counsel has complained of the delay by the plaintiff in seeking orders. The defendant himself took no steps to clarify the rights of the parties; doubtless the value of the property has increased considerably since the date of separation. In my view by taking the value of the equity as it was in 1975 and the plaintiff receiving an equal share of that value, the justice of the case will be met. I have in this regard taken into account *Bernard v. Josephs* [1982] Ch. 391."

The judge then said that the plaintiff was entitled to an order for sale so that her interest could be realised. However, she postponed the effect of the order for three months so that the defendant could consider whether it was open to him to buy the plaintiff out when the 1975 valuation had been ascertained. Then she said that in the light of her judgment paragraphs (5) and (6) of the application did not fall to be considered. Having delivered judgment, the judge ordered the defendant to pay the plaintiff's costs to be taxed on Scale 3 and not to be enforced without the leave of the court. She also ordered a legal aid taxation of the costs of each side.

We were told by Mr. Jaques that it was not until he had had an opportunity of fully considering the judgment that it came home to him that the victory which he thought had been his client's had largely been taken from her by the judge's direction that her share should be quantified by reference to the value of the property in August 1975. However, when his instructing solicitors communicated with the court office on the same or the following day with a view to seeking an opportunity to argue that question further, they were told that the order had already been drawn up. This raises an incidental, but unsatisfactory, feature of the case which should not be allowed to pass without comment. The order appears to have been drawn up on the day on which judgment was delivered. The front page of the order is in the usual form, but the only substantive orders there made are the orders for costs. Those orders are preceded by the formula: "And upon the written judgment being given." The order then embodies the judgment, as appears from the fact that the court stamp has been placed on the first page of a copy of the judgment, as it has been on the front page of the order. In other words, it appears that the second and subsequent pages of the order are the first and subsequent pages of the judgment. Unless there is some established practice in the county court of which I am unaware, it seems to me to be undesirable that an order of the court

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A in a case of this kind should be made in that form. Not only does it result in the order being unnecessarily long and difficult to abstract, there must also be a risk that there will be some question as to its true effect which could have been avoided if it had been drawn in the usual way.

B Once the order had been entered the plaintiff's only remedy was to come to this court. Her reasons for wishing to get rid of the judge's direction can be understood from a glance at the following figures. The value of the property in August 1975 was about £10,000. Its 1987 value is about £35,000. The capital element in the mortgage instalments which were paid between August 1975 and 30 December 1981 was about £5,000. Assuming for this purpose only that the defendant is entitled to be credited with the £5,000 without at the same time being debited in respect of his occupation of the property after August 1975, I think it is clear that the potential loss to the plaintiff is considerable. If the property is valued at £10,500, her share, after deducting £5,000, will be worth only £2,750. If, on the other hand, the net proceeds of sale amount to £35,000 then, after deducting £5,000, her share will be worth £15,000. The point is therefore one of great importance to the plaintiff. It is of equal importance to the defendant because, although he might well be able to raise £2,750 to buy out the plaintiff, he could not raise £15,000 or anything like it.

D As appears from the passage already quoted from her judgment, Judge McKinney held that the relevant date for valuing the parties' shares in the property was when they ceased to live together in August 1975. The reason she gave was that that was when the purpose of the trust expired. That shows, I think, that she was relying on the decision of this court in the comparable case of *Hall v. Hall*, 3 F.L.R. 379. The question is whether that was something which she could properly do.

E The principal distinction between *Hall v. Hall* and the present case is that there the house had been conveyed into the sole name of the man. That meant that the woman could only achieve a beneficial interest in it if she was able to bring herself within the principles stated in *Gissing v. Gissing* [1971] A.C. 886. It had been conceded in the court below that the woman did have some beneficial interest in the house, although both the concession and some observations of Lord Denning M.R. on that part of the case have since been criticised: see *Burns v. Burns* [1984] Ch. 317. The judge held that the woman was entitled to a one fifth share and that holding was affirmed in this court. I respectfully doubt whether that part of the decision is now of any authoritative value, but that is not a question which has to be further considered in the present case.

G The second and material part of the decision in *Hall v. Hall* can best be understood from the judgment of Lord Denning M.R., 3 F.L.R. 379, 381-382:

H "The next question is new. At what time should her share be taken to be realised? Should it be taken at the time when she left in 1978? Or should it be taken at the time of the hearing before the court? In the meantime this house has increased in value. At the time she left in 1978 the equity was £15,000-odd. Now it is £24,000-odd. The woman says that her share should be taken as at the date of the hearing. But the judge said it should be one fifth at the time when she left—when the parties separated. Even so, he said that interest

should be allowed at 10 per cent. over the intervening period. That is a nice point. If it were husband and wife, their relationship was intended to be permanent. The trust should continue during the continuance of that relationship. The trust should not be deemed to be extinguished until the relationship is extinguished. But, in a case of this kind, the relationship comes to an end when the parties separate—whoever orders the other out. This is supported by some observations of this court in *Munday v. Robertson* (unreported), 18 April 1973, Court of Appeal (Civil Division) Transcript No. 169 of 1973. It was pointed out that, in a situation like this, although the house has increased in value, the man has been living in it, keeping up the mortgage payments, keeping it in repair, and the like. Any increase in value is therefore largely due to his efforts in keeping the house going, rather than selling it. In view of the guidance in *Munday v. Robertson*, and viewing it in the same way as the judge did, it seems to me that he was quite entitled to treat the trust as extinguished at the time of the separation. He said that he thought it was illogical that the woman should be able to enjoy the benefit of the present value which had been brought about by inflation after she had left what was never a permanent relationship. He went on to make this important observation: ‘She gets the benefit of her new set-up and I see no reason why she should continue to benefit.’ So there it is. She gets the benefit of her new relationship. For all I know, she may be getting the benefit of any inflation in the house in which she now lives. It seems to me that the judge was quite entitled—it would be a matter for his discretion—to treat the trust as being extinguished and the shares to be ascertained as at the date of the separation.”

Dunn L.J. said, at p. 385:

“So far as the date for the assessment or valuation of the share is concerned, as Lord Denning M.R. said in *Cooke v. Head* [1972] 1 W.L.R. 518, 521, in the case of a mistress that fell to be assessed at the date of separation. I respectfully agree that, although there may be different considerations when dealing with a resulting trust as between husband and wife, in the case of a mistress the trust comes to an end at the termination of the relationship which gave rise to the trust in the first place. Accordingly, I would hold that the judge was quite right in taking the date of separation as the relevant date in this case. He in fact gave interest for the period between the date of separation and the date of the hearing. I think that he was right to do so and, speaking for myself, I cannot fault his reasoning as to the date when the assessment of the proportion is made.”

O'Connor L.J. agreed with both judgments.

This part of the decision in *Hall v. Hall*, 3 F.L.R. 379 has also caused difficulties in subsequent cases. We were referred to three decisions of this court in which it was relied on in argument but not applied by the court. The fullest and most recent consideration of it is to be found in the judgment of Dillon L.J. in *Walker v. Hall* [1984] F.L.R. 126, 131–133, where reference is made to the subsequent decisions in *Bernard v. Josephs* [1982] Ch. 391 and *Gordon v. Douce* [1983] 1 W.L.R. 563 and also to the earlier decision of this court in *Munday v. Robertson* (unreported), 18 April 1973; Court of Appeal (Civil Division)

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- A Transcript No. 169 of 1973. In agreement with the view which had been expressed by Fox L.J. in *Gordon v. Douce*, Dillon L.J. concluded that *Hall v. Hall* did not establish a rigid rule, but only that the court had a discretion as to valuation in cases concerned with unmarried couples. However, both he and Lawton L.J. (with whose judgments Kerr L.J. agreed) went on to express views from which it seems necessarily to follow that there is in truth no discretion in the matter at all and that the shares can only be valued at the date of realisation.

B Since the views of Dillon and Lawton L.J. are of great importance in a class of case which is now very common and since the consequences of them may not yet have been fully appreciated, the material passages in their judgments must be set out at length.

In *Walker v. Hall* [1984] F.L.R. 126, 132–133, Dillon L.J. said:

- C “As it seems to me, the true position is that when Mrs. Walker left 33 Foxberry Road and her cohabitation with Mr. Hall ceased the purpose of the trust, in the sense of the purpose for which 33 Foxberry Road was bought, came to an end in that 33 Foxberry Road would no longer be used as a family home for Mr. Hall and Mrs. Walker and the children. But the trust for sale, imposed by statute as a result of the transfer of the property into joint names, did not come to an end but would inevitably continue until either the property was sold in execution of the trust for sale in order to satisfy the beneficial interests of the parties, or one party, by buying the other out, became solely and absolutely entitled to the property in equity. A fortiori, the beneficial interests of both parties, established by their contributions to the original purchase of the property, would not automatically cease or be quantified as fixed sums on the cesser of cohabitation. Unfettered by *Hall v. Hall*, I see no reason, in the circumstances of this case, why Mrs. Walker’s interest in 33 Foxberry Road should be valued or quantified at the date when she left. It should be valued at the present time, if Mr. Hall is to buy her out, or she should take the appropriate fractional share of the actual proceeds of sale if the property is sold. I see no hardship to Mr. Hall in this since he, too, will benefit proportionately from the rise in the value of the property from 1973 until now.”

Lawton L.J. said, at pp. 135–136:

- G “During the past two decades the courts have had to consider on a number of occasions the division of property between men and women living together without being married. Ever since the Matrimonial Proceedings and Property Act 1970, which has been replaced by the Matrimonial Causes Act 1973, the courts have been able to make an equitable division of property between spouses when a marriage breaks down and a decree of divorce is pronounced. No such jurisdiction exists when the cohabitantes are unmarried. H When such a relationship comes to an end, just as with many divorced couples, there are likely to be disputes about the distribution of shared property. How are such disputes to be decided? They cannot be decided in the same way as similar disputes are decided when there has been a divorce. The courts have no jurisdiction to do so. They have to be decided in accordance with the law relating to property: see *Pettitt v. Pettitt* [1970] A.C. 777 and *Gissing v. Gissing* [1971] A.C. 886.

"There is no special law relating to property shared by cohabitees any more than there is any special law relating to property used in common by partners or members of a club. The principles of law to be applied are clear, though sometimes their application to particular facts are difficult. In circumstances such as arose in this case the appropriate law is that of resulting trusts. If there is a resulting trust (and there was one in this case) the beneficiaries acquire by operation of law interests in the trust property. An interest in property which is the consequence of a legal process must be identifiable. It must be more than expectations which at some later date require to be valued by a court. A property interest cannot be brought to an end by the happening of an event unrelated to the property interest itself, for example, by the separation of the cohabitees. The interest can be turned into another form of property such as money. This can happen when the trust property is sold or by one of the joint owners buying the interest of the other. Valuing a property interest at a particular time does not turn it into money, although it may be a preliminary to doing so.

"When these general principles are applied to the facts of this case the results are as follows: first, the only way of ascertaining what were the property interests of Mrs. Walker and Mr. Hall is to ascertain what each contributed to creating the trust property. Any other way would require the court to give an opinion as to what the property interest should be in all the circumstances rather than to make a finding on the evidence as to what they were. Secondly, Mrs. Walker's beneficial interests in the house continue until it is sold. It will then be turned into money. For these reasons I agree with Dillon L.J.'s judgment, both as to principles and detail."

It is thus made clear that Dillon and Lawton L.JJ. were of the opinion that a beneficial interest acquired under an application of the principles stated in *Gissing v. Gissing* can only be an absolute and indefeasible interest. It cannot be one which is liable to determine or to be defeated or diminished—either automatically or by the exercise of some discretion—on the happening of some future event, for example the separation of an unmarried couple who were living together at the time of its acquisition. The validity of that proposition is in my judgment beyond doubt.

It must always be remembered that the basis on which the court proceeds is a common intention, usually to be inferred from the conduct of the parties, that the claimant is to have a beneficial interest in the house. In the common case where the intention can be inferred only from the respective contributions, either initial or under a mortgage, to the cost of its acquisition it is held that the house belongs to the parties beneficially in proportions corresponding to those contributions. But the effect of *Hall v. Hall*, 3 F.L.R. 379, as it has now been explained, is to presuppose a completely different intention in the case of an unmarried couple, namely that the original proportions may, at the discretion of the court, be varied by reference to the value of the house if and when they cease to live together. There are two reasons why that cannot be correct. First, it is impossible to see how, on general principles, such an intention can be inferred or implied. The only fair and reasonable inference is that an interest acquired in circumstances such as these is to be absolute and indefeasible. Second and perhaps more important, it is

A of the essence of the principles stated in *Gissing v. Gissing* [1971] A.C. 886 that the court has no discretion in the matter. As Lawton L.J. has pointed out in *Walker v. Hall* [1984] F.L.R. 126, 135, except in cases to which the Matrimonial Causes Act 1973 applies, the function of the court is not to give an opinion as to what the beneficial interests ought to be, but to make a finding on the evidence as to what they are.

B How then did it come about that a different view was taken in *Hall v. Hall*, 3 F.L.R. 379? The arguments of counsel are not reported. Lord Denning M.R. described the question as being a new one. Neither he nor Dunn L.J. said or implied anything to suggest that it had been argued on behalf of the woman that the question was one which could not arise. If that had been argued, the question being a new one, I would have expected to find a reference to it. I think that it is possible
C that the point was never taken. In any event, for the reasons stated, I have to express my respectful opinion that the second part of the decision in *Hall v. Hall* is contrary to the principles stated in *Gissing v. Gissing* [1971] A.C. 836. I am unable to see how it could properly be applied in any other case. I think that it ought no longer to be followed at first instance.

D I have so far approached the matter without regard to the express declaration of trust which was contained in the conveyance to the plaintiff and the defendant in the present case. That approach has been adopted out of deference to the argument of Mr. Cutler on behalf of the defendant, which was to the effect that the second part of the decision in *Hall v. Hall*, 3 F.L.R. 379 applies as much to a case where the beneficial interests are expressly declared as it does to one where they are not. However, the plain truth is that the former case is a fortiori
E to the latter. As authority for that proposition it is only necessary to return to *Goodman v. Gallant* [1986] Fam. 106 and to the following passage in the judgment of the court delivered by Slade L.J. [1986] Fam. 106, 117:

F "In these circumstances the overwhelming preponderance of authority . . . in our judgment both entitle and oblige us to hold that, in the absence of any claim for rectification or rescission, the provision in the conveyance declaring that the plaintiff and the defendant were to hold the proceeds of sale of the property 'upon trust for themselves as joint tenants' concludes the question of the respective beneficial interests of the two parties insofar as that declaration of trust, on its true construction, exhaustively declares the beneficial interests."

G It is obvious that a discretion in the court to quantify the shares of the proceeds of sale by reference to the value of the house at some date other than that on which one or both of them are realised can only operate in derogation of the beneficial interests declared by the conveyance and the subsequent notice of severance.

H For these reasons I would allow the appeal, delete the judge's direction as to valuation and remit the matter to the county court for further consideration under paragraphs (5) and (6) of the originating application. There was some general discussion before us as to possible consequential adjustments. However, I do not think that it is appropriate to do more than to express, first, a belief that the principles on which the adjustments ought to be made involve no discretion on the part of the court and are now well settled by authority and, secondly, a hope that they can be disposed of by agreement between the parties.

The judge evidently thought that the plaintiff, having contributed nothing towards the cost of acquiring the house and having ceased to live with the defendant in 1975 after no more than five or six years together, did not deserve to receive a half share of its current value. That is without doubt a well tenable view of the case to which due respect will be paid. But it must again be emphasised that the ability of the courts to meet the deserts of unmarried couples lies not within the powers which Parliament has given them.

KERR L.J. I agree that this appeal must clearly be allowed on the ground dealt with by Nourse L.J. at the end of his judgment. As shown most recently by the decision of this court in *Goodman v. Gallant* [1986] Fam. 106, an express declaration of trust covering the respective beneficial interests of the parties is conclusive and excludes any possible resulting implied or constructive trust, and with it any possible discretionary jurisdiction relating to the assessment or valuation of the parties' beneficial shares which might otherwise exist. With respect to the judge, the decision of this court in *Bernard v. Josephs* [1982] Ch. 391, to which she referred, was on any view irrelevant. Not only was it concerned with a situation in which there had been no express declaration of trust, but it was also not concerned with any question as to the time when the parties' beneficial interests were to be valued. In *Bernard v. Josephs* it was common ground that the relevant point of time was the date of the sale or notional sale. The relevance of the time of separation was merely that it triggered off the demand by the ousted plaintiff for a sale under section 30 of the Law of Property Act 1925. The court then had to determine the appropriate accounts between the parties, which were in issue. These in turn involved consideration of adjustments which required to be made as the result of the separation, when the house ceased to be their joint home.

But primarily, as pointed out by Nourse L.J., the judge must have been relying on the decision of this court in *Hall v. Hall*, 3 F.L.R. 739, which is admittedly of greater relevance. The second point raised in that case did deal with the discretion which the judge purported to exercise in the present case. But since there was no express declaration of trust in *Hall v. Hall*, and since the discretion cannot co-exist with an express declaration of trust as here, the appeal in the present case must be allowed in any event.

However, although not directly raised by the present case, that leaves the question of the status of *Hall v. Hall* in cases where there is no express declaration of trust. In the light of the arguments addressed to us and of the importance which that decision may be assuming in similar situations, possibly quite frequent, we should express our views on it.

With all due respect to the members of the court in *Hall v. Hall*, I entirely agree with Nourse L.J. that the decision on this point cannot have been correct. It must have been wrong on at least two grounds, quite apart from the fact that the whole case is pervaded by what is now recognised as an untenable approach of differentiating between married and unmarried couples otherwise than on the basis of statutory provisions. The first reason is that, once the court had found the existence of a constructive or implied trust whereby the beneficial rights to the property belonged to the parties in whatever shares the court determined, then the necessary consequence was the recognition by the

A court of rights which are proprietary in their nature and which lie wholly outside the exercise of any discretionary powers. That was made clear, inter alia, in *Gissing v. Gissing* [1971] A.C. 886. The second reason is related to the first. Even if the court retained some discretionary power, it could in any event do no more than to give effect to the parties' intentions to be implied from the circumstances at the time when the trust came into existence. Even on this (mistaken) assumption however, there would be no basis for concluding that when the trust came into existence by reason of the contributions to the acquisition or subsequent improvement of, or expenditure upon, the property, it was the intention of the parties that their respective resulting rights should be valued as at the time when they might separate and one or the other might move out. There would be no ground for attributing any such intention to them unless they had so declared or agreed expressly. In effect, the only intention which could properly be attributed to them would produce the same result as the first ground for concluding that *Hall v. Hall*, 3 F.L.R. 379 was wrongly decided. Their inferred intention could only be that if and when they should separate, then each of them would still have whatever may be their appropriate beneficial share in the property, which would remain until such time as it might be sold or one might buy out the interest of the other. But there would never be any basis for attributing to them any implied intention that their respective shares should be valued specifically at the time of separation. Indeed, this was not the basis of the relevant part of the decision in *Hall v. Hall*, as shown by the extracts from the judgments which Nourse L.J. has cited.

It was not suggested in the arguments before us that *Hall v. Hall*, 3 F.L.R. 379 was decided per incuriam, and I therefore express no opinion about this. But in my view the precise status of the decision makes no difference in practice, although its reversal by the House of Lords at an early opportunity should no doubt be welcomed. The reason, as it seems to me, lies in the second ground which I have sought to state for concluding that *Hall v. Hall* was wrongly decided. Thus, even if it is impossible to consign the decision to limbo on the ground that the only correct analysis is that each of the parties must have had a proprietary interest incapable of being touched by the exercise of any discretion by the court, the exercise of any possible discretion to the same effect as in *Hall v. Hall*, and as in the present case, must in my view always be wrong in principle, and must therefore always be reviewable on appeal. As I have sought to explain above, unless there is some express declaration or agreement to the effect that the parties' respective beneficial shares are to be valued at the time of their separation if and when this should occur, there could never be any sufficient ground for attributing any such intention to them merely by implication from the circumstances. In the result, therefore, the parties' beneficial interests would always have to be regarded in the normal way under a trust for sale, with the effect that they would endure until such time as the property is sold, and that they will then attach to the proceeds of sale. I can see no basis in any event, by the exercise of any discretionary power, for cutting off the effect of the trust at some earlier point in time. The parties' separation will no doubt indicate that the purpose of the implied or constructive trust—to provide a joint home for them both—has failed. But this would merely trigger off a demand for a sale, as in *Bernard v. Josephs* [1982] Ch. 391. It would not give rise to any discretion, in subsequent proceedings to determine the parties'

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respective interests, to impose a valuation of these interests retrospectively by reference to the value of the property at that particular time.

For all these reasons I agree that this appeal should be allowed.

Appeal allowed with costs.

Order as to costs not to be enforced without leave.

Legal aid taxation for both parties.

Solicitors: Baileys Shaw & Gillett for Tozers, Dawlish; Mooring Aldridge & Haydon, Bournemouth.

A. R.

[QUEEN'S BENCH DIVISION]

REGINA v. SECRETARY OF STATE FOR THE HOME
DEPARTMENT, *Ex parte* ROFATHULLAH

REGINA v. SECRETARY OF STATE FOR THE HOME
DEPARTMENT, *Ex parte* ALI

REGINA v. SECRETARY OF STATE FOR THE HOME
DEPARTMENT, *Ex parte* FORIZUDDIN

1987 Jan. 15, 16

Taylor J.

Immigration—Commonwealth immigrant—Patrial's wife—Bangladeshi wife of British citizen seeking entry to United Kingdom without entry clearance—Leave to enter refused—Delay in processing applications for entry clearance in Bangladesh—Secretary of State refusing interview for entry clearance in United Kingdom—Whether refusal restraint of husband's right to enter United Kingdom without let or hindrance—Immigration Act 1971 (c. 77), s. 1(1)

The three applicants were British citizens. On respective visits to Bangladesh the first two applicants married Bangladeshi wives and the third became engaged to a Bangladeshi fiancée whom he subsequently married in the United Kingdom. Applications to the British High Commission in Dacca for entry clearance were at the relevant period subject to a delay of some 13 months. Rather than wait for the processing of their applications each applicant chose to return to the United Kingdom accompanied by his spouse. On arrival the spouses were refused entry by immigration officers. The Secretary of State, in upholding the refusal, also refused to allow the interviews for the purpose of obtaining entry clearance to be

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carried out in the United Kingdom, stating that he considered it unfair to allow the spouses precedence over those who were awaiting their turn in Dacca. The applicants sought judicial review of the Secretary of State's refusals to reverse the decisions of the immigration officers and a declaration that the right of a British citizen to live in the United Kingdom without let or hindrance conferred by section 1(1) of the Immigration Act 1971¹ included the right to marry and live in this country with a spouse and that any delay in the exercise of that right was unlawful.

On the applications for judicial review:—

Held, dismissing the applications, (1) that the right conferred by section 1(1) of the Act of 1971 did not by implication carry with it the right to be accompanied by a spouse or relatives who themselves required leave enter; and that even if it did the requirement that the spouses obtain entry clearance prior to admission to the United Kingdom was lawfully imposed as a requirement to establish the right of abode within the meaning of section 1(1) (post, pp. 639F–G, 640F–G).

Reg. v. Secretary of State for Home Department, Ex parte Akhtar [1975] 1 W.L.R. 1717, D.C. applied.

Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar [1976] Q.B. 606, C.A. distinguished.

(2) That although the delay in processing applications could be lessened by the appointment of more entry clearance officers, the decision as to financial expenditure was one for the political judgment of the Secretary of State and was not a ground for challenging the Secretary of State's decision; and that his refusal to allow the interviews for the purpose of obtaining entry clearance to take place in the United Kingdom was not a decision which no reasonable Secretary of State properly directing himself could have reached (post, pp. 641F–642A).

The following cases are referred to in the judgment:

Reg. v. Chief Immigration Officer at Heathrow Airport, Ex parte Brahmabhatt, The Times, 12 December 1984; Court of Appeal (Civil Division) Transcript No. 464 of 1984, C.A.

Reg. v. Secretary of state for the Environment, Ex parte Nottinghamshire County Council [1986] A.C. 240; [1986] 2 W.L.R. 1; [1986] 1 All E.R. 199, H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Akhtar [1975] 1 W.L.R. 1717; [1975] 3 All E.R. 1087, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar [1976] Q.B. 606; [1975] 3 W.L.R. 322; [1975] 3 All E.R. 497, D.C. and C.A.

No additional cases were cited in argument.

APPLICATIONS for judicial review.

The applicants, Rofathullah, Soifur Rahman ali and Forizuddin, sought judicial review of decisions by the Secretary of State for the Home Department on 18 June 1986, 6 December 1985 and 14 May 1986 respectively to reverse the decisions of immigration officers to grant admission to the United Kingdom to the spouse, and in the case of the

¹ Immigration Act 1971, s. 1(1): see post, p. 637F.

applicant Forizuddin, the fiancée, of the applicants. The applicants sought declaration that the right to come into and to go from the United Kingdom conferred by section 1(1) of the Immigration Act 1971 included the right to marry and live in the United Kingdom with a spouse and that any delay in the exercise of that right was unlawful.

The facts are stated in the judgment.

Alper Riza for the applicants.

David Pannick for the Secretary of State.

TAYLOR J. These are three applications for judicial review. They have been heard together as they all raise the same points. In each the applicant is a British citizen married to a Bangladeshi wife. In each the wife was refused entry into the United Kingdom since she lacked an entry clearance certificate. The decision challenged in each case is the refusal of the Secretary of State to reverse the immigration officer's refusal.

The facts of the three cases can be stated quite shortly. The first applicant, Rofathullah, is 25 years old and was born in Bangladesh. He came to the United Kingdom in 1976 to join his father. He settled here and was registered as a British citizen in 1984. In May 1985 he went back to Bangladesh where he married Nurjahan Begum on 31 August 1985. She was a Bangladeshi citizen. He returned to the United Kingdom with his wife on 5 October 1985. They had made no application for an entry certificate in Dacca before coming to the United Kingdom because they knew that there would be a very considerable delay. On arrival the wife was refused leave to enter on the ground that she had no entry certificate. The assistance of a Member of Parliament was enlisted to seek a reversal of that decision, but by a letter of 6 December 1985 the Secretary of State maintained the refusal.

It is accepted in each of these three cases that the process of being interviewed with a view to obtaining an entry certificate in Dacca at the present time involved something of the order of 13 months' delay.

The second applicant is Soifur Rahman Ali. He is 27 years old. He is a British citizen born in the United Kingdom in Coventry of Bangladeshi parents. He has lived here most of his life, but on 13 March 1986 he married Dina Begum in Bangladesh. On 29 March 1986 he and his wife visited the British High Commission in Dacca and applied for an entry certificate for the wife to join her husband in England. There are letters from the High Commission indicating that no firm date could be given for an interview. The applicant claims that he had to return to the United Kingdom for business reasons and he was unwilling to endure any lengthy delay before his wife could join him. Accordingly he brought her back with him on 5 April 1986. She was given temporary admission whilst her case was considered, but on 4 May she was refused entry again on the ground that she had no entry clearance certificate. Once again the applicant sought help from a Member of Parliament. He also suggested by letter to the authorities that any interview that was necessary in respect of his wife's application for entry clearance might take place in the United Kingdom rather than in Dacca, but again the Secretary of State turned down the application by letter of 18 June 1986.

The third applicant is Forizuddin. He is 20 years old and was born in Bangladesh. He became a registered British citizen on 1 June 1985. He married Ashma Begum, a Bangladeshi citizen, in the United Kingdom

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A on 18 December 1985. She falls to be considered as a fiancée rather than
 as a wife in this case because she had arrived on 23 November seeking
 leave to enter so as to marry the applicant. She was refused leave at that
 stage as she had no entry clearance, but she was granted temporary
 admission. She took advantage of that to marry the applicant and
 thereafter in this case, as in the other two, the assistance of a Member
 of Parliament was sought to try to overturn the decision of the
 B immigration officer. But by a letter of 14 May 1986 the Secretary of
 State refused to change the decision. Special reliance was placed in that
 case upon the fact that the applicant's wife was expecting a child
 imminently at the time that the approach was made to the Secretary of
 State, but unfortunately that child was stillborn in July 1986.

C It is unnecessary to recite the precise terms of the Secretary of
 State's decision in each case, but the rationale of each can perhaps best
 be summarized by referring to the letter which was written in the case of
 Soifur Rahman Ali on 18 June 1986. This paragraph appears in the
 minister's letter:

D "I attach great importance to the entry clearance requirement as an
 essential factor in maintaining an effective immigration control
 which is both firm and fair. It provides not only the opportunity for
 entry clearance officers to check the entitlement of applicants before
 they travel but also ensures that all are dealt with in a fair and
 orderly way. Waiving the requirement would encourage others to
 travel without entry clearance leading to long delays at ports while
 the necessary inquiries were undertaken. For these reasons I am
 prepared to set aside the entry clearance requirement only in
 E exceptional compassionate circumstances."

It is right to say that Mr. Riza does not suggest in these cases that
 there are any exceptional compassionate circumstances.

It is next convenient to look at the statutory provisions and at the
 rules which are relevant. First, reference must be made to section 1 of
 the Immigration Act 1971, which provides:

F "(1) All those who are in this Act expressed to have the right of
 abode in the United Kingdom shall be free to live in, and to come
 and go into and from, the United Kingdom without let or hindrance
 except such as may be required under and in accordance with this
 Act to enable their right to be established or as may be otherwise
 lawfully imposed on any person. (2) Those not having that right
 G may live, work and settle in the United Kingdom by permission and
 subject to such regulation and control of their entry into, stay in
 and departure from the United Kingdom as is imposed by this
 Act . . . (4) The rules laid down by the Secretary of State as to the
 practice to be followed in the administration of this Act for
 regulating the entry into and stay in the United Kingdom of persons
 not having the right of abode shall include provision for admitting
 H (in such cases and subject to such restrictions as may be provided
 by the rules, and subject or not to conditions as to length of stay or
 otherwise) persons coming . . . as dependants of persons lawfully in
 or entering the United Kingdom."

Section 2(1) of the Act, in the form in which it now stands having
 been amended by section 39 of the British Nationality Act 1981, reads:
 "A person is under this Act to have the right of abode in the United

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Kingdom if—(a) he is a British citizen . . .” Section 3, so far as is relevant, reads:

“(1) Except as otherwise provided by or under this Act, where a person is not [a British citizen]—(a) he shall not enter the United Kingdom unless given leave to do so in accordance with this Act . . . (2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter . . .”

The relevant rules are those laid down in the Statement of Changes in Immigration Rules of 9 February 1983 (H.C. 169), as amended by the Statement of Changes in Immigration Rules of 15 July 1985 (H.C. 503). Paragraph 4 of H.C. 169 deals, *inter alia*, with the requirements for entry. The last sentence of paragraph 4 reads: “A person who is neither a British citizen nor a Commonwealth citizen having the right of abode requires leave to enter.” H.C. 503, by paragraph 3, substitutes new paragraphs in relation to the obtaining of entry clearance. It is unnecessary for me to read the provisions in full. Paragraph 8 of H.C. 503 substitutes new paragraphs 41 to 44 in H.C. 169 in respect of fiancées and deals with requirements before they can be admitted for settlement. Those requirements are that they must hold a current entry clearance granted for the purpose of entry and the entry clearance will be refused unless the officer is satisfied of various matters which I can shortly summarise as saying that the marriage is not a marriage of convenience. Similarly paragraph 10 of H.C. 503 substitutes new paragraphs in H.C. 169 in respect of spouses which are in similar terms to those in relation to fiancées.

Mr. Riza accepts that the wives of these applicants do not have a right of entry to the United Kingdom. They do not have a right of abode themselves, nor does the fact that they are married in each case to a British citizen give them any such right. Under the Immigration Act 1971 as originally enacted they would as Commonwealth citizens married to British citizens have had a right of abode themselves pursuant to section 2(2) as it then was. However, section 39(2) of the British Nationality Act 1981 amended the Act of 1971 to remove that right. Now wives and fiancées of British citizens who are themselves Commonwealth citizens require leave to enter the United Kingdom under section 3(1)(a) of the Act of 1971. They are subject to immigration control and to the rules made in pursuance of section 1(2), section 1(4) and section 3(2) of the Act of 1971.

Mr. Riza seeks to meet this problem by basing his case on the rights of the applicant husbands. His principal argument stems from section 1(1) of the Act of 1971. Each of the applicants having a right of abode has a right under that section to live in, come from and go to the United Kingdom without let or hindrance, subject to the exceptions stated. The argument is that if his wife is delayed for months in joining him that constitutes an indirect let or hindrance to the applicant's right. Mr. Riza contends that the right to live in the United Kingdom is not confined to a right of physical presence. It includes by implication, he says, the right to live in the United Kingdom normally with one's wife. He goes further and says not only with one's wife, but with one's children and relatives

A too. Therefore, the delay occasioned by processing entry clearance infringes the husband's right. He recognises that the phrase "without let or hindrance" in section 1(1) is qualified by the words "except as may be otherwise lawfully imposed on any person," but he maintains that once the wife is eligible to come any extensive delay in allowing her to do so is not lawfully imposed.

B Mr. Riza relies on *Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar* [1976] Q.B. 606. There the Court of Appeal ruled that it was unlawful for a wife's certificate of patriality to be delayed without good cause and that a desire by the authorities to be fair to all and avoid queue-jumping was not a valid reason for such delay. However, *Phansopkar's* case was decided when section 2(2) of the Act of 1971 still operated to give the patial's wife a right to come to the United Kingdom. Each member of the Court of Appeal emphasized the difference between one who has a right to come and one who requires leave. Thus Lord Denning M.R. said, at p. 622:

"It is only those who have a simple straightforward case for patriality who should get priority because they are entitled as of right and not by leave."

D Similarly Lawton L.J. said, at p. 623:

"Such rules as have been made under section 3(2) would not apply to patrials including wives coming within section 2(2) as they have a right to enter: they do not require leave to enter."

E The case decided that a wife having a right of abode could not lawfully be delayed in her exercise of it. Here it is common ground that the wives required leave.

F The distinction was underlined in the subsequent case of *Reg. v. Secretary of State for the Home Department, Ex parte Akhtar* [1975] 1 W.L.R. 1717. There the wife was an alien and had therefore no right of abode under section 2(2) even as originally enacted. The court made it clear that the decision in *Phansopkar's* case did not apply to a person who did not have the right of abode.

G In my judgment, the argument based upon section 1(1) in this case is misconceived. However desirable it no doubt is in human terms that husband and wife should live together and should not have to endure long separation, section 1 cannot by implication give the husband a right to have his wife join him forthwith. The Act is concerned to distinguish between different categories of persons for the purposes of immigration. It differentiates between those who have a right of abode and those who require leave. The phrase "without let or hindrance" in section 1 cannot in my view carry with it the right to bring in forthwith a wife or relatives who themselves require leave. If it did there would be no need in section 1(4) to make provision by rules for dependants to come. Moreover, section 2(2), as originally enacted, which gave the Commonwealth wives of British citizens right of abode, would have been otiose. The amendment which replaced it has in any event made it clear that such wives require leave and the meaning of section 1(1) cannot have altered simply because section 2 has been amended.

H Mr. Pannick referred me to a decision of the Court of Appeal on similar facts which supports the view that Mr. Riza's argument is misconceived. It is *Reg. v. Chief Immigration Officer at Heathrow Airport, Ex parte Brahmhatt*, *The Times*, 12 December 1984; Court of

Appeal (Civil Division) Transcript No. 464 of 1984, where Slade L.J. said, at pp. 14-15: A

"Though Mr. Nathan made some reference to the past history of our immigration laws going back beyond 1971, I confess that it never became completely clear to me upon what grounds he asserted that immediately before the passing of the Act of 1981 a wife in the position of the appellant would have had a right to enter this country *at common law*, apart from the statutory rights given her by section 2(2) of the Act of 1971. If I understood him correctly, he submitted, *inter alia*, that a woman in this position would have possessed such a right at common law as a by-product of the statutory right of her husband under section 1(1) of the Act of 1971 to come into the United Kingdom 'without let or hindrance.' I would, for my part, find great difficulty in accepting any such submission. However, I think it unnecessary to consider further what rights, if any, to enter this country the wife of a person who is now to be termed a British citizen would have enjoyed at common law immediately before the passing of the Act of 1981. For, in my opinion, it is quite clear that such common law right, if indeed it existed, must have been removed by the Act of 1981. B C

"In this context, I need do no more than refer to section 3(1)(a) of the Act of 1971, as amended in 1981 and quoted above, which makes it clear that a person who is not a British citizen has no right to enter the United Kingdom 'except as otherwise provided by or under this Act,' unless he is given leave to do so. In other words, whatever may have been the position before the passing of the Act of 1981, the rights of entry of any such person now stem from statute and statute alone. A person such as the appellant can gain a right of entry only by qualifying under the Act and the Rules. This, I think, is the combined effect of section 1(1), (2) and (4) and section 3(1) and (2) of the Act of 1971 as amended in 1981." D E

It is true that the argument in that case was put on the basis that the wife herself acquired a right to come as a by-product of the husband's right to live here without let or hindrance, whereas Mr. Riza simply relies upon the husband's right. However, the reasoning is analogous and in my view equally fallacious. Even if there were any merit in the broad submission that "without let or hindrance" implies a right to have one's wife and family, the exception here in relation to the wife requiring entry clearance is lawfully imposed. It depends upon section 3(1) and (2) and the rules made thereunder. F G

Mr. Riza concedes that if his main submission on section 1(1) fails, as I hold it does, he is in difficulty in pursuing his remaining contentions. They are that the delay is unreasonably long and that there is no reason why wives should not be interviewed in the United Kingdom rather than be sent back to Dacca. H

I accept Mr. Pannick's submission that the Secretary of State's decision is only open to challenge if it could be said to be illegal, irrational or involve a procedural impropriety. Apart from his point on section 1(1) of the Act, Mr. Riza does not suggest that this decision was illegal. Nor does he suggest that it involved any procedural impropriety in the sense of denying the applicant a hearing or failing to consult or any of the other manifestations of the phrase "procedural impropriety."

A What he contends here is that the decision was irrational. The
irrationality he relies upon is based upon the factual background to the
delay which has been mentioned. The delay, it is common ground, is
due to the large number of applicants and the small number of entry
clearance officers. There is no suggestion here of bad faith on the part
of the authorities. There is no suggestion that the delay is being
B deliberately created in order to slow down or bar immigration and there
is no suggestion that the Secretary of State has prescribed, as it were, a
period of delay in order to postpone the arrival of those eligible to join
their spouses.

C What is accepted to be the position is that, having regard to the
numbers, the period of delay in fact works out currently at about 13
months. Mr. Riza says that this could be overcome by appointing more
entry clearance officers. Of course, that would involve further expense.
Mr. Pannick relies upon the fact that the expenditure is one which
would have to be considered by the Secretary of State and he would be
responsible to Parliament for considering what added expenditure would
be justified.

D In those circumstances Mr. Pannick says that the court should be,
and habitually has been, slow to interfere with the exercise of discretion
by a Secretary of State. He relies further upon the dicta in *Reg. v.*
Secretary of State for the Environment, Ex parte Nottinghamshire County
Council [1986] A.C. 240. That was a rate-capping case and it is perhaps
sufficient if I read, from the headnote, the second holding in that case:

E “in the absence of some exceptional circumstances such as bad faith
or improper motive on the part of the Secretary of State it was
inappropriate for the courts to intervene on the ground of
‘unreasonableness’ in a matter of public financial administration that
had been one for the political judgment of the Secretary of State
and the House of Commons.”

F So far as Mr. Riza's second argument is concerned, namely that
interviews could take place in the United Kingdom rather than applicant's
wives be sent back to Dacca, a further consideration arises. The
Secretary of State takes the view that it would be unfair to allow priority
to those who enter in defiance of the requirement of entry certificate
being obtained over those who abide by the rules and take their turn
back in Bangladesh. In other words, it is the argument of fairness which
G failed in *Phansopkar's* case [1976] Q.B. 606 because there it was sought
to rely upon it where there was a right to come. Here, however, there is
no such right. There is an eligibility subject to procedural rules which it
is for the Secretary of State to make and place before Parliament and
unless it could be shown that the system was one which was irrational in
the sense that it was one which no reasonable Secretary of State could
H properly arrive at, then such challenge as Mr. Riza makes to it must fail.

In my judgment, both on the question of additional expense in
providing further entry clearance officers and in relation to the argument
on interviews taking place in the United Kingdom where someone has
sought to jump the queue, the approach which has been adopted by the
Secretary of State is a reasonable one. One could not possibly say that it
was one which was irrational or which no reasonable Secretary of State
could have reached.

In those circumstances, the challenge on that basis must fail and accordingly, these applications must be refused.

Applications dismissed.

Solicitors: Norton & Coker; Suriya & Co.; Treasury Solicitor.

[Reported by SIMON CASSELL, ESQ., Barrister-at-law.]

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[QUEEN'S BENCH DIVISION]

REGINA v. OXFORD CITY JUSTICES, *Ex parte* BERRY1986 Nov. 28;
Dec. 5

May L.J. and Russell J.

B

Justices—Committal proceedings—Evidence—Confession to police sole evidence of offence—Justices' refusal to inquire into admissibility of confession—Whether committal valid—Police and Criminal Evidence Act 1984 (c. 60), s. 76(2)

Judicial Review—Magistrates' court—Committal proceedings—Evidence of alleged confession to police put before examining justices—Justices' refusal to inquire into voluntariness of confession—Whether certiorari available to quash committal

C

The applicant was charged with five offences of burglary. The evidence on four of the charges consisted of alleged confessions to the police during the course of interviews. On the fifth charge the evidence against the applicant was circumstantial and did not include evidence of any alleged confession. At committal proceedings before the justices the applicant indicated that he wished to challenge the admissibility of the alleged confessions pursuant to section 76(2) of the Police and Criminal Evidence Act 1984¹ on the ground that they had not been made voluntarily. The justices declined to inquire into the question whether the confessions were admissible, and committed the applicant for trial.

D

On an application for judicial review and an order of certiorari to quash the committal:—

E

Held, dismissing the appeal, that section 76(2) of the Act of 1984 had the effect that the justices were to consider the admissibility of a confession statement if that issue was raised in committal proceedings and, therefore, a refusal by the justices to do so was open to judicial review; but that, the court should only exercise its discretionary jurisdiction to quash a committal order on that ground alone in exceptional circumstances; and that, in any event, the court should not exercise its discretion in the present case since there was sufficient evidence to support the committal of the applicant on the fifth charge and, under the provisions of section 2(2)(i) of the Administration of Justice (Miscellaneous Provisions) Act 1933, the other charges, in respect of which the evidence included the alleged confessions, were capable of being included in the indictment as being charges founded on the same facts or evidence disclosed in the depositions relating to the fifth charge (post, pp. 645D–E, 647D–F, H, 648A–B).

F

Reg. v. Marsham [1892] 1 Q.B. 371, C.A. and *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, H.L.(E.) applied.

G

The following cases are referred to in the judgment of May L.J.:

H

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208, H.L.(E.)

Reg. v. Carden (1879) 5 Q.B.D. 1, D.C.

Reg. v. Highbury Magistrates' Court, Ex parte Boyce (1984) 79 Cr.App.R. 132, D.C.

Reg. v. Ipswich Justices, Ex parte Edwards (1979) 143 J.P. 699, D.C.

Reg. v. Marsham [1892] 1 Q.B. 371, C.A.

Reg. v. Norfolk Quarter Sessions, Ex parte Brunson [1953] 1 Q.B. 503; [1953] 2 W.L.R. 294; [1953] 1 All E.R. 346, D.C.

¹ Police and Criminal Evidence Act 1984, s.76(2); see post, p. 644E–G.

The following additional cases were cited in argument:

Reg. v. Cripps, Ex parte Muldoon [1984] Q.B. 686; [1984] 3 W.L.R. 53; [1984] 2 All E.R. 705, C.A.

Reg. v. Horsham Justices, Ex parte Bukhari (1981) 74 Cr.App.R. 291, D.C.

APPLICATION for judicial review.

The applicant, John Andrew Berry, sought judicial review by way of an order of certiorari to bring up into the High Court and quash his committal on 11 February 1986 by the Oxford City justices for trial on five charges of burglary. The grounds for the application were that the refusal of the justices to inquire into the voluntariness of confessions alleged by the prosecution to have been made by him to police in relation to four of the charges was unlawful and in breach of the provisions of section 76(2) of the Police and Criminal Evidence Act 1984.

The facts are stated in the judgment of May L.J.

James Gibbons for the applicant.

Richard Jenkins for the prosecution.

Cur. adv. vult.

5 December. MAY L.J. read the following judgment. In this matter Mr. Gibbons moved with leave on behalf of one John Andrew Berry for judicial review in the nature of certiorari to bring up and quash his committal for trial on five charges of alleged burglary by the Oxford City justices on 11 February 1986.

The grounds upon which this application was made were based upon the provisions of section 76(2) of the Police and Criminal Evidence Act 1984 which reads:

"If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—
(a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

The only evidence against the applicant on four of the burglary charges were confessions said to have been made by him to the police when they were investigating the offences. The evidence against him on the fifth charge was circumstantial and, it was contended before us, weak in the extreme. I shall have to return to this later in this judgment.

At the committal proceedings, at which the applicant appeared in person, he indicated to the justices and to their clerk that he wished to challenge the admissibility of his alleged confessions on the ground that they had not been voluntary under the provisions of section 76(2) of the Act of 1984. In an affidavit sworn by the clerk to the justices and filed in these proceedings, the latter said:

A "I considered section 76(2) of the Police and Criminal Evidence Act
1984 in the light of section 6(1) of the Magistrates' Courts Act 1980
in that examining justices were concerned in finding a prima facie
case only. Further, in the light of observations made in earlier
B decided cases concerning the proper forum for the consideration of
such matters I advised the justices that the issue of a confession
improperly obtained was a matter for a judge in the Crown Court
to decide, if prima facie evidence existed to commit the defendant
for trial. The justices followed this advice and the committal
continued."

C The applicant accepted that prior to the coming into force of the Act
of 1984, if examining justices followed the procedure for committal
proceedings prescribed by the Magistrates' Courts Act 1980 and the
Magistrates' Courts Rules 1981 (S.I. 1981 No. 552), this court would not
interfere with a committal for trial on the ground that during the
committal proceedings inadmissible evidence had been received: see
Reg. v. Norfolk Quarter Sessions, Ex parte Brunson [1953] 1 Q.B. 503;
Reg. v. Ipswich Justices, Ex parte Edwards (1979) 143 J.P. 699 and *Reg.*
v. Highbury Magistrates' Court, Ex parte Boyce (1984) 79 Cr.App.R.
D 132.

E Counsel contended, however, that since the passing of the Act of
1984, where, as here, examining justices have not merely received
inadmissible evidence, but have refused to enter upon the inquiry
prescribed by section 76(2) of the Act of 1984 before receiving evidence
of a confession, when it has been represented that it was or may not
have been voluntary, the situation is different. By so refusing, he
submitted, the justices thereby declined to enter upon an inquiry on
which they were bound to enter; they did not merely receive inadmissible
evidence, but they declined jurisdiction and thus the resulting committal
can be challenged by certiorari.

F In support of this argument counsel referred us first to *Reg. v.*
Carden (1879) 5 Q.B.D. 1. In that case the question was whether upon
an information for maliciously publishing a defamatory libel the
examining magistrate should have received evidence as to the truth of
the libel before deciding whether or not to commit the defendants for
trial. The facts of that case were wholly different from those of the
instant application and so also were the relevant statutory provisions.
But it had been argued that the magistrate had declined jurisdiction and
G in the course of his judgment Cockburn C.J. said, at pp. 5-6:

H "It is said that in this case the magistrate has declined jurisdiction.
That involves the question whether he had jurisdiction to hear this
evidence. I am clearly of the opinion that he had not. The duty and
province of the magistrate before whom a person is brought, with a
view to his being committed for trial or held to bail, is to determine,
on hearing the evidence for the prosecution and that for the
defence, if there be any, whether the case is one in which the
accused ought to be put upon his trial. It is no part of his province
to try the case. That being so, in my opinion, unless there is some
further statutory duty imposed on the magistrate, the evidence
before him must be confined to the question whether the case is
such as ought to be sent for trial, and if he exceeds the limits of
that inquiry, he transcends the bounds of his jurisdiction."

Counsel argued that today there is a further statutory duty imposed on the examining justices, namely that of making the inquiry into the question whether any confession relied on by the prosecution had been made voluntarily by virtue of section 76(2) of the Act of 1984.

We were also referred to *Reg. v. Marsham* [1892] 1 Q.B. 371. There, on the hearing of a summons against the owner of property in a new street to enforce payment of his apportioned share of the expenses of paving it, the defendant sought to give evidence to show that the amount alleged to have been expended had not actually been expended, or that it included expenses other than paving expenses. The magistrate refused to receive such evidence. An application for an order nisi for mandamus directed to the magistrate requiring him to hear and determine the summons, that is to do so according to law, was refused by a Divisional Court but was subsequently granted and thereafter made absolute in the Court of Appeal. In the course of his judgment Lord Halsbury L.C. said, at pp. 375, 376:

“No doubt a magistrate may improperly reject evidence, and the court may be unable to set him right, and the question is, whether this case comes within that category. I think that it does not; the act of the magistrate was not a mere rejection of evidence, but amounted to a declining to enter upon an inquiry on which he was bound to enter; he has not merely rejected evidence, but has declined jurisdiction, and, therefore, the right of the applicants to call upon him to exercise his jurisdiction is enforceable by mandamus . . . The magistrate was asked to enter upon an inquiry whether the subject-matter was paving or not, and it was suggested that the board had expended money on works which were wholly outside paving works. The magistrate took the view that he could not enter into the inquiry, and declined to do so, and the question for us is whether he was right. If so, no mandamus will lie; but if he was wrong, it is manifest that he absolutely refused to enter upon the inquiry and declined jurisdiction.”

In the same case, Lord Esher M.R. said, at p. 378:

“there is now an application for a mandamus upon the ground that the magistrate declined to exercise the jurisdiction given him by law. Now, the form in which he is said to have declined jurisdiction is, that he refused to hear certain evidence which was tendered before him, and it is suggested on behalf of the board that such refusal, at the most, only amounted to a wrongful refusal to receive evidence, and not to a declining of jurisdiction. The distinction between the two is sometimes rather nice; but it is plain that a judge may wrongly refuse to hear evidence upon either of two grounds: one, that even if received the evidence would not prove the subject-matter which the judge was bound to inquire into; the other, that whether the evidence would prove the subject-matter or not, the subject-matter itself was one into which he had no jurisdiction to inquire. In the former case the judge would be wrongly refusing to receive evidence, but would not be refusing jurisdiction, as he would in the latter. Here the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction.”

A Although the circumstances of that case were again different from the present one, nevertheless it was argued that the applicable principle of law was the same. Where a magistrate is asked to enter upon an inquiry on which he is bound by statute to enter, then judicial review will lie to quash a decision reached by him without undertaking that obligatory inquiry.

B In answer to these submissions counsel for the Crown argued that the failure of the justices, on advice, to consider whether the alleged confessions by the applicant had or had not been improperly obtained did not affect their jurisdiction to decide whether a *prima facie* case had been made out against him and thus whether he should be committed for trial, even having regard to the provisions of section 76(2) of the Act. All that the justices may have done was to admit evidence which
C might prove to be inadmissible and there was ample authority, indeed it was accepted, that this court would not interfere with a committal by justices on this ground alone.

D Counsel, secondly, submitted that in any event *certiorari* was a discretionary remedy and that in circumstances such as obtained in the instant case, this court ought not to exercise its discretion in favour of the applicant: there would be ample opportunity at the trial to investigate the voluntariness or otherwise of the alleged confessions.

E Finally, counsel for the Crown submitted that the evidence relied on to raise a *prima facie* case against the applicant on the fifth charge of burglary did not include any alleged confession by him. Consequently his committal on this charge could not validly be challenged. By virtue of section 2(2)(i) of the Administration of Justice (Miscellaneous Provisions) Act 1933 the indictment against the applicant could then include further counts founded on the facts or evidence disclosed in the depositions, for instance counts charging the four burglaries in respect of which the evidence led against the applicant in the committal proceedings had included the disputed confessions. On this ground also, the argument continued, it would be wrong to quash the committal of the applicant on any of the charges against him.

F I very much doubt whether the draftsman of section 76(2) of the Act of 1984 ever had in mind the possible impact that its provisions could have on committal proceedings before justices. I do not think that it can ever have been intended to produce such a radical change in such proceedings. As is well known the question of the voluntariness or otherwise of alleged confessions by an accused has hitherto seldom, if
G ever, been investigated in committal proceedings before justices, save perhaps to have some matters of fact established in the cross-examination of prosecution witnesses to found a subsequent challenge to a confession at the ultimate trial on indictment.

H Nevertheless, on the authorities to which I have referred and remembering Lord Reid's classic dictum on the meaning of "jurisdiction" in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, 171, I think that as a matter of law *certiorari* could go to quash a committal in circumstances such as in the instant case, where the justices have refused to undertake the inquiry contemplated by section 76(2). Nevertheless I am quite satisfied that, save in the exceptional case, this court should not quash any committal on this ground alone. Judicial review is a discretionary remedy and if it were allowed to go in the circumstances of the instant case "I tremble to think what would be the result to the criminal practice of this country"—to use the words of Lord

Goddard C.J. in *Reg. v. Norfolk Quarter Sessions, Ex parte Brunson* [1953] 1 Q.B. 503, 505. As Geoffrey Lane L.J. said in similar vein in *Reg. v. Ipswich Justices, Ex parte Edwards*, 143 J.P. 699, 706: "No hardship results. If the evidence is found to be inadmissible at the trial, then the prosecution will have to do without it, to put it bluntly."

In any event, in the instant case, I think that, despite counsel for the applicant's valiant argument to the contrary, there was sufficient evidence before the justices to support their committal of him on the fifth burglary charge. On the third argument raised by counsel for the Crown therefore, it would I think be clearly wrong to accede to this application and for my part I would refuse it.

RUSSELL J. I agree.

Application dismissed.
No order for costs.

Solicitors: Darby & Son, Oxford; Crown Prosecution Service.

[Reported by SIMON CASSELL, ESQ., Barrister-at-Law]

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3 W.L.R.

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[COURT OF APPEAL]

GOLD v. HARINGEY HEALTH AUTHORITY

1987 March 10, 11, 12;
April 14

Watkins, Stephen Brown and Lloyd L.JJ.

B

Medical Practitioner—Negligence—Duty to inform—Sterilisation operation—Failure to give warning of possibility of fertility being restored—Subsequent pregnancy—Claim in negligence for non-disclosure of risk—Body of medical opinion against giving warning as to risk of pregnancy—Whether accepted professional standard test applicable to non-therapeutic advice

C

During the course of her third pregnancy in 1979, the plaintiff, after indicating that she did not wish to have any more children, was advised to undergo a sterilisation operation at the defendants' hospital after the birth of her child. The operation was duly carried out but the plaintiff later became pregnant and gave birth to a fourth child. She brought an action for damages for negligence against the defendants alleging, inter alia, that she had not been warned of the failure rate of female sterilisation operations and that if she had been warned her husband would have undergone a vasectomy instead. Medical evidence was adduced at the trial that there was a substantial body of responsible doctors who would not have given any such warning in 1979. The judge however held that the test whether there existed a substantial body of medical opinion who would have acted as the defendants had done applied only to advice given in a therapeutic context and did not apply to advice given in a contraceptive context. Applying his own view as to what information should have been given, he found that the defendants had been negligent in not warning the plaintiff that the operation might not succeed.

D

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On the defendants' appeal:—

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Held, allowing the appeal, that for the purposes of ascertaining the test as to the duty of care owed by a doctor to a patient there was no distinction to be made between advice given in a therapeutic context and advice given in a non-therapeutic context; that, accordingly, the judge erred in holding that advice given in a contraceptive context was not to be judged by the contemporary standards of a responsible body of medical opinion; and that, on the evidence, there was a substantial body of responsible doctors who would not in 1979 have warned the plaintiff of the failure rate of female sterilisation operations (post, pp. 656G—657B, 658A—B, 659A—D).

G

Bolam v. Friern Hospital Management Committee [1957] 1 W.L.R. 582 and *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] A.C. 871, H.L.(E.) applied.

Decision of Schiemann J. reversed.

H

The following cases are referred to in the judgments:

Bolam v. Friern Hospital Management Committee [1957] 1 W.L.R. 582; [1957] 2 All E.R. 118

Emeh v. Kensington and Chelsea and Westminster Area Health Authority [1985] Q.B. 1012; [1985] 2 W.L.R. 233; [1984] 3 All E.R. 1044, C.A.

Eyre v. Measday [1986] 1 All E.R. 488, C.A.

Jones v. Berkshire Area Health Authority (unreported), 2 July 1986, Ognall J.

- Maynard v. West Midlands Regional Health Authority* [1984] 1 W.L.R. 634; [1985] 1 All E.R. 635, H.L.(E.) A
- Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198; [1978] 3 W.L.R. 849; [1978] 3 All E.R. 1033, H.L.(E.)
- Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] A.C. 871; [1985] 2 W.L.R. 480; [1985] 1 All E.R. 643, H.L.(E.)
- Thake v. Maurice* [1986] Q.B. 644; [1986] 2 W.L.R. 337; [1986] 1 All E.R. 497, C.A. B

The following additional cases were cited in argument:

- Clarke v. Adams* (1950) 94 S.J. 599
- Hucks v. Cole* (unreported), 8 May 1968; Court of Appeal (Civil Division) Transcript No. 181 of 1968, C.A. C

APPEAL from Schiemann J.

By a writ dated 10 October 1984 the plaintiff, Phyllis Gold, claimed damages against the defendants, the Haringey Health Authority, for negligence and breach of contract in the carrying out of a sterilisation operation on her on 20 August 1979. In 1982 she gave birth to a child. It was alleged that the defendants were negligent in failing to disclose to the plaintiff that the operation had a failure rate and was not guaranteed of success and, further (during the trial, by leave of the judge), in failing to discuss vasectomy with the plaintiff and/or the relative rates of failure of that and sterilisation. It was further alleged that the defendants were in breach of contract in that they undertook and guaranteed, alternatively were reasonably understood by the plaintiff to have undertaken or guaranteed, to make her permanently sterile. D

The defendants denied liability, contending that the plaintiff had been told that there was a failure rate with any sterilisation procedure and that, in any event, in 1979 a failure to warn in such circumstances would not have been negligent. E

On 16 June 1986 the judge upheld the plaintiff's claim finding the defendants negligent in not warning of a failure rate and in not mentioning vasectomy, and also finding the allegation of negligent misrepresentation proved. He gave judgment for the plaintiff for £19,000. F

By their notice of appeal, the defendants appealed on the grounds, inter alia, that the judge misdirected himself in holding that there was a distinction between advice given in a therapeutic context and advice given in connection with contraception counselling which meant that the latter was not to be judged by the contemporary reasonable standards of the medical profession; that he failed to attach any or sufficient weight to the fact that the undisputed evidence on both sides was to the effect that in 1979 approximately half the medical profession would not have warned of the risk of failure of an operation for sterilisation, nor, by implication, would they have counselled as to other appropriate methods of sterilisation or contraception; that he misdirected himself, or there was no evidence on which he could have made a finding, that there was no responsible body of medical opinion which would have failed to warn or mention vasectomy as an option in the context of someone seeking contraceptive advice; that he misdirected himself in holding that the questions as to warning of the failure rates and the relative risks of vasectomy and sterilisation were to be determined by the court's view as to whether or not the person giving advice acted negligently; and that G H

3 W.L.R.

Gold v. Haringey Health Authority (C.A.)

A the judge misdirected himself in holding that the defendants had negligently misrepresented to the plaintiff that the operation for sterilisation would render her permanently sterile.

The facts are set out in the judgment of Lloyd L.J.

Stephen Miller for the defendants.

Charles Lewis for the plaintiff.

Cur. adv. vult.

14 April. The following judgments were handed down.

C LLOYD L.J. On 20 August 1979 the plaintiff, Mrs. Phyllis Gold, underwent an operation for sterilisation at the North Middlesex Hospital. It was on the day after the birth of her third child. The operation did not succeed, for in October 1982 she gave birth to her fourth child, Darren. In October 1984 she commenced these proceedings against Haringey Health Authority, despite the fact that she and her husband are delighted with Darren, their first boy, and indeed have gone on to have a fifth child, born in November 1984.

D In her writ, as amended, she claims damages for negligence in carrying out the operation. But that claim was rejected by the judge. He found that the plaintiff had failed to prove that Dr. Arzanghi, who carried out the operation, had been negligent. There is no appeal against that finding.

E But the judge went on to hold the defendants liable on another ground. He held that they ought to have warned the plaintiff that the operation might not succeed, and ought, in the circumstances, to have mentioned the alternative of vasectomy. If they had, then, according to the judge's findings, the plaintiff would not have consented to the operation, and Mr. Gold would have been vasectomised instead. By inference, he has found that the vasectomy would have been effective to prevent the birth of the fourth and fifth children. The failure rate for vasectomy was accepted as being about five per ten thousand, compared with a failure rate for female sterilisation of between two and six per thousand. The judge held that the defendants were negligent in not informing the plaintiff of the failure rate for female sterilisation, and that they are liable in damages accordingly, which he assessed at £19,000.

G Before relating the history of the matter, I desire to make one point clear. We are not in this case called on to decide whether it is desirable or not that a plaintiff should be able to claim damages for the birth of a healthy child, and a child which, in this particular case, the plaintiff and her husband are now delighted to have. In *Jones v. Berkshire Area Health Authority* (unreported), 2 July 1986, another unwanted pregnancy case, Ognall J. said:

H "I pause only to observe that, speaking purely personally, it remains a matter of surprise to me that the law acknowledges an entitlement in a mother to claim damages for the blessing of a healthy child. Certain it is that those who are afflicted with a handicapped child or who long desperately to have a child at all and are denied that good fortune would regard an award for this sort of contingency with a measure of astonishment. But there it is: that is the law."

Lloyd L.J.

Gold v. Haringey Health Authority (C.A.)

[1987]

Many would no doubt agree with that observation. But the desirability of permitting such a claim does not concern us here. At one time there was a conflict of decisions at first instance as to whether it was against public policy to allow a plaintiff to recover damages for the birth of a healthy child. But that conflict has been resolved, so far as this court is concerned, by the unanimous decision of this court in *Emeh v. Kensington and Chelsea and Westminster Area Health Authority* [1985] Q.B. 1012. So in the present appeal we are concerned solely with the question whether the plaintiff has established negligence against the defendants by reason of their failure to warn the plaintiff that the operation might not succeed.

The history of the matter, very briefly, is as follows. The plaintiff's first and second children, both girls, were born in December 1969 and November 1972. There was then a long gap before she conceived her third child. In the course of her third pregnancy, she discussed with her husband the possibility of him having a vasectomy. According to Mr. Gold's evidence, they knew about vasectomy because two of his friends had had a vasectomy, including the plaintiff's brother-in-law. On 9 January 1982 the plaintiff went to see her general practitioner, Dr. Gomez. He confirmed she was pregnant. She told him that she and her husband were thinking of vasectomy. Dr. Gomez suggested sterilisation instead. According to the plaintiff's evidence, Dr. Gomez was not against vasectomy, but said that sterilisation would be "handier" as the plaintiff would be in hospital in any event having her third child.

On 24 July 1982 the plaintiff saw Miss Witt, the consultant to whom she had been referred at the commencement of her pregnancy. The plaintiff told Miss Witt that she did not want any more children. Miss Witt suggested sterilisation. She did not mention vasectomy as an alternative; but then neither did the plaintiff, although it had been discussed between her and her husband the previous January.

Soon after 24 July the plaintiff must have returned to see Dr. Gomez, her general practitioner. Regrettably Dr. Gomez was not called as a witness, so we do not know what took place on that occasion. All we know is that on 31 July he wrote to Miss Witt:

"Many thanks for considering this patient for sterilisation. She has two children aged 10 and 7 years and she is due for her confinement on 20 August 1979. The patient is aware that this is an irreversible operation."

It may be that there was some discussion about vasectomy, and that Dr. Gomez repeated his earlier advice that sterilisation would be "handier;" but we do not know, since Dr. Gomez was not called, and the plaintiff was not asked.

On 14 August the plaintiff saw Dr. Plummer, the house surgeon. She told her that she wanted to be sterilised, and signed a written consent in the form then current. On 19 August she gave birth to Nicola. On 20 August the operation was performed. The judge has found on the balance of probabilities that neither Miss Witt nor Dr. Plummer nor Dr. Arzanghi ever clearly explained that there was a risk of the operation failing. Mr. Miller, who appears for the defendants, does not seek to go behind that finding.

In her case as originally pleaded the plaintiff relied exclusively on the absence of any warning as to the failure rate of the operation, which, as I have said, was accepted as being about two per thousand, or about six

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A per thousand if carried out immediately after childbirth. But on the third day of the evidence, when one of the plaintiff's experts was being re-examined, the judge raised the question whether it might be the defendants' duty, not only to warn the plaintiff of the failure rate for sterilisation, but also to compare the failure rate for female sterilisation with the failure rate for male vasectomy. The point was taken up later

B the same day with the first of the defendants' experts. On the following morning Mr. Lewis, for the plaintiff, applied to re-amend the statement of claim in accordance with the judge's indication, so as to allege that the defendants were negligent in failing to discuss vasectomy with the plaintiff, and to mention the relative failure rates of the two operations. Despite this amendment, Mr. Lewis made clear to us that his main case rested, and had always rested, on the simple failure to warn that

C sterilisation might not succeed.

I now turn to the evidence. The doctors were unanimous in their view that though they themselves would have warned of the risk of failure, nevertheless a substantial body of responsible doctors would not have given any such warning in 1979. One of the witnesses put the proportion of doctors who would not have given any such warning in 1979 as high as 50 per cent. How then did it come about that the judge

D convicted the defendants of negligence?

In directing the jury in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 587, McNair J. said:

E "[A medical man] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. . . . merely because there is a body of opinion who would take a contrary view."

In *Maynard v. West Midlands Regional Health Authority* [1984] 1 W.L.R. 634, the House of Lords applied the *Bolam* test to a case of wrongful diagnosis. Lord Scarman said, at p. 638:

F "It is not enough to show that there is a body of competent professional opinion which considers that there was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken it was reasonable in the sense that a responsible body of medical opinion would have

G accepted it as proper."

In *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] A.C. 871, the House of Lords applied the same test to a case in which a doctor, before carrying out an operation, failed to warn his patient of a very small risk of very serious injury. It would have been open to the House of Lords to hold that the *Bolam* test applied to negligent diagnosis and negligent treatment, but not negligent advice. In other words, the House of Lords could have adopted the doctrine of "informed consent" favoured in the United States of America and Canada. But the House of Lords declined to follow that path. Lord Diplock said, at pp. 893-895:

H

"In English jurisprudence the doctor's relationship with his patient which gives rise to the normal duty of care to exercise his skill and judgment to improve the patient's health in any particular respect in

which the patient has sought his aid, has hitherto been treated as single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment in the improvement of the physical or mental condition of the patient for which his services either as a general practitioner or specialist have been engaged. This general duty is not subject to dissection into a number of component parts to which different criteria of what satisfy the duty of care apply, such as diagnosis, treatment, advice (including warning of any risks of something going wrong however skilfully the treatment advised is carried out.) The *Bolam* case itself embraced failure to advise the patient of the risk involved in the electric shock treatment as one of the allegations of negligence against the surgeon as well as negligence in the actual carrying out of treatment in which that risk did result in injury to the patient. The same criteria were applied to both these aspects of the surgeon's duty of care. In modern medicine and surgery such dissection of the various things a doctor had to do in the exercise of his whole duty of care owed to his patient is neither legally meaningful nor medically practicable. Diagnosis itself may involve exploratory surgery, the insertion of drugs by injection (or vaccination) involves intrusion upon the body of the patient and oral treatment by drugs although it involves no physical intrusion by the doctor on the patient's body may in the case of particular patients involve serious and unforeseen risks. . . . My Lords, I venture to think that in making this separation between that part of the doctor's duty of care that he owes to each individual patient, which can be described as a duty to advise upon treatment and warn of its risks, the courts have misconceived their functions as the finders of fact in cases depending upon the negligent exercise of professional skill and judgment. In matters of diagnosis and the carrying out of treatment the court is not tempted to put itself in the surgeon's shoes; it has to rely upon and evaluate expert evidence, remembering that it is no part of its task of evaluation to give effect to any preference it may have for one responsible body of professional opinion over another, provided it is satisfied by the expert evidence that both qualify as responsible bodies of medical opinion. But when it comes to warning about risks, the kind of training and experience that a judge will have undergone at the Bar makes it natural for him to say (correctly) it is my right to decide whether any particular thing is done to my body, and I want to be fully informed of any risks there may be involved of which I am not already aware from my general knowledge as a highly educated man of experience, so that I may form my own judgment as to whether to refuse the advised treatment or not.

"No doubt if the patient in fact manifested this attitude by means of questioning, the doctor would tell him whatever it was the patient wanted to know; but we are concerned here with volunteering unsought information about risks of the proposed treatment failing to achieve the result sought or making the patient's physical or mental condition worse rather than better. The only effect that mention of risks can have on the patient's mind, if it has any at all, can be in the direction of deterring the patient from undergoing the treatment which in the expert opinion of the doctor it is in the patient's interest to undergo. To decide what risks the existence of

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A which a patient should be voluntarily warned and the terms in
which such warning, if any, should be given, having regard to the
effect that the warning may have, is as much an exercise of
professional skill and judgment as any other part of the doctor's
comprehensive duty of care to the individual patient, and expert
medical evidence on this matter should be treated in just the same
B way. The *Bolam* test should be applied."

How then, I ask again, did it come about that the judge found the
defendants guilty of negligence, when he accepted that there was a
substantial body of responsible medical opinion in 1979 who would not
have given any warning? The answer is that he drew a distinction
between advice or warning in a therapeutic context and advice or
C warning in a contraceptive context. In a therapeutic context there was a
body of responsible medical opinion which would not have warned of
the failure rate. But in a contraceptive context there was no such body
of responsible medical opinion. Even if there had been, he would still
have found the defendants negligent, since in his view the *Bolam* test
does not apply at all to advice given in a non-therapeutic context. He
said:

D "I accept that it was the view of the majority of the House of Lords
that in the therapeutic context of that case the duty to give advice
was subject to the same test as the duty to diagnose and treat, and
that this test, known as the *Bolam* test after an earlier case, was
that a doctor is not negligent if he acts in accordance with a practice
accepted as proper by a responsible body of medical opinion even
E though other doctors adopt a different practice. This test is different
from the one generally applied in actions in respect of negligent
advice. I see nothing in the reasons given for adopting the *Bolam*
test in the sort of circumstances under consideration in *Sidaway*
which compels me to widen the application of this exceptional rule
so as to cause it to apply to contraceptive counselling."

F So the judge decided against the defendants on two grounds. First,
he held that the *Bolam* test did not apply at all in a contraceptive
context. Instead he applied his own judgment as to what should have
been mentioned in that context. Secondly, if the *Bolam* test did apply,
then he found as a fact that there was nobody of responsible medical
opinion which would not, in a contraceptive context, have warned of the
G risk of failure. I have reversed these two grounds, since the first ground
raises a question of considerable general importance.

Was the judge right when he held that the *Bolam* test is an exception
to the ordinary rule in actions for negligence? If by an "exceptional
rule" the judge meant that the *Bolam* test is confined to actions against
doctors, then I would respectfully disagree. I have already quoted a
H passage from McNair J.'s summing up in *Bolam's* case. In an earlier
passage he had said [1957] 1 W.L.R. 582, 586:

"where you get a situation which involves the use of some special
skill or competence, then the test as to whether there has been
negligence or not is not the test of the man on the top of a
Clapham omnibus, because he has not got this special skill. The test
is the standard of the ordinary skilled man exercising and professing
to have that special skill."

So far as I know that passage has always been treated as being of general application whenever a defendant professes any special skill. It is so treated in *Charlesworth & Percy on Negligence*, 7th ed. (1983), p. 388 para. 6–17. The *Bolam* test is not confined to a defendant exercising or professing the particular skill of medicine. If there had been any doubt on the question, which I do not think there was, it was removed by the speech of Lord Diplock in the *Sidaway* case [1985] A.C. 871, 892. Lord Diplock made it clear that the *Bolam* test is rooted in an ancient rule of common law applicable to all artificers. In *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, Lord Diplock treated the same test as applicable to barristers, although he did not mention the *Bolam* case by name. The question in that case was whether a barrister is immune from an action in negligence in relation to advice given out of court. It was held that he is not. Lord Diplock said, at p. 220:

“No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made.”

Mr. Lewis did his best to argue that the *Bolam* test is confined to doctors. For the reasons I have given, I cannot accept that argument. I can see no possible ground for distinguishing between doctors and any other profession or calling which requires special skill, knowledge or experience. To be fair to the judge, it was not, I think, on this ground that he regarded the *Bolam* test as exceptional.

In passing, I should mention that the *Bolam* test is often thought of as limiting the duty of care. So in one sense it does. But it also extends the duty of care, as the second of the two passages I have quoted from McNair J.’s summing up in the *Bolam* case makes clear. The standard is not that of the man on the top of the Clapham omnibus, as in other fields of negligence, but the higher standard of the man skilled in the particular profession or calling.

Why then did the judge think that it would be an extension of the *Bolam* test to apply it in the present case? The reason can only have been that which I have already mentioned, namely, the distinction between therapeutic and non-therapeutic advice. Mr. Lewis took us through the *Sidaway* case [1985] A.C. 871 speech by speech, and paragraph by paragraph, in order to point the distinction. But I remain unconvinced. In the first place the line between therapeutic and non-therapeutic medicine is elusive. A plastic surgeon carrying out a skin graft is presumably engaged in therapeutic surgery; but what if he is carrying out a face-lift, or some other cosmetic operation? Mr. Lewis found it hard to say.

In the second place, a distinction between advice given in a therapeutic context and advice given in a non-therapeutic context would be a departure from the principle on which the *Bolam* test is itself grounded. The principle does not depend on the context in which any act is performed, or any advice given. It depends on a man professing skill or competence in a field beyond that possessed by the man on the Clapham omnibus. If the giving of contraceptive advice required no special skill, then I could see an argument that the *Bolam* test should not apply. But that was not, and could not have been, suggested. The fact (if it be the fact) that giving contraceptive advice involves a different

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A sort of skill and competence from carrying out a surgical operation does not mean that the *Bolam* test ceases to be applicable. It is clear from Lord Diplock's speech in *Sidaway* that a doctor's duty of care in relation to diagnosis, treatment and advice, whether the doctor be a specialist or general practitioner, is not to be dissected into its component parts. To dissect a doctor's advice into that given in a therapeutic context and that given in a contraceptive context would be to go against the whole thrust of the decision of the majority of the House of Lords in that case. So I would reject Mr. Lewis's argument under this head, and hold that the judge was not free, as he thought, to form his own view of what warning and information ought to have been given, irrespective of any body of responsible medical opinion to the contrary.

C So I turn to the second question, which assumes, as I have held, that the *Bolam* test applies. Here Mr. Lewis acknowledges that he is in some difficulty. For in the course of the defence evidence the judge observed to Mr. Lewis:

D "You are in the happy position of being able to say, as I understand it, that all of the defence team, as it were, are all saying that they personally would have advised, and in one case they claim they did advise. You are in that happy position. You are in the unhappy position that they will say, as you have to accept, that there were squads of people who did not."

To which Mr. Lewis replied: "Yes, if we apply the *Bolam* test, I have had it on this limb certainly."

E Indeed as late as Mr. Miller's closing submission the judge observed that the defendants were "home and dry" if *Sidaway* applied, as I have held it does. Yet when he came to give judgment, the judge had changed his mind. For the sake of convenience I repeat here verbatim the three relevant findings:

F "[1] That in a non-contraceptive context, for instance if there had been a therapeutic reason for sterilising [the plaintiff], there was a responsible body of medical opinion which would not, unasked, have mentioned the fact that the operation involved an element of risk. [2] That in the context of someone seeking contraceptive advice there was such a body of medical opinion which would not, unasked, have mentioned that the failure rate of a post partum sterilisation operation was several times as high as the ultimate failure rate of a vasectomy. [3] That in the context of someone seeking contraceptive advice there was no such body of medical opinion which would have failed to mention that there was a risk of failure of the post partum sterilisation or that vasectomy was an option or to make inquiries of the domestic situation of the party seeking advice."

H I can find nothing in the evidence which justifies the last of these findings. Mr. Lewis relies on the documentary evidence, some of which is set out in the judge's judgment. I need not refer to it in detail. As was to be expected, it emphasises the importance of counselling before deciding on an operation, whether for male or female sterilisation. In addition, the documents published by the medical defence bodies—again as was only to be expected—discourage the giving of any sort of guarantee of success. But this evidence does not meet the point made by Mr. Miller and by all the witnesses, including those called by the

plaintiff, who said that (though they would themselves have warned the plaintiff of the risk of failure, there was a body of responsible doctors in 1979 who would not have done so. The judge accepted in his judgment that the distinction between advising in a contraceptive and non-contraceptive context was not "crystal clear" on the evidence. With respect, that is an understatement. The witnesses were never asked to distinguish between the two cases. There was therefore only one finding open on the evidence, namely, that there was a body of responsible medical opinion which would not have given any warning as to the failure of female sterilisation, and the possible alternatives, in the circumstances in which the defendants actually found themselves. So I would not accept the second of the two grounds on which the judge decided against the defendants.

That makes it unnecessary to consider whether, if the defendants had been under a duty to warn, they were entitled to assume that an adequate warning had been given by Dr. Gomes, the general practitioner. We know from his letter of 31 July 1979 that he warned the plaintiff that the operation was irreversible. But since he was not called, we do not know what other warning, if any, he may have given.

Mr. Lewis referred us in passing to *Thorne v. Motor* [1985] Q.B. 644, where it was held to have been negligent on the part of a surgeon undertaking a vasectomy not to warn of the risk of failure in accordance with his usual practice. But in that case, as Kerr L.J. pointed out at p. 680, there was no independent medical evidence called by either side. So, as Mr. Lewis sensibly agreed, it does not help him in the present case. Nor does he get any help from *Jones v. Berkshire Area Health Authority* (unreported), 2 July 1986 for in that case the duty to warn was admitted.

Finally, I should mention the plaintiff's claim for negligent misrepresentation. In the statement of claim it is pleaded by amendment:

"By reason of the matters pleaded in paragraphs 2-5 above the defendants negligently misrepresented to the plaintiff that the operation would render her permanently sterile and/or that sterilisation was her only contraceptive option and in reliance upon such representation the plaintiff agreed to undergo the said operation."

The judge deals with that allegation at the end of his judgment, and does so in a very few words for the sake, as he puts it, of completeness. He makes no finding as to the terms of the representation, or whether it was express or implied. All he says is, "I find that allegation proved."

The only possible justification for the judge's finding on the evidence is that it is to be inferred from the fact that the plaintiff was told that the operation was irreversible. But to draw that inference from the use of the word "irreversible" would be inconsistent with the decision of this court in *Ayre v. Moulton* [1986] 1 All E.R. 488, where a similar argument was advanced. Slade L.J. said, at p. 494:

"There has been some discussion in the course of argument on the meaning of the phrase 'irreversible' and as to the relevance of the statement, undoubtedly made by the defendant to the plaintiff, that the proposed operation must be regarded as being irreversible. However, I take the reference to irreversibility as simply meaning that the operative procedure in question is incapable of being reversed, that what is about to be done cannot be undone. I do not think it can reasonably be construed as a representation that the

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A operation is bound to achieve its acknowledged object, which is a different matter altogether.”

So I would reject the plaintiff's claim for negligent misrepresentation.

For the reasons I have given the plaintiff has failed to make good her claim for negligence. Accordingly, I would allow this appeal.

B WATKINS L.J. I agree.

STEPHEN BROWN L.J. I agree that this appeal should be allowed. In my judgment the test laid down in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 587 as further considered and explained by Lord Diplock in *Sidaway v. Board of Governors of Bethlem Royal Hospital* [1985] A.C. 871 should be applied to the facts of this case. The judge appears to have been persuaded to find a distinction between advice given in a “therapeutic” and a “non-therapeutic” context. Such a distinction is wholly unwarranted and artificial. The general duty of the doctors treating the plaintiff is, in the words of Lord Diplock at p. 893, “not subject to dissection into a number of component parts to which different criteria of what satisfy the duty of care apply.” I entirely agree with the careful analysis made by Lloyd L.J. in his judgment.

D I feel it right to add that in this case it was unfortunate that the judge was not able to hear evidence from the general practitioner, who clearly played an important and relevant role in the story.

Appeal allowed.

Costs of defendants against plaintiff in court below not to be enforced without order of court.

Costs of appeal against the legal aid fund of The Law Society, not to be proceeded with without granting The Law Society opportunity to make representations.

Leave to appeal refused.

Solicitors: Hempsons; Pritchard Englefield & Tobin.

C. T. B.

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[1987]

[COURT OF APPEAL]

A

CRAVEN (INSPECTOR OF TAXES) v. WHITE (STEPHEN)
 SAME v. WHITE (BRIAN)
 INLAND REVENUE COMMISSIONERS v. BOWATER PROPERTY
 DEVELOPMENTS LTD.
 BAYLIS (INSPECTOR OF TAXES) v. GREGORY
 SAME v. SAME AND ANOTHER

B

1987 Jan. 20, 21, 22, 23, 26;
 March 24

Slade, Parker and Mustill L.JJ.

Revenue—Capital gains tax—Tax avoidance—Negotiations for sale or merger of company—Taxpayers acquiring shares in non-resident company in exchange for shareholding—Negotiations concluding with sale of company—Whether transactions single composite transaction—Whether “disposal” by taxpayers of shares direct to ultimate purchasers—Whether relieving provisions for “company amalgamations” applicable to defer liability—Finance Act 1965 (c. 25), s. 19(1), Sch. 7, paras. 4(2), 6(1)

C

D

Revenue—Development land tax—Disposal of land—Fragmentation of ownership of land prior to sale—Sale postponed—Whether eventual sale part of same transaction—Development Land Tax 1976 (c. 24), s. 1

Revenue—Capital gains tax—Assessment—Mistake—Year of assessment wrongly stated—Taxpayer unaware of error—Inspector “vacating” assessment without notifying taxpayer—Whether assessment valid—Whether mistake to be disregarded—Taxes Management Act 1970 (c. 9), s. 114(1)

E

In the first of the three appeals the taxpayers were the directors of, and owned shares in Q. Ltd., a company operating in the grocery trade. In early 1976 the taxpayers began to negotiate with C. Ltd. for a merger of the two companies and steps were taken to establish an Isle of Man holding company to act as a vehicle for the taxpayers' shares should the merger materialise. Later in that year the taxpayers were approached regarding the possibility of a sale of Q. Ltd. to J. Ltd. Thereupon the merger negotiations with C. Ltd. ceased during negotiations to sell Q. Ltd. for a price in excess of £2m. By June 1976 the taxpayers, fearing that the sale to J. Ltd. would not materialise, resumed merger talks with C. Ltd., and M. Ltd., an Isle of Man holding company, was incorporated. But talks were resumed between the taxpayers, their advisers and J. Ltd. The taxpayers on 19 July 1976 exchanged their shares in Q. Ltd. for shares in M. Ltd. On 9 August agreement was reached for J. Ltd. to purchase the share capital of Q. Ltd. from M. Ltd. for £2.2m. subject to adjustments. Payments for the shares was to be made by instalments, £1.8m. on completion of the sale and the balance by two further payments of adjustable amounts. The taxpayers between 1977 and 1981 received several substantial interest free loans from M. Ltd. They were each assessed under section 19 of the Finance Act

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1965¹ to capital gains tax for the years 1976–77 and 1977–78 on the basis that they had for tax purposes disposed of their shares in Q. Ltd. to J. Ltd., the share exchange with M. Ltd. being treated as a fiscal nullity, and that those disposals gave rise to chargeable gains, the consideration for the disposals being the sums received by M. Ltd. for Q. Ltd.'s shares. The taxpayers appealed against the assessments contending that the relieving provisions for company amalgamations contained in paragraphs 4(2) and 6 of Schedule 7 to the Finance Act 1965 exempted them from the charge to the tax. The special commissioners determined the appeals shortly before the House of Lords' decision in *Furniss v. Dawson* [1984] A.C. 474 and they held, *inter alia*, that there was a single composite transaction for the purposes of the principle enunciated by the House of Lords in *W.T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300 but that no part of it, was to be regarded as a fiscal nullity. An appeal by the Crown from that determination was dismissed by Peter Gibson J. who held that as the taxpayers had exchanged the shares partly for a proper commercial purpose and had done so at a time when the sale of Q. Ltd. to J. Ltd. was not certain, there was no "pre-ordained series of transactions" or "single composite transaction" for the purposes of applying the *Ramsay* principle. In the result the share exchange could not be disregarded for fiscal purposes and the taxpayers were not to be regarded for the purposes of the tax as having made any disposal to J. Ltd.

In the second of the three cases the taxpayer company, a member of a large group of companies, decided to sell 23 acres of land that it owned. In 1980 negotiations began for a sale of that land to M.P. Ltd. for a price exceeding £200,000. Before any contract for such a sale was entered into, the taxpayer company, who at that time fully expected the proposed sale to M.P. Ltd. to materialise, contracted to sell the land to five companies in the group as beneficial tenants in common in equal shares for £180,000. It was common ground that that transaction was designed solely to avoid liability to development land tax that would otherwise arise on a direct sale of the land by the taxpayer company to M.P. Ltd. under the provisions of sections 1 and 4 of the Development Land Tax Act 1976.² In July 1980 M.P. Ltd. notified the taxpayer company that it no longer wished to purchase the land. However, due to a change in circumstances, in February 1981 M.P. Ltd. reopened negotiations that resulted in a sale in November 1981 of the land by the five group companies to M.P. Ltd. for £259,750. An assessment to the tax was subsequently raised on the taxpayer company in respect of the sale on the basis that the taxpayer company was to be regarded for tax purposes as having disposed of the land direct to M.P. Ltd. The taxpayer company appealed

¹ Finance Act 1965, s. 19(1): see post, p. 669f.

Sch. 7, para. 4: "(2) . . . a reorganisation or reduction of a company's share capital shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired."

Para. 6: "(1) . . . where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, paragraph 4 above shall apply with any necessary adaptations as if the two companies were the same company and the exchange were a reorganisation of its share capital."

² Development Land Tax Act 1976, s. 1: see post, p. 687c–d.

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against the assessment to the special commissioners who upheld its case that because at the time of the sale of the land to the five companies there was no certainty that the ultimate sale to M.P. Ltd. would take place, the transactions did not constitute a single composite transaction for the purposes of the application of the *Ramsay* principle and accordingly the true disponors of the land were the five companies. The commissioners discharged the assessment. An appeal by the Crown was dismissed by Warner J. who held that the commissioners' decision was correct: the relevant transactions resulting in the disposal to M.P. Ltd. were not pre-arranged or pre-ordained because at the time of the sale of the land by the taxpayer company to the five companies it could not be said that there was no likelihood in practice that the ultimate sale to M.P. Ltd. would not follow.

In the third appeal the first of the taxpayers was the managing director and major shareholder in P.G.I. Ltd. and also one of the trustees of a family trust that held shares in the company. In 1973 he began negotiations, that eventually broke down, to sell P.G.I. Ltd. to another company. To postpone indefinitely liability to a capital gains tax charge on a sale of P.G.I. Ltd. an Isle of Man company was incorporated for the purpose of carrying out a share exchange scheme that would attract roll-over relief under the provisions contained in Schedule 7 to the Finance Act 1965. Despite the failure of the negotiations, in 1974 the shares in P.G.I. Ltd. were exchanged for shares in the Isle of Man company. In 1976 the Isle of Man company sold all the shares in P.G.I. Ltd. to a third party. Various assessments to tax were raised on the taxpayer personally and on him as a trustee and on other P.G.I. Ltd. shareholders on the basis that the 1974 share exchange constituted chargeable disposals by them. All the assessments were appealed against. In the assessment that was raised on the trustees, due to a typing error the year assessed was stated to be 1974-75: it should have related to the year 1975-76. The trustees did not notice the mistake and by the time that it came to the tax inspector's notice the time limit for raising a new assessment for 1975-76 had expired. Without notifying the trustees, the inspector had the assessment "vacated" in the assessment book and advised the collector of taxes not to proceed in respect of it against the trustees. At the hearing of the appeals the special commissioners allowed the appeals by all the shareholders. In relation to the assessment on the trustees containing the mistake, a single commissioner rejected the Crown's case that an assessment could not be withdrawn unilaterally and that in any event it was capable of being corrected under the provisions of section 114(1) of the Taxes Management Act 1970.³ He held that that assessment could not stand. The Crown appealed in respect of both the substantive and the preliminary issues. Vinelott J. allowed its appeal on the preliminary issue holding that an assessment could not be withdrawn by the unilateral act of an inspector after it had been made and served on a taxpayer and that as the error was genuine and had not misled the trustees section 114(1) of the Act of 1970 applied with the result that the assessment could be treated as a valid assessment for 1975-76 but he dismissed the Crown's appeal on the substantive issue.

On appeals by the Crown on the substantive issue raised in each case and by the trustees on the preliminary issue raised in the third case:—

³ Taxes Management Act 1970, s. 114(1): see post, p. 695E-F.

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Held, (1) dismissing the Crown's appeals, that transactions, each of which had legal effects, were not to be regarded as a pre-ordained series of transactions or a single composite transaction for the purposes of applying the *Ramsay* principle unless at the time when the first transaction was effected all the essential features of the second transaction had already been determined by persons having both the intention and ability to procure the implementation of that second transaction; that in each of the three appeals because the first transaction had been effected at a time when there was no certainty that the ultimate sale would materialise there were no preordained series of transactions or composite transactions; that accordingly neither the share exchange transactions nor the sale of land to the five group companies could be disregarded for fiscal purposes and the taxpayers were not to be regarded either for capital gains tax purposes or for development land tax purposes as having made a disposal of the relevant assets direct to the ultimate purchasers (post, pp. 679A—680A, 686B—D, 689G—H, 690C—D, 697E—H, 702D—E, 707H, 709A, 714H—716A).

Ramsay (W. T.) Ltd. v. Inland Revenue Commissioners [1982] A.C. 300, H.L.(E.); *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.*, (1982) 54 T.C. 200; [1982] S.T.C. 30, H.L.(E.) and *Furniss v. Dawson* [1984] A.C. 474, H.L.(E.) distinguished.

(2) Allowing the trustees' appeal, that the vacation of an assessment to tax had to be properly effected if it was to be valid and was not, in accordance with the provisions of the Taxes Management Act 1970, so effected by the unilateral act of an inspector; that in relation to capital gains tax the year of assessment was of critical importance and the revenue when issuing an assessment had to get the fiscal year to which it related correct and neither section 114(1) nor any other provision of the Act of 1970 enabled an assessment specified to be for one year to take effect as an assessment for another; it followed that the assessment raised on the trustees was to be treated as a valid assessment for 1974–75 and not for 1975–76 and accordingly did not give rise to any liability to charge against them (post, pp. 693D—E, 694B—C, H—695A, D—E, 696A—C, G—H, 708H, 716A).

Decisions of Peter Gibson J. [1985] 1 W.L.R. 1024; [1985] 3 All E.R. 125 and Warner J. [1985] S.T.C. 783 affirmed and Vinelott J. [1986] 1 W.L.R. 624; [1986] 1 All E.R. 289; [1986] S.T.C. 22 affirmed in part.

The following cases are referred to in the judgments:

British Estate Investment Society Ltd. v. Jackson (1956) 37 T.C. 79
Edwards v. Bairstow [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.(E.)

Fleming v. London Produce Co. Ltd. [1968] 1 W.L.R. 1013; [1968] 2 All E.R. 975; 44 T.C. 582

Floor v. Davis [1978] Ch. 295; [1978] 3 W.L.R. 360; [1978] 2 All E.R. 1079, C.A.; [1980] A.C. 695; [1979] 2 W.L.R. 830; [1979] 2 All E.R. 677, H.L.(E.)

Furniss v. Dawson [1984] A.C. 474; [1983] 3 W.L.R. 635, C.A.; [1984] A.C. 474; [1984] 2 W.L.R. 226; [1984] 1 All E.R. 530; 55 T.C. 324, H.L.(E.)

Hart v. Briscoe [1979] Ch. 1; [1978] 2 W.L.R. 832; [1978] 1 All E.R. 791

Honig v. Sarsfield [1986] S.T.C. 246, C.A.

Inland Revenue Commissioners v. Burmah Oil Co. Ltd. 54 T.C. 200; [1982] S.T.C. 30, H.L.(Sc.)

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- Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C.1; 19 T.C. 490, H.L.(E.) A
- Inland Revenue Commissioners v. Wesleyan and General Assurance Society* (1946) 30 T.C. 11, C.A.
- Mangin v. Inland Revenue Commissioner* [1971] A.C. 739; [1971] 2 W.L.R. 39; [1971] 1 All E.R. 179, P.C.
- Partington v. Attorney-General* (1869) L.R. 4 H.L. 100, H.L.(E.)
- Ramsay (W.T.) Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300; [1981] 2 W.L.R. 449; [1981] 1 All E.R. 865, H.L.(E.) B
- Tennant v. Smith* [1892] A.C. 150, H.L.(Sc.)

The following additional cases were cited in argument:

- Barnes v. Hely Hutchinson* [1940] A.C. 81; [1939] 3 All E.R. 803; 22 T.C. 655, H.L.(E.) C
- Bath and West Counties Property Trust Ltd. v. Thomas* [1977] 1 W.L.R. 1423; [1978] 1 All E.R. 305; 52 T.C. 20
- Chinn v. Hochstrasser* [1981] A.C. 533; [1981] 2 W.L.R. 14; [1981] 1 All E.R. 189, H.L.(E.)
- Commissioner of Inland Revenue v. Challenge Corporation Ltd.* [1987] A.C. 155; [1987] 2 W.L.R. 24, P.C.
- Inland Revenue Commissioners v. Cleary* [1968] A.C. 766; [1967] 2 W.L.R. 1271; [1967] 2 All E.R. 48, H.L.(E.) D
- Magnavox Electronics Co. Ltd. v. Hall* [1985] S.T.C. 260
- Young v. Phillips* [1984] S.T.C. 520

CRAVEN (INSPECTOR OF TAXES) v. WHITE (STEPHEN)
SAME v. WHITE (BRIAN)

E

APPEAL from Peter Gibson J.

During 1976 the taxpayers, Stephen White and Brian White, together with Archibald White, were involved in the following transactions: (1) the exchange by them on 19 July 1976 of their shares in S. White and Sons (Queensferry) Ltd. for shares in Millor Investments Ltd., an Isle of Man company, and (2) the sale by Millor Investments Ltd. on 9 August 1976 to Morris and David Jones Ltd. of the shares of the company which it had acquired on 19 July 1976. They appealed against assessments to capital gains tax made on them as follows: Mr. Stephen White: 1976–77: £400,000 (main) and £1,075,000 (further) and 1977–78: £80,000; Mr. Brian White: 1976–77: £130,000 (main) and £360,000 (further) and 1977–78: £27,000. Assessments were also raised for the same years against Mr. Archibald White and against which he appealed. The special commissioners determined the appeals by reducing the assessments raised on Mr. Stephen White to £55,000 for 1976–77 and to £60,000 for 1977–78 and by discharging the assessments for 1976–77 made on Mr. Brian White and reducing that for 1977–78 to £12,098. They further determined the assessments on Mr. Archibald White in substantially reduced amounts. The Crown appealed against all the determinations. Before the appeals came on for hearing Mr. Archibald White died and personal representatives of his estate were not appointed until some later date. On 24 May 1985 Peter Gibson J. ordered that the determination of the commissioners be affirmed holding that the taxpayers could not be regarded as having made disposals of their

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A shares direct to the ultimate purchaser and were entitled to claim relief for company amalgamations contained in paragraphs 4(2) and 6 of Schedule 7 to the Finance Act 1965 in respect of the share exchange transactions with the Isle of Man company.

B The Crown appealed and by a notice of appeal dated 28 June 1985 set out the grounds as (1) that the judge relied on the formulation by Lord Brightman in *Furniss v. Dawson* [1984] A.C. 474, 527, of the limitations of the principle in *W.T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300: "First, there must be a pre-ordained series of transactions: or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. . . . Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax—not no 'business effect.' If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes."

D (2) That in relation to the first of those limitations: (i) the question whether there was or was not a composite transaction comprising the share exchange on 19 July 1976 and the subsequent sale on 9 August 1976 was a question of fact as held by Lord Brightman in *Furniss v. Dawson* [1984] A.C. 474, 527–528, and accepted by the judge. The commissioners found as a fact (having had all the relevant authorities directed to their attention) that there was such a composite transaction. Such finding could only be disturbed if insupportable on the basis of the primary facts found; (ii) the judge erred in holding that the commissioners' finding of a composite transaction was insupportable. The judge [1985] 1 E W.L.R. 1024, 1033 held that the commissioners were wrong in regarding "as the essential quality of a composite transaction . . . that the taxpayer, with his advisers, should at the time the first step in the composite transaction was taken have planned the steps in the series that made up the composite transaction, regardless of whether the means of achieving all the steps lay within the control of the taxpayer or of whether there was otherwise any practical certainty that all the planned steps would be completed"; (iii) in so holding the judge confused certainty as to the series of steps, or machinery, by which any commercial end was to be achieved with certainty as to the achievement of the end itself; (iv) there was certainty on the facts as to the series of steps whereby the tax advantage was intended to be achieved. The taxpayers intended that should the sale of their shares be achieved it should be routed through G the interposed Isle of Man company; (v) provided the machinery by which the commercial end was to be achieved was pre-ordained it was irrelevant that there remained a possibility that its execution might be frustrated by a failure to achieve the commercial end itself; (vi) Lord Wilberforce in *Ramsay* [1982] A.C. 300, 323–324, said: "It is the task of the court to ascertain the legal nature of any transaction to which it is H sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded." The series of transactions in the case, namely the share exchange and the ultimate sale, were intended to operate "as such," namely in combination, and therefore it was that series of transactions which ought to be regarded as a whole; (vii) even if the cases in which the *Ramsay* principle had so far been applied have been ones in which there had been certainty both as

to the machinery whereby the commercial end was to be achieved and as to the achievement of the end itself, there was nothing in the reasoning of those cases to limit the application of the principle to such circumstances; (viii) in any event, the judge erred in holding that there must be "practical certainty . . . that the series of steps would be completed once started;" (ix) it was wrong in principle that tax avoidance machinery in respect of a prospective sale should be treated as effective and outside the *Ramsay* principle merely because it was set in motion before the detailed terms of the sale were finally determined; (x) the effect of the judge's decision was that the *Ramsay* principle could be easily side stepped by the simple expedient of the taxpayer taking the first step in the composite transaction (namely, the share exchange) prior to going into the market to find his purchaser, or even just prior to the final negotiating meeting at which the details of the transaction were expected to be finalised; (xi) the true principle emerged from *Ramsay* itself where Lord Wilberforce said, at p. 323: "If it can be seen that a document or transaction was intended to have effect as part of the nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance or substance to form." (xii) The judge erred in relying on Lord Wilberforce's reference to the "intentions of the parties" at p. 324 as indicating that, in a case like the present, the intention of the taxpayer alone was insufficient for determining what the relevant transaction was. *Ramsay* was a case where the entire series of transactions forming the composite transaction was from beginning to end under the control of the scheme organisers. The reference to the intention of the "parties" should be seen in that context as a reference to those scheme organisers. The judge erred in treating the reference as including, in the present case, a reference to the ultimate purchaser; (xiii) in like manner, the words of Lord Wilberforce at p. 324 referring to a case where there was "no likelihood in practice" that the end result would not be achieved must be seen in the context of a *Ramsay* type case where the entirety of the scheme was under the control of the scheme organisers. The judge erred in applying those words as if they were part of an enactment. Even Lord Wilberforce recognised that the degree of likelihood of achievement of the end result in such cases would "vary in emphasis." (3) In relation to the second limitation: (i) the judge erred in holding that the possible use of Millor as a holding company in a merger with Cee-N-Cee Supermarkets was a separate commercial purpose which prevented the acquisition of Millor being disregarded for fiscal purposes; (ii) it was submitted that Lord Brightman's reference to a commercial purpose was not intended to include a purpose which was alternative to, and inconsistent with, the commercial end to which the composite transaction itself was directed; (iii) since the possibility of Millor's use in a merger with Cee-N-Cee would inevitably be, and was, nullified by the sale to the ultimate purchaser, the existence of that possibility (whether or not in the minds of the taxpayers) was irrelevant to the legal analysis of the transactions which in fact took place; (iv) the *Ramsay* principle was concerned with identifying the relevant transaction by looking at the end result of a composite transaction, disregarding for fiscal purposes the artificially inserted steps. The artificially inserted step in the case was the interposition of Millor. That step was no less artificial because there might have been an intended use for it in the event that the intended

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A scheme or arrangement did not ultimately eventuate; (v) it would be absurd if what was to be a purely fiscal device, in the events which were expected to happen and which did happen, was not to be recognised as a purely fiscal device simply because it might have served a commercial purpose if different events had taken place. (4) If, which was denied, the facts posed by the commissioners did not bring the case within the formulation of the *Ramsay* principle stated by Lord Brightman, it was submitted, in line with the case-by-case approach advocated in particular by Lord Scarman in *Furniss v. Dawson* [1984] A.C. 474, 513, that the principle should be extended to cover at least a case where, as here, (i) the taxpayer's primary objective was a sale to a third party, (ii) there was a common understanding and a practical certainty that if the sale went ahead, it would be through the machinery of a share exchange with an Isle of Man company, and (iii) the sole purpose of the share exchange in the context to the sale was the avoidance of tax.

INLAND REVENUE COMMISSIONERS v. BOWATER PROPERTY
DEVELOPMENTS LTD.

APPEAL from Warner J.

D The taxpayer company, Bowater Property Developments Ltd., a member of the Bowater Corporation Plc., appealed against an assessment to development land tax made on it in the sum of £207,220 in connection with a disposal of an interest in certain land. In March 1980 the taxpayer company transferred its beneficial interest in that land to five companies in the Bowater group and in October 1981 those five companies contracted to sell their interests in the land to an independent purchaser, Milton Pipes Ltd. On appeal against that assessment the sole question for the special commissioners was whether the October 1981 disposal was, by virtue of the decisions of the House of Lords in *Ramsay* and subsequent cases, to be treated as a disposal for the purposes of the tax made by the taxpayer company rather than by the five group companies. The commissioners determined the issue in favour of the taxpayer company and an appeal by the Crown was dismissed by Warner J. on 18 October 1985. The judge held that the two transactions did not constitute a pre-ordained series of transactions as it could not be said that at the time when the taxpayer company disposed of the land to the five companies there was no likelihood in practice that the final sale would not follow. The Crown appealed by a notice dated 4 December 1985, the grounds of which were similar to those set out in *Craven v. White*.

BAYLIS (INSPECTOR OF TAXES) v. GREGORY
SAME v. SAME AND ANOTHER

APPEAL from Vinelott J.

H In May 1983 the special commissioners determined appeals against assessments to capital gains tax made (1) on Mr. Robert Felix Gregory for 1973-74 in the sum of £785,000 and in the alternative in the same amount for 1975-76, and (2) against Mr. Gregory and Mr. Bernard John Weare in their capacity as trustees of the estate of Joseph Gregory, deceased, for 1973-74 in the sum of £155,000 and in the alternative for 1974-75 (or 1975-76) in the same amount. The substantive issue with which the appeals were concerned was whether disposals of shares in Planet Gloves (Industrial) Ltd. by its shareholders in March 1974 to P.

G. Holdings, a private unlimited company incorporated in the Isle of Man, were chargeable disposals notwithstanding the provisions for roll-over relief in paragraphs 4(2) and 6 of Schedule 7 to the Finance Act 1965. The preliminary issue arose in relation to the second of the assessments on the trustees, namely: (1) whether, in the light of certain action taken by the inspector of taxes, any such assessment was not extant; if there was such an assessment in existence; (2) whether such an assessment was for the year 1974-75 (in which event it was common ground that no capital gains tax was payable) or whether it was for the year 1975-76, the mistake on its face being capable of being disregarded by virtue of the provisions of section 114(1) of the Taxes Management Act 1970. A single special commissioner determined the preliminary issues in favour of the trustees. The substantive issue was determined at a separate hearing by special commissioners in favour of the taxpayers and all the assessments were discharged. The Crown appealed against the determinations on both the substantive and preliminary issues. On 26 November 1985 Vinelott J. upheld the commissioners' determination on the substantive issue on the ground that the share transactions did not fall within the principles designed to counteract tax avoidance schemes enunciated by the House of Lords in the *Ramsay* and *Furniss v. Dawson* cases. On the preliminary issue the judge, allowing the Crown's appeal and declaring the assessment to be a valid assessment for 1975-76, held that an assessment could not be withdrawn by the unilateral act of an inspector once it had been made and served on a taxpayer and that there was a genuine mistake which did not mislead anyone and which could be cured by virtue of the provisions of section 114(1) of the Taxes Management Act 1970.

By a notice dated 24 January 1986 the Crown appealed against the judge's decision on the substantive issue, the grounds of the appeal being similar to those in *Craven v. White*. By an amended respondents' notice under R.S.C., Ord. 59, r. 6(1), dated 26 January 1987, Mr. Gregory and Mr. Weare, in their capacity as trustees, contended that the judge's decision be affirmed on the alternative grounds (1) that the assessment for 1974-75, having been "vacated" by the revenue, had effectively ceased to exist, leaving no assessment capable of being corrected under section 114 of the Taxes Management Act 1970 and (2) that the determination of the commissioners refusing to correct the error in the assessment was correct because the error as to the year of assessment (1974-75 rather than 1975-76) was incapable of being corrected under section 114 and accordingly the Crown, having conceded that there was no liability to tax for the year 1974-75, that assessment was properly discharged by the commissioners.

The facts of all the cases are set out in the judgment of Slade L.J.

Jules Sher Q.C. and *Alan Moses* for the Crown.

Leolin Price Q.C. and *Grant Crawford* for the taxpayers in the first appeal.

Andrew Park Q.C. and *David Goy* for the taxpayer company in the second appeal.

Michael Flesch Q.C. for the taxpayers in the third appeal.

Cur. adv. vult.

24 March. The following judgments were handed down.

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Craven v. White (C.A.)

A SLADE L.J. There are before the court appeals by the Crown from three judgments. The first is from a judgment of Peter Gibson J. delivered on 24 May 1985 in *Craven v. White (Stephen)* and *Craven v. White (Brian)* [1985] 1 W.L.R. 1024. The second is from a judgment of Warner J. delivered on 18 October 1985 in *Inland Revenue Commissioners v. Bowater Property Developments Ltd.* [1985] S.T.C. 783. The third is from a judgment of Vinelott J. delivered on 26 November 1985 in *Baylis v. Gregory* and *Baylis v. Gregory* [1986] 1 W.L.R. 624; [1986] S.T.C. 22. The first and third of these judgments concern assessments to capital gains tax. The second of them concerns an assessment to development land tax. The three cases are quite separate from one another on their facts. However, they raise similar problems concerning the extent and limitations of the principle relating to tax avoidance schemes which has come to be known as "the *Ramsay* principle." This was first stated by the House of Lords in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners*; *Eilbeck v. Rawling* [1982] A.C. 300. It has subsequently been developed by their Lordships in *Inland Revenue Commissioners v. Burnham Oil Co. Ltd.* (1982) 54 T.C. 200 and *Furniss v. Dawson* [1984] A.C. 474 in which they reaffirmed the correctness of the dissenting judgment of Eveleigh L.J. in *Floor v. Davis* [1978] Ch. 295.

D The facts of all the cases now before this court have certain common features. In each of them there has been a disposition by the taxpayers of assets to one or more companies, followed by a disposition of those assets by the company or companies to an ultimate purchaser. Save possibly in *Craven v. White*, where this element is in dispute, the first disposition has had no commercial purpose other than that of tax avoidance. In none of the cases now before the court did there exist a contractual obligation to effect the second disposition at the time when the first was made. In each case the Crown, in reliance on the *Ramsay* principle, asserts that, for the purpose of ascertaining their fiscal consequences, the two steps or transactions involved should be treated as a single, composite transaction under which there was a "disposal" by the taxpayers in favour of the ultimate purchaser.

F Section 19(1) of the Finance Act 1965, which introduced capital gains tax, provided:

"Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets."

G Since a "disposal of assets" is the event which gives rise to the charge, the first inquiry must always be whether or not such a "disposal" in the relevant sense has occurred. The Act of 1965 contained provisions stating in effect that certain specifically defined events should or should not, as the case might be, be treated as involving a disposal of assets. However, it contained no comprehensive definition of the word "disposal." Accordingly, where an assessment to capital gains tax is under challenge and the transactions in question are not specifically covered by a particular statutory provision, the task of the court, in the final analysis, must always involve the identification of the relevant disposal or disposals of assets (if any). In deciding whether a disposal has occurred within the meaning of the statute, it may have to consider in particular (i) who were the parties to that disposal; (ii) what was its date and (iii) what were the assets disposed of.

The identification of the relevant disposal or disposals was the essential issue before the court in *Furniss v. Dawson* [1984] A.C. 474 and is the essential issue in each of these three appeals, though the second of them happens to concern disposals with reference to the Development Land Tax Act 1976 rather than to the Finance Act 1965.

There are many similarities, though the taxpayers would say essential differences, between the facts of the first and third appeals and the facts of the *Dawson* case. A brief reference to the facts of that well known case will suffice for present purposes. The Dawsons held shares in two operating companies. They reached an agreement in principle with another company, Wood Bastow, that Wood Bastow would purchase all those shares. Before the sale took place, they entered into a scheme designed to defer the liability to pay capital gains tax to which the transfer of the shares to Wood Bastow would otherwise have given rise. To that end, with the concurrence of Wood Bastow, they arranged for their shares to be exchanged for shares in a company, Greenjacket, specially incorporated for the purpose in the Isle of Man. The final part of the scheme, which was implemented on 20 December 1971, involved two distinct steps, namely (a) a transfer by the Dawsons to Greenjacket of the shares in the operating companies and (b) a subsequent transfer of the same shares on the same day by Greenjacket to Wood Bastow. The thinking behind the scheme was that paragraph 6 of Schedule 7 to the Act of 1965 would apply, so as to prevent the transfers by the Dawsons to Greenjacket from being chargeable disposals of the shares in the family companies.

The facts of the *Dawson* case had at least four features in common with the facts of each of the three present appeals. They involved a transfer of assets by A to B, followed by a transfer of those same assets by B to C. The special commissioners in each case accepted that the transfer by A to B was a genuine transaction; there was nothing sham about it in the sense that it purported to be something that it was not in fact. The commissioners in each case further accepted that the transfer by A to B had passed to B the full legal and beneficial ownership of the assets in question. In each of the four cases the Crown has further sought to exact tax on the basis that for fiscal purposes there has been a disposal by A not in favour of B but in favour of C.

There are, however, certain significant differences between the facts of the *Dawson* case and the present case. In particular, in the *Dawson* case, unlike the present cases, at the time when the transfer of assets by A to B took place, there existed, by virtue of the pre-arranged scheme, the practical certainty, albeit covered by no pre-existing legally binding contractual arrangements, that the transfer of the same assets by B to C would almost immediately follow. Whether or not this renders the *Dawson* case distinguishable on its facts is one of the important issues on each of the present appeals.

On appeal by the Crown to this court from the decision of Vinelott J. in the *Dawson* case, this court rejected the Crown's claim that there had been a disposal of the shares in the operating companies by the Dawsons in favour of Wood Bastow. All its members, of whom I was one, found difficulty in accepting the re-analysis of the relevant transactions for which the Crown contended, in such a way, in Oliver L.J.'s words [1984] A.C. 474, 483, "as to attribute to them, for fiscal purposes, a legal result which they did not have and which, indeed, they were specifically designed to avoid having." Oliver L.J. was also

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A particularly concerned with the prospect of double taxation. He considered, at p. 482, that, if the Crown's argument were right, when the taxpayers sold their shares in Greenjacket, their value on the sale would, under Schedule 7, fall to be measured by the asset content of Greenjacket, which would include the assets representing the proceeds of sale of the original shares in the operating companies. The gain on that transaction would then be computed under that Schedule on the difference between that value and the acquisition cost of the original shares, which, on this hypothesis, would already have been taxed. In my own judgment, at pp. 505–506, I referred to what seemed to me the conceptual difficulties involved in regarding a composite transaction embodying a transfer by A to B of the full legal and beneficial title to property and a subsequent transfer of the same property by B to C as giving rise to three disposals for capital gains tax purposes, namely a disposal by A in favour of B, a disposal by B in favour of C and a disposal by A in favour of C in each case of the same assets.

The House of Lords, however, in reversing the decision of this court in the *Dawson* case, concluded *per* Lord Brightman, at p. 528:

“The result of correctly applying the *Ramsay* principle to the facts of this case is that there was a disposal by the Dawsons in favour of Wood Bastow in consideration of a sum of money paid with the concurrence of the Dawsons to Greenjacket. Capital gains tax is payable accordingly.”

Their Lordships' decision made it clear that the “three disposals” point which had concerned me was, at least on the facts of that case, without substance. If in any given case the *Ramsay* principle applies, there will merely have been one disposal for fiscal purposes, namely a disposal by A to C; the introduction of B into the scheme will fall to be wholly disregarded for fiscal purposes: see *per* Lord Brightman at p. 527. By parity of reasoning, the decision indicated that Oliver L.J.'s fears of oppressive double taxation were not well founded on the facts of that case. As Lord Brightman put it, at p. 525:

“If the Crown's case were correct, there would be a disposal by the Dawsons to Wood Bastow on which capital gains tax would be payable. There could be no *additional* capital gains tax on the steps by which that disposal was achieved, namely the sale first to Greenjacket and then by Greenjacket to Wood Bastow, because it is the Crown's case that the fiscal consequences of the introduction of Greenjacket are to be disregarded. The revenue cannot, and does not claim to, have it both ways.”

This decision of the House of Lords has thus clearly established that, in the light of the *Ramsay* principle, and contrary to the views which I had expressed in this court, a composite transaction which embodies a transfer by A to B of the full legal and beneficial title to property, and a subsequent transfer by B to C of the full legal and beneficial title to the same property, *is* capable in certain circumstances of giving rise to a disposal by A to C for capital gains tax purposes. The task of this court on the first and third of the present appeals is to consider whether or not the facts are such as to produce this result.

The House of Lords in the *Dawson* case [1984] A.C. 474, while giving guidance in general terms, did not think it necessary or appropriate to attempt a comprehensive definition of the circumstances in which two

such successive transfers of the same property may give rise to a disposal by A to C for fiscal purposes. As Lord Scarman observed, at pp. 513–514, the law in the area of the *Ramsay* principle is in an early stage of development. Nevertheless, a number of significant guidelines are to be found in their Lordships' speeches. First, they contain expositions of the general nature of the *Ramsay* principle, which was being applied. Lord Fraser of Tullybelton, who had himself been a party to the *Ramsay* decision, explained it thus, at p. 512:

“The true principle of the decision in *Ramsay* [1982] A.C. 300 was that the fiscal consequences of a preordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately. The principle was stated in the speech of Lord Wilberforce in *Ramsay*, at p. 324A–C, especially where his Lordship said: ‘For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that documents or transactions are not ‘shams,’ from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is. They are not, under the *Westminster* doctrine [*Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1] or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole.’”

Lord Brightman, at p. 523, similarly explained the *Ramsay* principle by reference to Lord Wilberforce's speech in that case:

“The fact that the court accepted that each step in a transaction was a genuine step producing its intended legal result did not confine the court to considering each step in isolation for the purpose of assessing the fiscal results. ‘... viewed as a whole, a composite transaction may produce an effect which brings it within a fiscal provision.’ (p. 325). Lord Wilberforce added later, at p. 326: ‘To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process. In each case the facts must be established, and a legal analysis made: legislation cannot be required or even be desirable to enable the courts to arrive at a conclusion which corresponds with the parties' own intentions.’”

Secondly, *Dawson* establishes that the *Ramsay* principle is capable of applying to what has been described in argument on the present appeal as “linear transactions,” as well as to “self-cancelling transactions” such as those under consideration in the *Ramsay* case itself. In that case the respective taxpayers had adopted elaborate and artificial schemes which were designed to create a loss for tax purposes, capable of being set off against existing realised gains, but would nevertheless not leave the taxpayers out of pocket after the schemes had been carried through to completion. The actual decisions in the *Ramsay* case were that the schemes gave rise to no allowable loss (save a sum not exceeding £370 in one case). In the *Dawson* case, as Lord Fraser of Tullybelton pointed out at p. 512, the scheme was much simpler and had enduring legal

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A consequences. However, this was not a sufficient ground for failing to apply the *Ramsay* principle.

B Thirdly, however, the mere fact that a scheme which involves a series of stages is designed to avoid or mitigate tax does not by itself entitle the revenue to charge tax by reference to the result of the series as a whole, without considering each individual stage separately. Lord Brightman, with whose speech the rest of their Lordships concurred, expressed, in the following crucially important passage, at p. 527, the conditions which have to be satisfied if the *Ramsay* principle is to be applied in any given case:

C “The formulation by Lord Diplock in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30, 33 expresses the limitations of the *Ramsay* principle. First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax—not ‘no business effect.’ If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.”

E Fourthly, and this is allied to the third point, as Lord Brightman stated, at p. 527, in any case where the revenue is seeking to invoke the *Ramsay* principle, the commissioners will be required to make two findings of fact, namely:

F “first, whether there was a pre-ordained series of transactions, i.e. a single composite transaction, secondly, whether that transaction contained steps which were inserted without any commercial or business purpose apart from a tax advantage. Those are facts to be found by the commissioners. They may be primary facts or, more probably, inferences to be drawn from the primary facts. If they are inferences, they are nevertheless facts to be found by the commissioners. Such inferences of fact cannot be disturbed by the court save on *Edwards v. Bairstow* [1956] A.C. 14 principles.”

G Lord Wilberforce in *Ramsay* [1982] A.C. 300, 324, had referred to the duty of the commissioners as being to

“find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions.”

H To the limited extent that he referred to this matter as being “one of law,” I think that, as Peter Gibson J. pointed out in his judgment in *Craven v. White* [1985] 1 W.L.R. 1024, 1031–1032, Lord Wilberforce’s opinion must be regarded as having been overruled by Lord Brightman’s speech in *Dawson*, with which all their Lordships concurred.

For present purposes, the third of these four guidelines is of paramount importance. In two of the three appeals before us the schemes in question admittedly included steps which had no business

purpose apart from the avoidance of a liability to tax. The principal argument in all three appeals has centred round the condition for the application of the *Ramsay* principle that "there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction." I will refer to this as the first *Ramsay* condition. The first appeal, however, also concerns the application of the condition that "there must be steps inserted which have no commercial (business) purpose, apart from the avoidance of a liability to tax . . ." I will refer to this as the second *Ramsay* condition.

Mr. Sher, in opening the appeals on behalf of the Crown, rightly indicated that perhaps the most important point of principle which this court has to consider is the essential nature of the link between two or more transactions which will suffice to satisfy the first *Ramsay* condition and thus entitle the revenue or the court to treat all the transactions as one single transaction for fiscal purposes. In the course of his forceful and able argument, he naturally put the point in different phraseology and with differing shades of emphasis. However, while it is expressed in slightly more qualified terms in its notices of appeal in the other cases, I think that the basic proposition which the Crown is concerned to establish is well and clearly reflected in its notices of appeal in the *Baylis* cases:

"(4) It is submitted that in order to prove a pre-ordained series of transactions which culminates in an ultimate disposal it is only necessary to prove that at the time of the first transaction it was intended by the taxpayer that the first transaction should be used as conveyancing machinery in order to achieve a final disposal of the asset if a disposal was ultimately made. It is submitted that provided the machinery by which the commercial end is to be achieved is pre-ordained, it is irrelevant that there remains a possibility that its execution may be frustrated by a failure to achieve the commercial end itself or that at the time of the first transaction there was no immediate prospect or intention of finally disposing of the asset."

It will be convenient to consider in general terms this proposition, which I will call the Crown's basic contention, before turning to the particular facts of each appeal.

While in the *Dawson* case the proposed price and other terms of the ultimate purchase by C had been negotiated, although not to the stage of commitment, in advance of the transfer of assets by A to B, this was not so in any of the cases now before the court. Mr. Sher accepted that, if the evidence shows that, in advance of the first transaction, the purchase price and terms were all known, that may be the best evidence of the existence of one single composite transaction. Nevertheless, he submitted, the *Ramsay* principle is not applicable only in a case where there existed at the time of the first transaction a known purchaser who was prepared to purchase at a known price and on known terms. Since, he submitted, the purpose of the *Ramsay* principle is to identify the real transaction in any given case, by ignoring artificially inserted steps, the actual identification of the purchaser and the price does not signify anything of critical importance. If A Ltd. wishes to sell its land free of development land tax and fragments the land into five subsidiary companies which have not used their £50,000 free band, can it make any difference, he asked, whether at the time of the fragmentation A Ltd. has found the purchaser and negotiated the terms of the purchase or

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A whether it has listed the sale in an immediately impending auction at a modest reserve which will for all practical purposes ensure its sale?

B In the Crown's submission, the essential link required to enable the revenue to treat two or more transactions as a single composite transaction within the first *Ramsay* condition, does not depend on the identification at the first stage of the ultimate purchaser or the proposed terms of his purchase, or indeed upon the likelihood or otherwise of the second transaction following the first. The essential link is the *intention* of the taxpayer at the time of the first transaction. If, it was said, he embarks on the first stage with a view to facilitating an ultimate sale of the asset by means of a second stage, and that ultimate sale eventuates, that is enough to satisfy the first *Ramsay* condition. In Mr. Sher's submission, it suffices for this purpose even if at the time of the transfer of assets by the taxpayer A to B, A has no present intention to sell but his intention is merely that the transfer shall serve as a convenient springboard in case at some future date it may be desired to sell. (In the course of his argument he referred to the initial transfer in such a case as an instance of "strategic tax planning," and I will use the same convenient phrase hereafter in this judgment.) In the alternative, he submitted, it must in any event suffice if, at the time of the transfer of assets by A to B, A has the present general intention to sell and intends that such transfer shall serve as a springboard for a sale when it eventuates.

E It would be quite wrong to dissect and apply every word of Lord Brightman's formulation in the *Dawson* case of either the first or the second *Ramsay* condition as if it had statutory force. In due course, the House of Lords are themselves likely to give further guidance as to the circumstances in which the *Ramsay* principle is capable of applying to a linear transaction. In the meantime, however, I think that we in this court are both bound and entitled to apply Lord Brightman's careful and considered formulation of the limits of the *Ramsay* principle (which followed a similar formulation by Lord Diplock in the *Burmah* case and has the approval of all their Lordships) according to what we understand to be its true meaning and intent. Proceeding on this footing, I find myself unable to accept the Crown's basic contention. In my judgment, for the reasons which I will now attempt to state, it would involve an unwarrantable extension of the *Ramsay* principle.

F First, as Lord Brightman's speech makes clear, their Lordships in the *Dawson* case regarded the phrases "a pre-ordained series of transactions" and "one single composite transaction" as synonymous. I would not regard either phrase as apt to describe two transactions, each of which, independently, undeniably had legal effect, unless, as in the *Dawson*, *Ramsay* and *Burmah* cases, at the time when the first transaction was effected, all the essential features, not merely the general nature, of the second transaction had already been determined by a person or persons who had the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction. Special considerations might apply to a case where the second transaction consisted of a sale by auction which had been arranged before the first transaction was effected. Normally, however, it seems to me that a transfer by A to B followed by a sale by B to C could not, on the ordinary meaning of words, be together described either as "one single composite transaction" or as "a pre-ordained series of transactions" unless at the time of the first transfer C had been identified as a

prospective purchaser, and all the main terms of the sale to him had at least in principle been agreed; if this is not so, they have to be regarded as independent transactions. I am fortified in the belief that the House of Lords, in their precise formulation of the first *Ramsay* condition, would not have accepted the Crown's basic contention, by the second, third and fourth considerations to which I am about to refer.

Secondly, in the particular circumstances of all of the *Ramsay*, *Burmah* and *Dawson* cases, at the time when the first stage in the relevant scheme was carried through, all the essential features of the second stage had in fact been determined by persons who had the firm intention and for practical purposes the ability to procure the implementation of the second stage. Furthermore, this point emerges more or less explicitly from many of the speeches in those decisions.

As to the *Ramsay* scheme itself:

"It was reasonable to assume that all steps would, in practice, be carried out, but there was no binding arrangement that they should. The nature of the scheme was such that once set in motion it would proceed through all its stages to completion:" see [1982] A.C. 300, 328 *per* Lord Wilberforce.

In the *Rawling* scheme, one of the six Jersey companies concerned had actually contracted to procure the implementation of all the steps comprised in the scheme and was in a position to obtain the requisite co-operation of two of its associated companies: see p. 332A-B. Lord Wilberforce described the common features of the *Ramsay* and *Rawling* schemes, at p. 322:

"First, it is the clear and stated intention that once started each scheme shall proceed through the various steps to the end—they are not intended to be arrested half-way: . . . This intention may be expressed either as a firm contractual obligation (it was so in *Rawling*) or as in *Ramsay* as an expectation without contractual force."

The *Burmah Oil* case (1981) 54 T.C. 200 raised the question whether certain transactions resulted in an allowable capital loss for the purposes of corporation tax on capital gains. Lord Fraser of Tullybelton in his speech, with which all the rest of their Lordships agreed, referred, at pp. 219–220, to certain differences between the two stage scheme there under consideration and the schemes in *Ramsay* and *Eilbeck v. Rawling*. One difference was that in those cases the taxpayers had been provided with a "preconceived and ready made plan," whereas in the *Burmah* case the plan, though preconceived, was specially tailor-made for *Burmah*. Again, in those earlier cases, it was the clear and stated intention that, once started, each scheme would proceed to completion and would not be arrested half way. In *Burmah* the first series of events, those occurring on 12 December 1982, could have stood on their own and need not have been followed by the second series on 18 December. However, as Lord Fraser pointed out, at pp. 219–220:

"it is clear that the events initiated on 18 December formed part of a single scheme and I have already quoted the finding by the special commissioners that they took place in the order and according to a timetable prepared in advance. . . . No doubt the directors could have chosen, even at that stage, to abandon the scheme but the

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A reality was that the decision had already been taken to carry it through to completion . . .”

B In the *Dawson* case though there was no pre-existing contract when the scheme began to be implemented, there was an equivalent practical certainty that all its steps would be carried through to the end. Lord Brightman, at p. 520, described the manner in which the two sale agreements had been exchanged on the very same day and referred to minutes of the board meetings of the companies concerned. He commented:

C “These show that the whole process was planned and executed with faultless precision. The meetings began at 12.45 p.m. on 20 December, at which time the shareholdings of the operating companies were still owned by the Dawsons unaffected by any contract for sale. They ended with the shareholdings in the ownership of Wood Bastow. The minutes do not disclose when the meetings ended, but perhaps it was all over in time for lunch.”

D There are many other similar references in the speeches, in which the inevitability for practical purposes of the scheme proceeding from the first stage to the completion of the second stage is stressed. I do not think that the House of Lords would have been at such pains to emphasise this feature of the respective schemes if they had not regarded it as being of cardinal importance in deciding whether or not the various transactions could properly be treated as one composite transaction for fiscal purposes and whether or not the intermediate steps, inserted purely for the purposes of tax avoidance, could be disregarded for tax purposes, even though otherwise fully legally effective according to their terms.

E Thirdly, the Crown’s basic proposition is, in my opinion, inconsistent with the whole rationale of the *Ramsay* principle as explained by Lord Wilberforce in *Ramsay* [1982] A.C. 300, particularly at pp. 323–324 and by Lord Brightman in *Dawson* [1984] A.C. 474, who explained it thus, at pp. 526–527:

F “In a pre-planned tax-saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) a like series of steps which are followed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results. For example, equitable interests may pass when the contract for sale is signed. In many cases equity will regard that as done which is contracted to be done. *Ramsay* says that the fiscal result is to be no different if the several steps are pre-ordained rather than pre-contracted. For example, in the instant case tax will, on the *Ramsay* principle, fall to be assessed on the basis that there was a tripartite contract between the Dawsons, Greenjacket and Wood Bastow under which the Dawsons contracted to transfer their shares in the operating companies to Greenjacket in return for an allotment of shares in Greenjacket, and under which Greenjacket simultaneously contracted to transfer the same shares to Wood Bastow for a sum in cash. Under such a tripartite contract the Dawsons would clearly have disposed of the

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shares in the operating companies in favour of Wood Bastow in consideration of a sum of money paid by Wood Bastow with the concurrence of the Dawsons to Greenjacket. Tax would be assessed, and the base value of the Greenjacket shares calculated, accordingly. *Ramsay* says that this fiscal result cannot be avoided because the pre-ordained series of steps are to be found in an informal arrangement instead of in a binding contract. The day is not saved for the taxpayer because the arrangement is unsigned or contains the words 'this is not a binding contract.'

Thus, the whole rationale of the *Ramsay* principle is that no distinction falls to be drawn between case (i) and case (ii) referred to in this passage "*because none exists in reality.*" The whole of this reasoning presupposes that, in a case where there was no pre-existing contract but the *Ramsay* principle applies, all the steps in the pre-ordained series of transactions would have been capable of being embodied in a binding contract before the first transaction was effected, though the persons having control of the scheme did not choose or omitted so to embody them. This in turn presupposes that, before the first transaction was effected, all the essential features of the second transaction were planned, intended and ascertained.

Fourthly, I think that, if the *Ramsay* principle were to be held to apply to transactions of which the connecting link is so tenuous as that suggested in the Crown's basic contention, formidable uncertainty and practical difficulties would arise in the administration of our tax law, which the House of Lords, in formulating and developing the *Ramsay* principle, did not contemplate and would not have intended. The whole essence of this principle when it applies is that the step inserted in the series of transactions which has no commercial purpose apart from the liability to tax falls to be wholly disregarded for fiscal purposes: see *Furniss v. Dawson* [1984] A.C. 474, 527D, *per* Lord Brightman. But the step so inserted may well, by itself, have immediately and permanently altered the legal rights of the parties, for example by transferring the legal and beneficial title to assets from A to B. In the circumstances envisaged in the Crown's basic contention, a substantial interval of time may elapse before any transfer of those assets by B to C ensues and, indeed, in the event, no such transfer may ever take place. In the meantime, the revenue may well assess the interested parties to tax, *prima facie* quite properly, on the basis that there has been a disposal of assets by A to B, effective accordingly to the tenor of the documents. (It can by no means be assumed that in the case of other tax-saving schemes the first disposal will be wholly covered by a specific statutory exemption, such as was available in the *Dawson* case.)

What are then to be the fiscal consequences if and when a sale of assets by B to C at last ensues? If the original scheme was designed to avoid or mitigate tax, it is to be assumed that, if it could properly do so in reliance on the *Ramsay* principle, the revenue would subsequently wish to claim tax on the basis of a disposal by A to C, when the sale to C eventuates. However, of one thing I am certain. The Finance Act 1965, on its true construction, does not permit one single transfer of assets by A to be treated for capital gains tax purposes both as a disposal of all those assets in favour of B and as a disposal of all those same assets in favour of C. Neither the House of Lords in the *Dawson* case, nor Mr. Sher in this court, suggested to the contrary. What then is

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A to be the status of the earlier assessment in such circumstances? Was it
wrong when made or has it merely become wrong? If it cannot be said
that it was wrong when made, how can the taxpayer escape oppressive
double taxation in the absence of any relieving statutory provision? No
such provision has been drawn to our attention. If the revenue is to be
entitled to claim tax on the basis of a disposal by A to C, what is to be
B regarded as the date of that disposal? What is to be regarded as the base
value of the assets disposed of and at what date is it to be ascertained?
The list of difficult practical and conceptual problems that could arise, if
the Crown's basic contention were well founded, could be multiplied.

C Though several of these problems were canvassed in some depth in
argument before us, I cannot attempt to provide satisfactory answers to
them and I do not think that Mr. Sher, with due respect to his
submissions, was able to do so. In drawing attention to them, I observe
that, in cases where the scheme involves a pre-ordained series of
transactions, in the sense which I attribute to that phrase, as in the
Dawson, Ramsay and Burmah cases, there may be little practical
likelihood of the problems arising, because there is no practical likelihood
of a substantial "limbo" period elapsing between the first and second
stages of the series. In other cases, the problems might be real and
D serious.

Finally, before turning to the facts of the individual cases before us, I
should mention that each of the notices of appeal before us includes,
inter alia, the following ground:

E "The effect of the judge's decision is that the *Ramsay* principle can
be easily side stepped by the simple expedient of the taxpayer
taking the first step in the composite transaction (namely, the share
exchange) prior to going into the market to find his purchaser . . ."

While I appreciate the concern of the revenue in this context, this
ground, with due respect to the submission, seems to me to beg the very
question which has to be decided, namely, whether or not there has
indeed been a composite transaction. They assume that two transactions
F are together capable of constituting one composite transaction within the
meaning of the first *Ramsay* condition, even though at the time of the
first transaction the persons having control of the matter had not yet
gone into the market to find a purchaser and there was at that time no
certainty whatever that an ultimate sale would eventuate. For the
reasons which I have attempted to indicate, this assumption is, in my
judgment, incorrect. This was not the sort of case which the House of
G Lords, in referring to "one composite transaction" can have had in
mind. Various fiscal statutes expressly state that the term "disposition"
includes a "disposition effected by associated operations." Simply, for
example, section 51(1) of the Finance Act 1975, in the context of capital
transfer tax, so provides. And section 44(1)(b) of that Act provides that
"associated operations" means "any two operations of which one is
H effected with reference to the other, or with a view to enabling the other
to be effected or facilitating its being effected . . ." If the capital gains
tax legislation had included similar provisions, the Crown's basic
contention might have been easily sustainable. In my judgment, however,
the gap cannot be filled by judicial legislation.

As things are, as a matter of general principle, I conclude that two
successive transactions, each of which has legal effects, are not properly
to be regarded as a pre-ordained series or as a single composite

transaction within the meaning of the first *Kamau* condition as stated by the House of Lords unless, at the time when the first transaction was effected, all the essential features, not merely the general nature, of the second transaction had already been determined by a person or persons who had the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction.

After these general observations, I turn to a separate consideration of the three appeals now before us.

Craven v. White (Stephen); Same v. White (Brian)

In this case the special commissioners heard together appeals by three taxpayers, Messrs. Archibald, Brian and Stephen White, against assessments to capital gains tax. They gave their decision allowing those appeals, on 18 January 1984, after the decision of the Court of Appeal in *Furniss v. Dawson*, but before the decision of the House of Lords. The Crown appealed against the decision in each case, but the appeals which came before Peter Gibson J. related only to Brian and Stephen White, by that time Archibald White had died.

I gratefully adopt, more or less verbatim, the judge's summary of the basic facts of the case, merely adding a few references to certain additional points which Mr. Sher drew to our attention. Archibald, Brian and Stephen White, until 19 July 1976, owned all the issued share capital of S. White & Sons (Queensferry) Ltd. ("Queensferry"), which owned and operated about a dozen supermarkets. They respectively held 701, 700 and 2,101 £1 ordinary shares. In 1973, on the advice of Queensferry's accountant, Mr. Clarke, they decided that they would either merge Queensferry with a similar business or they would sell it. Between 1973 and the summer of 1976 they sought without success to achieve the one or the other result. Early in 1976 Stephen White approached Mr. Humphreys of Cee N Cee Supermarkets with a view to resuming talks about a possible merger between Queensferry's business and that of Cee N Cee. In February or March 1976 Mr. Clarke initiated talks with Manx lawyers, Kneale & Co. ("Kneales") about establishing a holding company in the Isle of Man as a vehicle for such a merger. At about the same time as discussions were resumed with Mr. Humphreys, a company called Oriel Foods Ltd. ("Oriel") asked Mr. Clarke if Queensferry was still up for sale. Oriel itself had been acquired by R.C.A. Corporation of America ("R.C.A.") in 1974. A subsidiary of Oriel was Morris & David Jones Ltd. ("Jones"). Once Oriel's inquiry was received, negotiations with Cee N Cee were set aside and negotiations with Oriel were pursued. In May 1976 broad agreement on price had been reached, that is to say that, if a sale went through, the consideration would probably exceed £2 million and be paid in cash. In June 1976 the taxpayers were alarmed by trade press reports that R.C.A. was disenchanted with its food operations. A meeting with Oriel on 17 June to find out how the proposed sale to Oriel stood left Brian and Stephen White and Mr. Clarke feeling despondent. They had exhausted other potential purchasers and trading prospects for Queensferry were not good. They went back to Cee N Cee, which was willing to resume talks.

On 21 June 1976 Mr. Clarke arranged with Kneales to acquire an off-the-shelf company, Miller Investments Ltd. ("Miller") as a holding company for the projected merger with Cee N Cee. Miller then had a £2 issued share capital, its two £1 shares being held by two advocates'

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A clerks from Kneales. In evidence before the commissioners Mr. Clarke and Stephen White insisted that the sole purpose of acquiring Millor was to act as a holding company for the shares of Queensferry and Cee-N-Cee and any other company which might join the group. The commissioners did not accept that this was the sole purpose of the acquisition. They put the matter thus:

B "The view we have formed is that Stephen White's approach to Mr. Humphreys early in 1976 was made as a final resort after repeated unsuccessful attempts since 1973 to dispose of [Queensferry]. We infer, from the fact that so soon as Oriel reappeared as a possible purchaser the talks with Mr. Humphreys were set aside, that Stephen White and Brian White regarded a deal with Oriel as a more desirable target than a merger with Cee-N-Cee."

C Nevertheless, I think it clear that the commissioners accepted as a fact that a subsidiary purpose of acquiring Millor was that it should act as a holding company if the sale to Jones did not happen but a merger between Queensferry and Cee-N-Cee should eventuate. On 23 June 1976 Millor increased its authorised share capital with a view to issuing 3,502 Millor shares in exchange for the Whites' Queensferry shares on a one for one basis. On 24 June Mr. Clarke sent to Kneales a draft which he had prepared of a contract between the Whites and Millor. Meanwhile, on 21 June 1976 Oriel had asked Mr. Clarke for a further meeting on 25 June. That meeting was held at the offices of Oriel's solicitors. Oriel asked if a draft contract for the acquisition of Queensferry could be sent to the Whites' solicitors and were told that the draft should be sent to Kneales as lawyers for Millor. Oriel's solicitors sent the draft to Kneales. The commissioners found that following the meeting of 25 June negotiations for the acquisition of Queensferry by Oriel "resumed more strongly and continued, albeit not always smoothly, towards the execution of the agreement on 9 August." Nevertheless, notwithstanding the increased purposefulness of these negotiations, the talks with Cee-N-Cee also continued.

F On 9 July 1976 Queensferry's authorised share capital was increased and 3,502 new ordinary shares were issued to the Whites on renounceable letters of allotment while the existing ordinary shares were converted into deferred ordinary shares with diminished rights. The commissioners found that the purpose of this reorganisation of share capital was on the advice of Kneales to effect stamp duty savings should the contract for the sale to Jones by Millor be entered into. On or before 14 July Millor offered to acquire the issued share capital of Queensferry. It offered to buy the deferred ordinary shares for 50p each and to exchange one Millor share for each Queensferry ordinary share, the offer to remain open until 9 August. On 19 July the taxpayers entered into an agreement with Millor ("the July agreement") accepting Millor's offer, and the Whites held shares in Millor in the same proportions as they had held shares in Queensferry. On 20 July the Queensferry board approved and registered the transfers of the deferred ordinary shares to Millor and agreed that, when the renounced letters of allotment for the ordinary shares were received, registration would be completed in accordance with the forms of renunciation. On 9 August there was a meeting between representatives of Oriel and Jones on the one hand and Stephen and Brian White and Mr. Clarke and the two directors, both H shares in Queensferry, of Millor on the other. That meeting was stormy: at one

stage Stephen White and his party walked out. But agreement was in the end reached and Millor and Jones entered into a written agreement ("the August agreement") whereby Jones agreed to purchase the whole of the issued share capital of Queensferry for a consideration of £2.2 million subject to adjustment. That consideration was apportioned as to 50p for each deferred ordinary share and the balance to the ordinary shares. Payment of the consideration was to be by instalments, £1.8 million on completion and then two other payments of adjustable amounts. In the event, £2,459,493 was paid by Jones. Following completion and between 25 March 1977 and 6 October 1981 Millor made several interest free loans to the Whites. In all £275,000 was lent to Stephen White, but of that £50,000 was repaid on 30 September 1981; £145,000 was lent to Brian White and £100,000 to Archibald White; £1,500 was expended on acquiring options on three Manx companies, and the balance lent interest free to those companies.

Assessments to capital gains tax were raised against each of Messrs. Archibald and Brian White in the sum of £490,000 for 1976-77 and in the sum of £27,000 for 1977-78, and against Mr. Stephen White in the sum of £1,475,000 for 1976-77, and in the sum of £80,000 for 1977-78. At the hearing of their appeals before the commissioners it was submitted on their behalf that the only disposals by them were the disposals of their Queensferry shares to Millor and that of those disposals only the sale of the deferred ordinary shares to Millor was a disposal for capital gains tax purposes, the exchange of the Queensferry ordinary shares for the Millor shares being, by the combined effect of paragraphs 4(2) and 6 of Schedule 7 to the Finance Act 1965, no disposal for such purposes. On the other hand, in reliance on the *Ramsay* principle, the Crown submitted that the taxpayers had for such purposes disposed of all their shares in Queensferry to Jones, on the ground that the transfer of their shares to Millor should be treated as a fiscal nullity. Alternatively, it was submitted, the taxpayers fell to be assessed on the amounts which they received from Millor by way of loans and at the time when the loans were made.

The commissioners found that, before the July agreement with Millor was entered into, the taxpayers and Mr. Clarke had reached an understanding that, if a sale to Jones transpired, arrangements could be made for the Whites to have the use of the proceeds of sale, either directly or indirectly, for their own purposes. Nevertheless, they pointed out that this understanding was "of a different nature from the carefully thought out and dovetailed arrangements reflected in the transactions considered" in *Floor v. Davis* [1978] Ch. 295 and in *Furniss v. Dawson* [1984] A.C. 474. Without spelling out their understanding of the nature of a "composite transaction," they said:

"We consider that we are constrained by authority to look at the transactions as a whole (*Ramsay*). We have found that the primary objective of the [taxpayers] was to conclude a sale of [Queensferry's] shares to Jones. That objective was achieved, and the agreements of July and August are to be looked upon as parts of a composite transaction comprising those two agreements, if no more; it is irrelevant that the terms of the August agreement were not finally settled until the day it was executed."

Nevertheless, following the decision of the majority of this court in *Floor v. Davis*, on what was described as the first stage of the transaction in that case, the commissioners held that the July and August agreements

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A were real transactions, that Millor acquired the Queensferry shares as a principal and that accordingly the taxpayers could not be regarded as having disposed of their shares direct to Jones. They therefore held that there was no disposal for capital gains tax purposes of the Queensferry ordinary shares effected by the July agreement. However, they also held that on each of the occasions when one of the taxpayers received a loan he must be deemed to have made a part-disposal of the shares which he
B formerly owned in Queensferry.

By the time that Peter Gibson J. heard the Crown's appeal against the rejection of the commissioners' argument that the taxpayers had made a disposal for capital gains tax purposes of their Queensferry shares to Jones, the view of the majority of this court in *Floor v. Davis* had been held by the House of Lords in the *Dawson* case to have been
C wrong and the dissenting judgment of Eveleigh L.J. in *Floor* had been reaffirmed as correct. It was submitted to the judge that the scheme employed by the taxpayers was exactly the same as that in *Dawson* and that, given the finding of the composite transaction by the commissioners, the court should hold that the only true reasonable conclusion, on the facts found by them, was that the transfer of the Queensferry shares to Millor had no commercial purpose other than the avoidance of tax. It
D was therefore submitted that, by virtue of the *Ramsay* principle, the real transaction was the sale by the taxpayers of their Queensferry shares to Jones for the moneys which they caused to be paid to Millor and that the taxpayers were liable to capital gains tax.

Mr. Sher submitted to the judge, as he did before us, that the important characteristic of each step forming part of a "composite transaction" is that it should be intended by the taxpayer to be one step
E in a series of steps. For this he particularly relied on Lord Wilberforce's words in the *Ramsay* case [1982] A.C. 300, 323:

"If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is
F nothing in the doctrine to prevent it being so regarded: . . ."

However, in the next paragraph, Lord Wilberforce referred to the "intentions of the parties" which, in Peter Gibson J.'s view [1985] 1 W.L.R. 1024, 1031, suggested that he may not have regarded the intentions of the taxpayer alone as sufficient for determining what the relevant transaction was. Furthermore, Lord Wilberforce went on to say
G [1982] A.C. 300, 324 that the commissioners:

"are not, under the *Westminster* doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. This is particularly the case where (as in *Rawling*) it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps. It may be so where (as in *Ramsay* or in *Black Nominees Ltd. v. Nicol* (1975) 50 T.C. 229) there is an expectation that it will be so carried through, and no likelihood in
H practice that it will not."

Peter Gibson J. observed [1985] 1 W.L.R. 1024, 1032:

"Lord Wilberforce in the passage cited refers to two classes of case to which the *Ramsay* principle has or may have application and which correspond to the contractual and non-contractual

arrangements to which Lord Brightman referred in giving the rationale of the *Ramsay* principle. It is to be noted that to the non-contractual class of case Lord Wilberforce applies the description that it is where there is an expectation that the series of steps will be carried through once a scheme is set in motion and there is no likelihood that it will not. The practical certainty, to adopt Mr. Price's phrase, that the series of steps will be completed once started is a feature of the rationale of the *Ramsay* principle as expounded by Lord Brightman and is well exemplified in all the cases in which the principle has been held to apply. The justification for equating the non-contractual arrangement with the contractual is that looking at the realities of a pre-planned tax-saving scheme where every step has been arranged there is no distinction between the two. both will in practice be carried through to their intended conclusion. Contrast the case where in reality there is a distinct possibility that a planned series of steps may not be completed as planned; in those circumstances the real position is not the equivalent of a contractual arrangement capable of being enforced."

The judge, at pp. 1032-1033, recognised that the commissioners had attempted to make a finding of a composite transaction for the purpose of the application of the *Ramsay* principle and that, having regard to what had been said in *Dawson*, this was a finding of fact which was reviewable on the principles of *Edwards v. Bairstow* [1956] A.C. 14. Having referred to this and other findings of fact by the commissioners, he commented, at p. 1033:

"It would appear from these findings that what the commissioners regarded as the essential quality of a composite transaction was that the taxpayer, with his advisers, should at the time the first step in the composite transaction was taken have planned the steps in the series that made up the composite transaction, regardless of whether the means of achieving all the steps lay within the control of the taxpayer or of whether there was otherwise any practical certainty that all the planned steps would be completed. Thus, although I do not doubt that the commissioners were attempting to make a finding of a composite transaction for the purpose of the application of the *Ramsay* principle, to my mind they have not directed themselves correctly in law. The case would have to be remitted to the commissioners, as Mr. Sher submitted it should, unless there was only one true and reasonable conclusion on the facts as found or there was some other point decisive of the appeals."

However, looking at the primary facts found by the commissioners, he concluded that, at the time when the July agreement was made, there was no "practical certainty" that the sale to Jones would be completed; on the contrary there was a live possibility that it would not. In those circumstances, he concluded that it was impossible to say that the July agreement and the August agreement were parts of a composite transaction, so as to satisfy the first *Ramsay* condition. He considered (see p. 1033) that the commissioners had misdirected themselves in law because they

"regarded as the essential quality of a composite transaction . . . that the taxpayer, with his advisers, should at the time the first step in the composite transaction was taken have planned the steps in

A the series that made up the composite transaction, regardless of whether the means of achieving all the steps lay within the control of the taxpayer or of whether there was otherwise any practical certainty that all the planned steps would be completed.”

B As a second, further ground of his decision the judge, at p. 1034, held that, in any event, the second *Ramsay* condition was not satisfied, because it could not properly be said that the July agreement had no commercial purpose other than the avoidance of a liability to tax. He therefore held that the *Ramsay* principle, as formulated by the House of Lords, had no application to the case. It was common ground that, if the July agreement did not fall to be disregarded, the provisions of paragraphs 4 and 6 of Schedule 7 to the Act of 1965 were applicable, so that the transfers of the ordinary shares in Queensferry by the taxpayers to Millor were to be treated as not being disposals for capital gains tax purposes. He therefore dismissed the Crown’s appeals.

C In relation to the first of the two main grounds of Peter Gibson J.’s decision, Mr. Sher submitted to us that the judge erred in holding that the commissioner’s finding of a composite transaction was insupportable on *Edwards v. Bairstow* principles. On the contrary, he contended, the judge himself, in applying the “practical certainty” test referred to above, applied the wrong test; he confused certainty as to the series of steps by which a particular commercial end is to be achieved with certainty as to the achievement of the end itself. It was irrelevant, in Mr. Sher’s submission, that, at the time of the July agreement, there remained a possibility that the sale to the Whites would not ultimately be achieved; the crucial point was that, at that time, the taxpayers had a firm intention that, if a sale to the Whites should be achieved, it would be routed through the interposed company, Millor.

E In any event, even if contrary to his submission, the “practical certainty” test were the correct one, Mr. Sher suggested that it was satisfied on the facts. At the time of the first transfers of the shares in Queensferry on 19 July 1976, the negotiations for the ultimate sale had advanced a long way. The proposed purchaser, Jones, was identified. F The approximate likely consideration, in excess of £2 million, had been known since May 1976. From that time onwards, the taxpayers had been striving towards the object of an ultimate sale to Jones. These negotiations faltered between 17 and 21 June. However, from that time on they continued, according to the commissioners’ findings, with increased purposefulness until the contract with Jones was finally concluded on 9 August; this contract had been in draft form since 25 June 1976. In Mr. Sher’s submission, the fact that Jones may not have had any settled intention to purchase as at 19 July 1976 was irrelevant; the judge erred in considering that the intentions of the contemplated purchaser are relevant in deciding whether or not there is one composite transaction in any given case; the intentions of the taxpayer are the only relevant intentions. G H

As a matter of legal analysis, I would for my part prefer to express the first *Ramsay* condition by reference to the test suggested at the end of the first section of this judgment, rather than by reference to the “practical certainty” test adumbrated and applied by the judge. It seems to me, with respect, that the former test perhaps reflects more accurately both the wording of the phrase “a pre-ordained series of transactions, i.e. a single composite transaction” and the essential rationale which

enables such a composite transaction to be regarded as involving a disposal by A to C, rather than a disposal by A to B for tax purposes. Nevertheless, both tests come to much the same thing. Unless, at the time when the first transaction in the series is effected, all the essential features of the second transaction have already been determined by persons who have the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction, there will be no practical certainty that the second transaction will be effected.

I agree with the judge that, on the basis of the facts found by the commissioners, they could not in law properly have found that the July and August agreements constituted a single composite transaction so as to satisfy the first *Ramsay* condition. As at the date of the July agreement, the taxpayer, though hoping and intending that the sale to Jones would go through if they could achieve it, did not have the practical ability to ensure this result. Their ability to do so depended on what Jones might finally be willing to contract with Millor on terms which the taxpayer regarded as acceptable. This, I think, is the relevance of Jones' intentions. The final decision of Jones was still unpredictable. As is indicated by the "stormy" meeting which took place on 9 August 1976, only at the last moment was there any practical certainty that the August agreement would be concluded. As Mr. Price cogently submitted in his skeleton argument: "Acceptance of the [Crown's] submission [that the first *Ramsay* condition was satisfied] would mean that the status of the share exchange with Millor could not be known on 19 July 1976, being contingently disregardable depending on whether a sale to Jones eventuated. Since the sale to Jones did take place on 9 August 1976, that period of uncertainty was only 21 days. But suppose the sale had not been concluded as quickly or possibly at all? The intention to create such uncertainty, especially in the context of taxation, should not be imputed to their Lordships."

In my judgment, this appeal should fail because the first *Ramsay* condition is not satisfied. In these circumstances, it is unnecessary to reach any conclusion in regard to the judge's view that the second *Ramsay* condition is not satisfied. I will only make these brief comments in this context. Though it is clear that the steps involving the interposition of Millor in the series of transactions had business effect, the relevant question is whether or not, on the commissioners' findings of fact, it could properly be said that the interposition of Millor had "no commercial (business) purpose apart from the avoidance of a liability to tax." Having studied these findings, I think that a proper reading of them indicates that the commissioners (a) regarded the primary purpose of both the acquisition of Millor and the subsequent transfer of the Queensferry shares to Millor as being to avoid the tax which would otherwise have been immediately payable on the ultimate sale to Jones, if that sale were eventually to take place; (b) accepted that a subsidiary purpose of both that acquisition and that transfer was that Millor should act as a holding company of the Queensferry shares if a sale to Jones did not happen but a merger between Queensferry and Cee-N-Cee eventuated and; (c) nevertheless, regarded the primary objective of the taxpayers at all material times as being to conclude a sale to Jones.

In these circumstances, I see the force of the submission made on behalf of the taxpayers that it cannot properly be said that the interposition of Millor had *no* commercial purpose apart from the avoidance of a liability to tax. Nevertheless, I would find some difficulty

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- A in accepting that the mere existence of what may be described colloquially as a “long-stop” purpose, such as mentioned in (b) above, can prevent the second *Ramsay* condition from being satisfied in a case where the *Ramsay* principle would otherwise apply on the facts. Such a conclusion would at present appear to me contrary to the true intent of the *Ramsay* and *Furniss v. Dawson* decisions. However, I find it unnecessary to express any concluded view on this point. For the reasons stated, relating to the first *Ramsay* condition, I would dismiss this appeal.
- B

Inland Revenue Commissioners v. Bowater Property Developments Ltd.

This appeal concerns the Development Land Tax Act 1976, which imposed new tax on the realisation of the development value of land.

- C Section 1, so far as material, provided:
- “(1) A tax, to be called development land tax, shall be charged in accordance with the provisions of this Act in respect of the realisation of the development value of land in the United Kingdom. (2) Subject to the provisions of this Act, a person shall be chargeable to development land tax on the realised development value, determined in accordance with this Act, which accrues to him on the disposal by him on or after the appointed day of an interest in land in the United Kingdom . . .”
- D

Section 4(1) provided:

- “Subject to the following provisions of this Act, the realised development value accruing to a person on the disposal by him of an interest in land shall be the amount (if any) by which the net proceeds of the disposal exceed the relevant base value of that interest.”
- E

Section 4(3) defined “the net proceeds of the disposal of an interest in land”, and section 5 defined “relevant base value.” Section 12, as amended by section 116 of the Finance Act 1980, gave an exemption for the first £50,000 of development value. It provided, inter alia:

- “(1) Subject to the provisions of this section, if the total amount of realised development value which accrues to any person in a financial year and on which, apart from this section, that person would be chargeable to development land tax does not exceed £50,000, development land tax shall not be chargeable on any of that realised development value. (2) If subsection (1) above does not apply to any person in respect of a financial year, then, subject to the following provisions of this section, the sum of £50,000 shall be deducted from the amount of realised development value on which, apart from this subsection, that person would be chargeable to development land tax in that financial year.”
- F
- G

- H Section 20(1) provided that a disposal of an interest in land by a member of a group of companies to another member of the group should be treated for the purposes of the Act of 1976 as a disposal and acquisition for which no consideration was given.

The respondent to this appeal by the Inland Revenue Commissioners is Bowater Property Developments Ltd., the taxpayer company, a company in the group of which the Bowater Corporation Plc. is the parent. Another of the subsidiaries in the Bowater group is Bowaters

United Kingdom Paper Co. Ltd. ("B.U.K.P."). By November 1978 agreement had been reached between B.U.K.P. and a company outside the Bowater group, Milton Pipes Ltd. ("M.P.L."), subject to contract, for the sale to M.P.L. of 23 acres of land near Milton Regis in Kent, known as "Crafts Marsh," for a sum of £202,500. In these negotiations, it had also been agreed that the contract would be conditional on planning permission being obtained for the uses to which M.P.L. wished to put the land. On 7 March 1979 the taxpayer company exercised an option to purchase Crafts Marsh from B.U.K.P. and thus became its owner. At about that time, one of Bowater's taxation advisers lined up a number of Bowater subsidiaries willing to take undivided shares in Crafts Marsh—a fragmentation exercise designed to make maximum use of the exemption under section 12 of the Act. At that date the exemption level stood at only £10,000 and no fewer than 18 subsidiaries were involved. Draft deeds were sent to M.P.L. on 9 March 1979 which indicated that a disposal in favour of the 18 subsidiaries was contemplated as a prelude to the sale to M.P.L. However, by 25 March 1980, no contract had yet been concluded with M.P.L. because of uncertainties relating to planning and other matters.

I now take up the story, more or less verbatim, from the judgment of Warner J. On 25 March 1980 the taxpayer company contracted to sell Crafts Marsh for £180,000 to five other companies ("the five companies") in the Bowater group as beneficial tenants in common in equal shares. It is not in dispute that that transaction ("the first transaction") had no business purpose. The five companies were selected because none of them had used any part of its £50,000 exemption from development land tax under section 12 of the Act of 1976 as amended. The sole object of the first transaction was to avoid the liability to development land tax which would otherwise fall on the taxpayer company if the sale to M.P.L. went through. At the time of the first transaction there was, as the commissioners found, a firm expectation on the Bowater side that that sale would go through, but the chances of M.P.L. being willing to sign a contract on or about 25 March 1980 were nil. On 22 May 1980 Mr. Goodger, a group legal adviser in the Bowater Corporation's legal department, during the course of what the commissioners describe as "a somewhat desultory correspondence" between himself and the solicitors acting for M.P.L., sent to them, to replace an earlier draft, a revised draft contract, conditional on M.P.L. obtaining planning permission. In this draft the five companies were of course named as vendors. On 7 July 1980 M.P.L.'s solicitors wrote to Mr. Goodger in these terms:

"Dear Sir,

"Land at Crafts Marsh

"We thank you for your letter of 22 May. We are sorry to tell you that the present economic situation with its direct effect on the concrete making industry has compelled our clients to give up the proposal to purchase your company's land. We enclose the various documents which you have sent us."

It appeared to those concerned on the Bowater side that the sale had fallen through for good. During the ensuing months it remained their general policy to sell Crafts Marsh, but they had no other potential purchaser in mind and they did not actively seek one. Early in February 1981, circumstances having changed, particularly from the planning point of view, the solicitors who had been acting for M.P.L. telephoned the

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A Bowater Corporation's legal department to say that M.P.L. was interested in Crafts Marsh again. Negotiations were thereupon reopened. They resulted in the exchange on 23 October 1981 of unconditional contracts for the sale of Crafts Marsh by the five companies to M.P.L. for £259,750 ("the second transaction"). The sales were completed on 23 November 1981.

B On 13 February 1984 the Inland Revenue Commissioners, in reliance on the *Ramsay* principle, assessed the taxpayer company to development land tax on the footing that the second transaction should be treated for tax purposes as a disposal by the taxpayer company. The commissioners held that, on the facts of this case, that principle did not apply and they discharged the assessment.

C In this case it was undisputed that the second *Ramsay* condition was satisfied. The submissions made before the judge concerned the first *Ramsay* condition and are to be found summarised in his judgment [1985] S.T.C. 783, 796–798. It will be seen that, following the lines of what I have called the Crown's basic contention, they involved a submission by Mr. Sher that the *Ramsay* principle applies whenever it is found that a step has been taken with a view to avoiding tax in a certain event and that event actually occurs. Warner J. said, at p. 796:

D "Thus, he says, in the present case, what matters is the expectation or intention of those concerned on behalf of the Bowater group at the time of the first transaction. They at that time expected the sale of Crafts Marsh to go through and their purpose in causing the first transaction to take place was to avoid development land tax on that sale. Therefore, the *Ramsay* principle applies, and the break in the negotiations between the Bowater group and [M.P.L.] that occurred from July 1980 to February 1981 was irrelevant."

E

Warner J. rejected these submissions of the Crown. He expressed himself in entire agreement with the reasoning that led Peter Gibson J. to hold in *Craven v. White* that the first *Ramsay* condition was not satisfied. He expressed the ratio of his final conclusion, at p. 800:

F "The crucial fact, to my mind—a fact of which the events of May and July 1980 are but evidence—is that it had not been pre-ordained or pre-arranged, at the time of the first transaction, that the second transaction would follow. Applying the test suggested by Lord Wilberforce's words, it could not be said at that time that there was 'no likelihood in practice' that the second transaction would not follow. When it followed, 19 months later, it followed as an independent transaction."

G

H The Crown's case on this appeal, as I see it, stands or falls on the Crown's basic contention. For the reasons which I have given in the first section of this judgment, I think that that contention is not well founded and that the relevant test for the purpose of the first *Ramsay* condition is that which I have indicated in that section. On the facts of this case, that test is not satisfied. It cannot conceivably be said that, at the date of the first transaction (25 March 1980), all the essential features of the second transaction, which ultimately took place on 23 October 1981, had already been determined by a person who had the firm intention, and for practical purposes the ability to procure, the implementation of that second transaction. If the "practical certainty" test is to be preferred, that test likewise is not satisfied.

Further detailed reference to the facts is unnecessary, but I mention a few points drawn to our attention by Mr. Park, on behalf of the taxpayer company, as illustrating the difficulties, to my mind insuperable, of holding that on 23 October 1981, either in substance or in reality, or within the meaning of the Act of 1976, there was a disposal of the land by the taxpayer company in favour of M.P.L.: (i) at the time of the second transaction the five companies, *not* the taxpayer company, had been the legal and beneficial owners of the land for some 19 months. (ii) The taxpayer company was not a party to the contract of sale of 23 October 1981. (iii) The taxpayer company was not a party to the negotiations which led to that contract and did not receive any of the proceeds of sale. (iv) The taxpayer company had no control over the land through the five companies. The Bowater group holding company controlled both the taxpayer company and the five companies, but the taxpayer company had no control, directly or indirectly, of the five companies.

It is common ground that the first transaction was effected without any commercial or business purpose, apart from a tax advantage. Nevertheless, on the facts found by them, I do not think it would have been open to the commissioners properly to find that the first and second transactions were one single composite transaction. The judge, in my view, was plainly right in deciding that, when the second transaction followed, it did so as an “independent” transaction in the sense of that phrase as used by Lord Wilberforce in the *Ramsay* case [1982] A.C. 300, 324.

Various other matters were canvassed in the course of argument, in particular suggested possibilities of double taxation. I do not find it necessary to deal with these matters. More generally, I would, with respect, associate myself with the following observations of Warner J., at p. 798:

“Counsel for the Crown argued that, unless his submissions were accepted, the application of the *Ramsay* principle in the ‘linear’ or bilateral type of case would be haphazard. A well-advised taxpayer need never be affected by it, because he could always ensure that the tax avoiding transaction was carried out before any deal with the other party was clinched. That argument would be very convincing if it were legitimate to regard the *Ramsay* principle as a judge-made anti-tax-avoidance rule, which it was open to the courts to mould and develop in the light of their experience of tax avoidance devices. Indeed counsel for the Crown went so far as to suggest that I should so regard it. In my opinion, however, that would be nothing short of unconstitutional. Under our constitution the imposition of taxation is a matter for Parliament. Indeed within Parliament itself it is a matter in which the House of Commons has a predominant role. The only function of the courts in this sphere is to interpret and apply the legislation enacted by Parliament in accordance with relevant legal principles. Among the relevant legal principles is the principle that the courts are bound to seek to ascertain the true nature of a transaction and to give effect to it. That, to my mind, is the real basis of the *Ramsay* principle. (I choose the phrase ‘true nature,’ but other expressions such as ‘reality’ or ‘substance’—in the sense in which I understand the latter

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A term to have been used by Lord Bridge in *Furniss v. Dawson*—will do just as well.)”

To call the true nature of the series of transactions in the present case a disposal made on 23 October 1981 in favour of M.P.L. by the taxpayer company would appear to me to involve a travesty of the facts.

I would dismiss this appeal.

B

Baylis v. Gregory; Same v. Same

C The decision of Vinelott J., which is under appeal by the Crown in this case, was given on appeals by the Crown against two related decisions of the special commissioners. These decisions had discharged assessments to capital gains tax respectively on Mr. R. F. Gregory and on Mr. Gregory and Mr. J. B. Weare (“the trustees”) jointly as trustees of the estate of Joseph Gregory deceased. They arose out of a transaction, or series of transactions, concerning the shares of a company called Planet Gloves (Industrial) Ltd. (“P.G.I.”) in which Mr. Gregory and the trustees held shares. There were ten other shareholders of P.G.I. All were members of Mr. Gregory’s family, trustees of family settlements or employees of P.G.I., except Mr. Weare. He was the company’s accountant and held a few shares in his own right. Appeals by the Crown against the discharge of assessments on the other shareholders had been held over pending the judge’s decision on the appeals before him.

E Once again, I will gratefully adopt, more or less verbatim, the greater part of the judge’s summary of the facts found by the commissioners. P.G.I. carried on a clothing business. At all material times Mr. Gregory was its managing director. He also, through his personal and trustee holdings, had voting control of P.G.I. In 1973 he negotiated, on behalf of all the shareholders, a sale of the entire issued share capital of P.G.I. to an investment company, Cannon Street Investments Ltd. (“Cannon”). In the course of the negotiations it was suggested to Mr. Gregory that liability to capital gains tax could be indefinitely deferred if the shares of P.G.I. were exchanged for shares of a holding company incorporated in the Isle of Man, which would sell them on to Cannon—thus, it was hoped, obtaining the benefit of the relief afforded by paragraphs 6 and 4 of Schedule 7 to the Finance Act 1965. It was also suggested that there would be no fiscal penalty if the proceeds of sale were later sent by the holding company to the shareholders rateably in proportion to their shareholdings. Mr. Gregory arranged for a private unlimited company called P. G. Holdings (“Holdings”) to be incorporated in the Isle of Man. Early in 1974, before shares of P.G.I. were exchanged for shares of Holdings, Cannon wrote to say that it could not proceed with the purchase. Mr. Gregory and the other shareholders decided that they would nonetheless proceed with the share exchange. There was no disadvantage in doing so. The exchange would be carried out by means of the issue and renunciation of the holdings of bonus shares of P.G.I. on which no stamp duty would be payable. The machinery would be there for use if a sale of the shares of P.G.I. were subsequently negotiated. The exchange was duly completed on 11 March 1974 pursuant to an agreement made that same day.

There matters rested for some time. Mr. Gregory took no steps to find a purchaser. Then, in the late spring of 1975, he learned by chance

that another company, Hawtin Ltd., might be interested in acquiring the shares. Discussions in May and June 1975 came to nothing. However, in November 1975, Hawtin approached him again. The renewed negotiations bore fruit, and on 30 January 1976 an agreement was concluded between Holdings and Hawtin for the sale of all the shares of P.G.I. for £1.75 million to be satisfied by a down payment of £1 million, a further payment of £550,000 on 31 December 1979, and an issue of convertible loan notes for the face value of £200,000. The agreement was completed on the same day in the Isle of Man. As a result of advice given by counsel the proposal that the proceeds of the sale should be lent to the shareholders of Holdings was deferred for a year save that £50,000 was lent to Mr. Gregory. The commissioners found that "a more general withdrawal of funds, to take place in March 1977, was in contemplation at the date of the sale agreement." In the meantime, the balance of the £1 million was invested. In March loans totalling £945,000 were made. Further loans were made after the deferred consideration of £550,000 had been paid (the payment of this sum having been by agreement deferred for a further six months). Although the Crown at one time contended that the loans were gains accruing to the shareholders, that claim was not pursued before the commissioners.

The question whether these transactions gave rise to a liability to capital gains tax was the subject of correspondence between a Mr. Rothwell, district inspector of taxes for the Pontypridd District, and Mr. Weare starting in 1978. In March 1980 Mr. Rothwell arranged for assessments to be made on all the shareholders for the year 1973–74. In March 1982 Mr. Rothwell decided that alternative assessments should be made for the year 1975–76. On 15 March 1982 he wrote to Mr. Weare's firm to say that alternative assessments would be made for the year 1975–76. Mr. Weare's firm was only concerned with the tax affairs of the trustees and one of the taxpayers. Alternative assessments for the year 1975–76 were against all the shareholders, including Mr. Gregory personally, for that year, though Mr. Rothwell had asked a subordinate to issue an assessment for 1975–76 to the trustees, the subordinate regrettably made an assessment, dated 15 March 1982, expressed to be for the fiscal year 6 April 1974 to 5 April 1975. At the same time he issued a notice of assessment bearing the same date, also expressed to be for that fiscal year. Mr. Weare's firm appealed against all the assessments. In the case of the trustees, their letter, dated 8 April 1982, read:

"We refer to capital gains tax assessment dated 15 March 1982 marked 1974–75. Please take this letter as formal appeal. Our appeal is based on paragraph 6 of Schedule 7 to the Finance Act 1965. We are requesting full postponement of tax."

At this stage Mr. Rothwell noticed the error. He also noticed that, as 5 April 1982 had passed, it was too late to make an assessment for the year 1975–76. So on 26 April 1982 he marked in his records on a standard form opposite the calculation of "Total Chargeable Gains—(Estimated) £155,000," in the column headed "Amendment" the words "Vacated" and "Raised in error." Then, opposite the calculation of the tax payable at 30 per cent. (£46,500) appear the words "Tax discharged—£46,500," and at the foot the tax payable as amended is stated to be "Nil." Mr. Rothwell notified the collector of taxes of this change but not Mr. Weare.

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A When preparing the appeals to the commissioners the taxpayers' solicitors wrote to the inspector of taxes, Pontypridd, and enclosed a schedule of appeals (24 in all: two for each taxpayer). In that schedule two assessments are shown as made on the trustees, one for 1973-74 and one for 1975-76.

B In substance, three issues have been argued on these appeals, namely: (A) Since 26 April 1982, when the assessment made against the trustees expressed as an assessment for 1974-75 was "vacated," has that assessment been capable of having any legal effect at all? (B) If the answer to question (A) is yes, can the last-mentioned assessment be treated as a good assessment for the fiscal year 1975-76, either by virtue of section 114 of the Taxes Management Act 1970 or otherwise? (C) Does the *Ramsay* principle entitle the Crown to claim that there have been disposals by the trustees and by Mr. Gregory personally in favour of Holdings? I will deal in turn with these issues, of which the first and second do not concern Mr. Gregory in his personal capacity.

Issue (A)

D The recent decision of this court in *Honig v. Sarsfield* [1986] S.T.C. 246 has established that, for the purpose of applying the time limit imposed by section 40(1) of the Taxes Management Act 1970, an assessment is made at the time when the inspector, authorised to make such an assessment, signs the certificate in the assessment book, not when notice of the assessment is served on the taxpayer. By what he suggested is parity of reasoning, Mr. Flesch, on behalf of the trustees, submitted that an inspector can effectively vacate or nullify an assessment merely by making an appropriate entry in his records, unilaterally and without any notice to the taxpayers. When Mr. Rothwell marked in his records the words "vacated" and "raised in error," this, it was submitted, ipso facto nullified the assessment made against the trustees.

E Though for the purpose of the relevant time limits an assessment can be made in the privacy of the inspector's office, it will have little, if any, other effect until notice of it is served on the person assessed. Until such service, such person is under no liability to pay; nor does the right of appeal conferred by section 31 of the Act of 1970 arise. However, once notice of the assessment has been served, the position entirely alters. The taxpayer can get rid of the assessment by means of a successful appeal under section 31. Section 50 provides for the reduction or increase of an assessment in the case of an appeal. Section 54 provides for the settling of appeals by agreement. Section 32(1) contains express provisions for the vacation of an assessment in specified circumstances. It reads:

H "If on a claim made to the board it appears to their satisfaction that a person has been assessed to tax more than once for the same cause and for the same chargeable period, they shall direct the whole, or such part of any assessment as appears to be an overcharge, to be vacated, and thereupon the same shall be vacated accordingly."

However—and this, in my judgment, is the crucial point—the Act of 1970 confers no general powers on an inspector to vacate an assessment. Significantly, section 29(6) specifically provides:

“After the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.”

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In the present case, therefore, section 29(6) would, in my opinion, have clearly precluded Mr. Rothwell from altering the relevant assessment so as to reduce the sum assessed to a nominal sum. It is perhaps more debatable whether section 29(6) on its true construction would itself have prohibited him from withdrawing or vacating an assessment. Nevertheless, Mr. Sher was, in my judgment, right in submitting that the vacation of an assessment has to be effected properly if it is to be valid, and in the absence of any statutory authority for the purported “vacation” by Mr. Rothwell, his entry in the assessment book which purported to record a vacation was not properly made and had no legal effect. In agreement with the judge, I would therefore reject the trustees’ contentions on issue (A).

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Issue (B)

As did the judge, I regard the next issue as more difficult. In this context I should begin by dealing with what seems to have been a new line of argument raised by Mr. Sher in this court and not canvassed in the court below. He pointed out that the assessment against the trustees related to capital gains tax, not income tax, and that, while income tax is payable in respect of income actually or notionally received over a period of time, capital gains tax is payable in respect of actual or notional disposals. In the latter case, as he put it, a particular time does not ordinarily have to be identified by the revenue beyond identifying the year in which the event took place. In the present case there were only two possible relevant events, namely, the share exchange which took place in the fiscal year 1973–74 (11 March 1974) and the sale to Hawtin which took place in the fiscal year 1975–76 (30 January 1976). Accordingly, there were only two fiscal years in which the relevant disposal could have taken place, that is to say 1973–74 or 1975–76. On 15 March 1982 Mr. Rothwell had written to Mr. Weare’s firm to say that, following the assessments already made for the year 1973–74, alternative assessments would be made for the year 1975–76. On that same day the revenue made an assessment against the trustees, which it marked with the year 1974–75, and sent out a notice of assessment marked with the same year. The notice was one of a bundle of 12 assessments all directed to the same transaction. The other assessments and notices of the assessments were duly marked with the year 1975–76. In these circumstances, Mr. Sher submitted, no one concerned believed that the assessment issued against the trustees and marked with the year 1974–75 was intended as anything other than an assessment for the year 1975–76. It was plainly intended to relate to the disposals which had taken place on 30 January 1976. In all the circumstances, it was submitted, the assessment was an assessment for the year 1975–76 and the Crown does not have to rely on section 114 of the Act.

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I have some sympathy with this argument because it would seem to me that Mr. Weare’s firm, or their clients, on receipt of the notice of assessment marked 1974–75, could not in all the circumstances, after proper thought, have reasonably believed that either the notice of assessment, or the assessment to which it referred, was intended by the revenue to relate to any year other than 1975–76. Nevertheless, apart

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A from section 114, to which I will revert, I find it impossible to hold that the assessment either was or took effect as an assessment for 1975–76. Contrary to Mr. Sher's submissions, as I understood them, the year of assessment is of critical importance in relation to capital gains tax. This is illustrated by section 19(3) of the Finance Act 1965, which provided:

B “a tax, to be called capital gains tax, shall be assessed and charged for the year 1965–66 and for subsequent years of assessment in respect of chargeable gains accruing in those years . . .”

Section 113(3) of the Act of 1970 provided:

C “Every assessment . . . notice of assessment . . . required to be used in assessing, charging, collecting and levying tax shall be in accordance with the forms prescribed from time to time in that behalf by the board . . .”

D The printed prescribed form of notice of assessment, which was employed by the revenue in the present case, predictably has a heading in the top left-hand corner: “Capital gains tax. Year ending 5 April 19 . . .” The body of the notice begins with the words “This notice gives particulars of an assessment made on you *for the year shown above*.” (The emphasis is mine.) All these matters illustrate that the year of assessment is an essential element of the assessment itself. *The assessment is what is written in the assessment book*. Section 114 apart, I find it is impossible to say that an assessment for one specified fiscal year can ever be or take effect as an assessment for another fiscal year. Section 114 apart, the fact that the taxpayer may have appreciated that a mistake has been made on receiving the notice of assessment is, to my mind, irrelevant in this context.

E I now turn to section 114 which provides:

F “(1) An assessment, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding. (2) An assessment shall not be impeached or affected—(a) by reason of a mistake therein as to—(i) the name or surname of a person liable, or (ii) the description of any profits or property, or (iii) the amount of the tax charged, or (b) by reason of any variance between the notice and the assessment.”

H The judge took the view that section 114 will enable an assessment expressed to be for one year to be treated and take effect as an assessment for another year provided that the Crown can show that there was a genuine mistake and that in all the circumstances there was no real possibility that the taxpayer was in any way misled. While I again have some sympathy with this view, which was supported by Mr. Sher in this court by way of alternative submission, I do not find myself able to concur in it, since I do not think it is warranted by the wording of the section. Subsection (2) has no application to the facts of this case. The only words of subsection (1) which can possibly be relied on by the Crown are the following:

“An assessment . . . which purports to be made in pursuance of any provision of the Taxes Acts shall not . . . be affected by reason of a mistake . . . if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts . . .”

The assessment in the present case, which the Crown asserts “is not to be affected,” is an assessment for 1974–75. Mr. Flesch accepted and contended that, as an assessment *for that fiscal year*, it would not be affected by reason of a mistake if the other conditions specified in section 114(1) were satisfied. However, as he pointed out, the subsection does not provide for rectification of an assessment; it is not the equivalent of the “slip rule.” The relevant fiscal year of assessment is an integral, fundamental part of the assessment itself. I, for my part, find it impossible to read the wording of section 114(1), wide though it is, as justifying in any circumstances the treatment of an assessment made for one fiscal year as an assessment made for another fiscal year. If the revenue make an assessment for the wrong year, their proper course is to issue a new assessment for the correct year. It is pertinent to observe that section 29(6) of the Act of 1970 would preclude them from themselves amending an assessment by substituting a reference to one fiscal year for another.

In the course of argument, three authorities relating to the effect of section 114 were cited: *British Estate Investment Society Ltd. v. Jackson* (1956) 37 T.C. 79; *Fleming v. London Produce Co. Ltd.* [1968] 1 W.L.R. 1013 and *Hart v. Briscoe* [1979] Ch. 1. However, I did not derive any great assistance from these authorities, since the judgments in those cases were directed to facts very different from those of the present case. However, in a passage in his judgment in the *Fleming* case (which judgment primarily concerned the statutory predecessor of section 114(2)) Megarry J. made the general observation, at p. 1027, that he would be slow to accept that the subsections “provide an impervious coverlet for gross errors.” Vinelott J. in the present case was not persuaded that gross error must be absent before what he described as the “dispensing power in section 114” can be exercised. I would merely make this comment. As I am sure the judge appreciated, section 114, where it applies, does not strictly confer a “dispensing power.” In a case where it applies, it gives the revenue or the taxpayer, as the case may be, the statutory right to claim that the assessment, warrant or other proceeding in question shall not be affected by reason of a mistake etc. If, contrary to my view, this statutory right has any relevance in relation to an assessment which has been made for the wrong year, I think it unlikely that the legislature would have intended that it would be exercisable where the error was a gross one—as in the present case I think it must have been. To sum up, however, in my judgment, neither section 114 nor any other statutory provision provides an escape route for the revenue if they issue an assessment for the wrong fiscal year. This is something they must get right.

For all these reasons, I think that the assessment made against the trustees cannot be treated as an assessment for the year 1975–76. It is common ground that, if it is to be regarded as an assessment for 1974–75, it can give rise to no legal liability on the part of the trustees.

Issue (C)

Even if my conclusion on issue (B) is correct, this does not dispose of the disputes relating to the assessment made against the taxpayer,

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A Mr. Gregory, personally. I must therefore proceed to consider issue (C).
The Crown's contention was that the exchange of the shares of P.G.I.
for the shares of Holdings and the subsequent sale of the P.G.I. shares
to Hawtin constituted one single composite transaction which, on an
application of the *Ramsay* principle, is to be treated for fiscal purposes
as involving a disposal by the taxpayers of the P.G.I. shares to the
ultimate purchaser, Hawtin. I propose to deal with this contention very
B shortly, because I think that the reasons for which I would reject the
Crown's similar claims in the two earlier appeals apply a fortiori on the
facts of the present cases. Attention, however, should be drawn to a few
particularly significant facts. In these cases, as the commissioners found,
by the time when the shares of P.G.I. were exchanged for shares of
Holdings on 11 March 1974, the previously contemplated sale to Cannon
had fallen through. The commissioners found as facts:

C "The incorporation of Holdings and the share exchange which
followed . . . were . . . not made without an appreciation of the
possible value of having taken those steps if, at some future date,
the [taxpayers] decided to sell the P.G.I. shares to an outside
purchaser. But at that time an intention of selling (or of procuring a
D sale) was absent: it came into being not earlier than the summer of
1975."

On these findings, the transfer of the P.G.I. shares to Holdings (though,
as the commissioners found, it passed the full legal beneficial interest to
Holdings) was made solely by way of what has been referred to in the
opening section of this judgment as "strategic tax planning." At that
E time no sale at all was in contemplation. The highest it could be put on
behalf of the Crown is that the parties intended that the interposition of
Holdings should serve as a convenient springboard (convenient for tax
purposes) in case at some future date it might be desired to sell the
shares in P.G.I.

There is no dispute that the second *Ramsay* condition is satisfied. In
the circumstances, however, I agree with Vinelott J. that it is impossible
F to say the same of the first *Ramsay* condition. The revenue's case is
again founded on the Crown's basic contention referred to in the
opening section of this judgment. In the court below particular reliance
appears to have been placed on Lord Wilberforce's reference in *Ramsay*
[1982] A.C. 300, 323, to "a transaction intended to have effect as part of
a nexus or series of transactions or as an ingredient of a wider
G transaction intended as a whole." The exchange of the P.G.I. shares, it
was postulated, could properly be regarded as a transaction so intended,
within Lord Wilberforce's words. Therefore, it was submitted, the first
Ramsay condition was satisfied. I much doubt the correctness of the
premise of this submission. Even accepting the premise, however, I do
not think the conclusion would follow. Lord Wilberforce's words now
fall to be read in the light of what Lord Diplock subsequently said in
H *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.*, 54 T.C. 200,
214 and what Lord Brightman said in *Furniss v. Dawson* [1984] A.C.
474, 527, in the authoritative formulation of the first *Ramsay* condition.
In my judgment, that condition does not come near to being satisfied on
the facts of the present case. It cannot properly be said that the share
exchange and the subsequent sale of the shares to Hawtin were a pre-
ordained series of transactions or a single composite transaction because,
at the date of the share exchange, so far from the essential features of a

sale to Hawtin or any other purchaser having already been determined, no one had the intention, still less the practical ability, to implement a sale to Hawtin, or indeed to any other purchaser.

The judge referred to the greater conceptual difficulties involved in treating the shareholders in P.G.I. as if they had entered into a tripartite arrangement for the sale of the shares in P.G.I. to Hawtin, in a case such as this, where the sale on by the interposed company, Holdings, had not been arranged at the time of the share exchange. He also made some cogent comments in relation to double taxation. I do not, however, find it necessary further to explore these points.

For the reasons which I have already stated, I would dismiss these appeals.

PARKER L.J. For the purposes of this judgment I shall first state the essential facts of the three appeals in the shortest possible form and indicate how the issues for determination arise. [His Lordship then set out a summary of the facts, sections 19(1) and (3), 20(1) and 22(3) of the Finance Act 1965 and sections 1 and 4 of the Development Land Tax 1976, the basic contentions of the Crown and continued:] In one sense, the question to be determined here is, in two cases, whether the taxpayers disposed of shares to the ultimate purchaser and whether, thereby, a chargeable gain accrued to them within section 19 and 20 of the Finance Act 1965. In the other case, it is whether the taxpayer company disposed of Crafts Marsh to the ultimate purchaser and whether, thereby, realised development value accrued to it within sections 1 and 2 of the Development Land Tax Act 1976. This, however, is, in my view, a gross over-simplification. The true question is, in each case, whether, on the true construction of any of the other provisions of the respective Acts, the taxpayers are, on the facts, brought within the charging sections.

In searching for the answer to this question I shall deal first with well settled principles before I examine in any detail the three decisions which together form the *Ramsay* principle. Lest it be thought that in so doing I am reluctant to escape from the ghosts or shackles of the past, I should perhaps make it clear that I do so because they were reiterated by Lord Wilberforce in *Ramsay* and because Lord Diplock stated in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.*, 54 T.C. 200, 214 that the new approach in *Ramsay* did not involve over-ruling previous decisions of their Lordships' House. Since in *Ramsay* Lord Russell of Killowen, Lord Roskill and Lord Bridge of Harwich agreed with Lord Wilberforce, and since in *Burmah* Lord Scarman, Lord Roskill and Lord Brandon of Oakbrook agreed with Lord Diplock, I regard myself as bound to do so. I take those principles from the speech of Lord Wilberforce in *Ramsay* [1982] A.C. 300, 323–324.

Principle 1

“A subject is only to be taxed upon clear words, not upon ‘intendment’ or upon the ‘equity’ of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle.”

Lord Wilberforce then continued:

“What are ‘clear words’ is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may,

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- A indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded: see *Inland Revenue Commissioners v. Wesleyan and General Assurance Society* (1946) 30 T.C. 11, 16, *per* Lord Greene M.R. and *Mangin v. Inland Revenue Commissioner* [1971] A.C. 739, 746, *per* Lord Donovan. The relevant Act in these cases is the Finance Act 1965, the purpose of which is to impose a tax on gains less allowable losses, arising from disposals.”
- B

- It is not entirely clear at first sight how, if intendment is to be excluded, “purpose” is to be included. I can myself derive no assistance on the point from Lord Greene M.R.’s judgment in the *Wesleyan* case for his observations on construction related to the construction of a document.
- C He did, however, make some general observations of relevance to the present appeals. He said, at p. 16:

- “In dealing with income tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable. It is sufficient to refer to the quite common case where property is sold for a lump sum payable by instalments. If a piece of property is sold for £1,000 and the purchase price is to be paid in ten instalments of £100 each, no tax is payable. If, on the other hand, the property is sold in consideration of an annuity of £100 a year for ten years, tax is payable. The net result from the financial point of view is precisely the same in each case, but one method of achieving it attracts tax and the other method does not. There have been cases in the past where what has been called the substance of the transaction has been thought to enable the court to construe a document in such a way as to attract tax. That particular doctrine of substance as distinct from form was, I hope, finally exploded by the decision of the House of Lords in the case of *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1.”
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On the particular point Lord Donovan’s judgment in *Mangin v. Inland Revenue Commissioner* [1971] A.C. 739 does not assist either, but again it is of value on the general ambit of Lord Wilberforce’s first principle. Lord Donovan said, at p. 746:

- “... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used’: *per* Rowlatt J. in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 K.B. 64, 71, approved by Viscount Simons L.C. in *Canadian Eagle Oil Co. Ltd. v. The King* [1946] A.C. 119, 140.
- G
- H Thirdly, the object of the construction of a statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. If *therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.* Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.” (Emphasis added.)

In connection with the first principle I cite two further passages from speeches in their Lordships' House In *Partington v. Attorney-General* (1869) L.R. 4 H.L. 100, 122, Lord Cairns said:

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"as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

B

C

And in *Tennant v. Smith* [1892] A.C. 150, 154, Lord Halsbury L.C. said:

"In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, *you must see whether a tax is expressly imposed.*" (Emphasis added.)

D

When Lord Wilberforce referred to the purpose of the Finance Act 1965 being to impose a tax on gains less allowable losses, arising from disposals, he was, as it seems to me, stating the "purpose" within those limits mentioned by Lord Halsbury L.C. In this limited sense the purpose does not appear to be of any assistance in the present appeals for the detailed and elaborate provisions of the Finance Act 1965 make it clear that the purpose was to tax some people and not others in respect of certain transactions and not others, and one can only determine which people and which transactions by looking at the words of the sections.

E

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Principle 2

"A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect."

G

This principle is stated by Lord Wilberforce without qualification. The first sentence is a paraphrase of what Lord Tomlin said in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1. The remainder appears to me to summarise the effect of the rest of Lord Tomlin's speech but, in view of later developments, it is desirable that Lord Tomlin's statements should be seen in context. He said, at pp. 19-20:

H

"it is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called 'the substance of the matter' . . . This supposed doctrine (upon which the commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases.

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A The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting 'the incertain and crooked cord of discretion' for 'the golden and streight metwand of the law.' Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, B however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of 'the substance' seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable. . . .

C "The matter was put accurately by my noble and learned friend Lord Warrington of Clyffe when as Warrington L.J. in *In re Hinckes, Dashwood v. Hinckes* [1921] 1 Ch. 475, 489 he used these words: 'It is said we must go behind the form and look at the substance . . . but, in order to ascertain the substance, I must look at the legal effect of the bargain which the parties have entered into.'"

D *Principle 3*

E "It is for the fact-finding commissioners to find whether a document, or a transaction, is genuine or a sham. In this context to say that a document or transaction is a 'sham' means that while professing to be one thing, it is in fact something different. To say that a document or transaction is genuine, means that, in law, it is what it professes to be, and it does not mean anything more than that."

Principle 4

"Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance." As to this principle Lord Wilberforce said, at p. 323:

F "This is a cardinal principle but it must not be overstated or overextended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect *as part of a* G *nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole*, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, *intended to operate as such*, it is that series or combination which may be regarded. For this there is authority in the law relating to income tax and capital gains tax: see *Chinn v. Hochstrasser* [1981] A.C. 533 and *Inland Revenue Commissioners v. Plummer* [1980] A.C. 896. For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams', from considering what, *as evidence by the documents themselves or by the manifested*

members of the parties, the relevant transaction is. They are not, under the *Wexminster* doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. This is particularly the case where (as in *Rawling*) it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps. It may be so where (as in *Ramsay* or in *Black Nominees Ltd. v. Nicol* (1975) 50 T.C. 229) there is an expectation that it will be so carried through, and no likelihood in practice that it will not. In such cases (which may vary in emphasis) the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions." (Emphasis added.)

I confess to finding some difficulty in appreciating how one can arrive at the conclusion that the legal nature of a series of transactions is something which in law it is not. It appears to me that this is preferring substance to form and this certainly appears to have been the view of both Lord Roskill and Lord Bridge of Harwich in their speeches in *Barms v. Dawson* [1984] 1 A.C. 474, 515, 517. I shall return to this question later.

First I shall consider whether, on any construction of any provision of either of the two Acts here in question, it can be said, within the four principles, that the taxpayers disposed of their shares or their land to the ultimate purchaser and thereby made a chargeable gain or realised development value. In my view, the answer must plainly be no. It would only be possible to arrive at such a result by implying some elaborate proviso in paragraph 6 of Schedule 7 to the Finance Act 1965 and section 20 of the Development Land Tax Act 1976. In the one case such a proviso would have to be on the following lines: "Provided that, if the sole purpose of the exchange is to avoid the tax which would have resulted had the original holding been sold to a third party and the shares are thereafter sold to a third party, then the sale to the third party shall be treated as if it were a disposal by the original owner to the third party and the proceeds of sale shall be treated as a capital sum derived from the disposal by the original owner." The implication could not, however, stop there, or so it seems to me. The original owner would still be possessed of the new holding and provision would need to be made as to what was to happen if and when he disposed of the new holding for, in the absence of such a provision, the position of the new holding is unascertainable. If one is to ignore the exchange, does one also ignore the acquisition and the subsequent disposal of the new holding?

In the *Bowmer* case also there would have to be some provision, equally elaborate, to achieve the result contended for by the Crown. The contention is only made because the fragmentation resulted in the five companies having greater free allowances than the original owner. What then must be read in? There are clearly many possibilities, none of them being expressed. Whatever solution were adopted it would seem to involve elaborate implication. If Lord Donovan in *Mangin v. Inland Revenue Commissioner* [1971] A.C. 739, 746, was right, nothing is to be implied. If imputed and equity are excluded, there is, in any event, no warrant for reading in anything. If motive does not invalidate, the

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A share exchanges and the fragmentation stand. If the legal results of genuine documents are looked at there is no question of the taxpayers being chargeable. If the parliamentary purpose is looked at it appears to be clear. In the two share cases it was that there should be no tax on the disposal constituted by the change but tax on a subsequent disposal of the new holding by the original owner. In the development land case it was similar.

B Unless, therefore, the *Ramsay* principle is wide enough to override, but without overruling, the four principles, the Crown's case must fail. I turn, therefore, to this aspect of the case. In *Ramsay* and in *Burmah* the question was whether the taxpayers had succeeded in creating an allowable loss and it was held that they had not. I find it unnecessary to examine further the speeches in that case, for in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.*, 54 T.C. 200 the House of Lords defined the ratio of the case and it is with that that this court is concerned. Lord Fraser of Tullybelton, with whose speech all other members of the Judicial Committee agreed, said, at p. 220:

D "The ratio of the decision in *Ramsay* is to be found in the speech of Lord Wilberforce at [p. 326] where he said this: 'The capital gains tax was created to operate in the real world, not that of make-belief. As I said in *Aberdeen Construction Group Ltd. v. Inland Revenue Commissioners* [1978] A.C. 885, it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in *an indivisible process*, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, *a single continuous operation*, is *not such a loss (or gain) as the legislation is dealing with*, is in my opinion well and indeed essentially within the judicial function.' At p. 337 of the same case I said this with reference to the cases of *Inland Revenue Commissioners v. Plummer* [1980] A.C. 896 and *Chinn v. Hochstrasser* [1981] A.C. 533: 'The essential feature of both schemes was that, when they were completely carried out, they did not result in any actual loss to the taxpayer. The apparently magic result of creating a tax loss that would not be a real loss was to be brought about by arranging that the scheme included a loss which was allowable for tax purposes and a matching gain which was not chargeable.' The question in this part of the appeal is whether the present scheme, when completely carried out, did or did not result in *a loss such as the legislation is dealing with*, which I may call for short, a real loss. In my opinion it did not."

Apart from defining the ratio of the *Ramsay* case, the *Burmah* case is, in my view, principally of importance for a passage in the speech of Lord Diplock with whose speech Lord Scarman, Lord Roskill and Lord Brandon of Oakbrook agreed. Lord Diplock said, at p. 214:

H "It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that *Ramsay's* case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have

been payable. The difference is in approach. *It does not necessitate the over-ruling of any earlier decisions of this House*; but it does involve recognising that Lord Tomlin's oft-quoted dictum in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1 at p. 19, 'Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be,' tells us little or nothing as to what methods of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would attach to them if business transactions were conducted in a straight-forward way." (Emphasis added.)

This passage is of importance for three reasons: (i) it defines the subject matter to which the significant new approach in *Ramsay* is to be applied; (ii) it states that the difference in approach does not involve over-ruling any earlier decisions of the House of Lords; (iii) it accepts specifically Lord Tomlin's dictum in the *Duke of Westminster* case [1936] A.C. 1, 19–20 but states that the new approach does involve recognising that the dictum is silent or at least nearly silent as to its scope or ambit.

As to the first of these matters, the definition goes further than *Ramsay* because it includes cases where the series of transactions includes the achievement of a legitimate commercial end. It is, however, much more specific than *Ramsay* for it appears to limit the cases to which the new approach is to be applied to those in which there are: (i) a series of transactions, which (ii) are pre-ordained, and into which (iii) there are inserted steps which have no commercial purpose apart from the avoidance of a liability to tax which, in the absence of those particular steps, would have been payable.

It is important to realise that Lord Diplock was not saying that, given these elements, the tax which the inserted steps are designed to avoid is payable. He was saying only that, given those elements, it is a proper case for the new approach. That approach is one in which one must look for the real loss or gain. In my view, he could not have been going further than I have indicated, for ultimately the question is one of construction of a taxing Act and, previous decisions not being over-ruled, they as well as the *Ramsay* principle must be applied. He cannot, therefore, have been saying that, given the elements mentioned, the result follows *whatever the language*.

I now come to *Furniss v. Dawson* [1984] A.C. 474, which clearly extended the *Ramsay* principle. The facts were very different. The transactions were only two in number, were not self-cancelling or circular, and included the achievement of a legitimate commercial end. In essence, those transactions consisted in the transfer from A to B Ltd. of shares in X Ltd. in exchange for shares in B Ltd. and the sale by B Ltd. of the shares in X Ltd. to C. The transactions, as transactions, were, therefore, in essence the same as the transactions here under consideration, although the fiscal advantages sought were different. Here in the two share exchanges the advantage was, as in the *Dawson* case, sought by the taxpayers themselves by way of tax deferment. In the case of the Crafts Marsh transactions, however, the advantage was a group advantage in the availability of the five companies' free allowances. Although the *Dawson* transactions were the same, the nature of the operation was markedly different in that case to the operations in the present cases. Lord Brightman described the *Dawson* operation, at p. 520:

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A "There are very full minutes of the board meeting of one of the operating companies and similar minutes exist in the case of the other company. These show that the whole process *was planned and executed with faultless precision*. The meetings began at 12.45 p.m. on 20 December, at which time the shareholdings of the operating companies were still owned by the Dawsons unaffected by any contract for sale. They ended with the shareholdings in the ownership of Wood Bastow. The minutes do not disclose when the meetings ended, but perhaps it was all over in time for lunch."

B

And Lord Bridge, at p. 518, said that the purpose of the scheme was to ensure that for a "scintilla temporis" the beneficial interest in the shares was held by Greenjacket (B Ltd.). The two transactions were thus carried out within a very short space of time, they were plainly pre-ordained and the purpose of the first was solely to defer payment of tax which would have been payable on a direct sale.

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I have ventured to say a little about the facts in *Dawson* before investigating the legal effect of the decision, for it is, in the present appeals, important to bear them in mind. To ascertain the legal effect requires, I fear, an examination in some detail of the speeches delivered by their Lordships. I take them in the order in which they were delivered. Lord Fraser of Tullybelton, who had in the *Burmah Oil* case identified the ratio of *Ramsay*, now identified its principle. He said, at p. 512:

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"The true principle of the decision in *Ramsay* [1982] A.C. 300 was that the fiscal consequences of a *preordained series of transactions, intended to operate as such*, are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately. The principle was stated in the speech of Lord Wilberforce in *Ramsay*, at p. 324A-C, especially where his Lordship said: 'For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams,' from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, *the relevant transaction* is. They are not, under the *Westminster* doctrine [*Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1] or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole.'" (Emphasis added.)

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He concluded, at p. 513:

"The series of two transactions in the present case *was planned as a single scheme*, and I am clearly of opinion that it should be viewed as a *whole*. The relevant transaction, if I may borrow the expression used by Lord Wilberforce [1982] A.C. 300, 324, consists of the two transactions or stages taken together. It was a disposal by the respondents of the shares in the operating company for cash to Wood Bastow. I would allow the appeals."

H

The acceptance of the *Westminster* doctrine is to be noted, as also is Lord Fraser's reference to "the fiscal consequences of a pre-ordained series of transactions, intended to operate as such."

Lord Scarman made some observations which deal with the general approach but also accepted the *Westminster* principle. He said, at pp. 513–514:

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“*What has been established* with certainty by the House in *Ramsay*’s case is that the determination of what does, and what does not, constitute unacceptable tax evasion is a subject suited to development by judicial process. The best chart that we have for the way forward appears to me, with great respect to all engaged on the map-making process, to be the words of my noble and learned friend, Lord Diplock, in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30, 32 which my noble and learned friend, Lord Brightman, quotes in his speech (post, p. 521B–C). These words leave space in the law for the principle enunciated by Lord Tomlin in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1, 19 that every man is entitled if he can to order his affairs so as to diminish the burden of tax. The limits within which this principle is to operate remain to be probed and determined judicially. Difficult though the task may be for judges, it is one which is beyond the power of the blunt instrument of legislation. Whatever a statute may provide, it has to be interpreted and applied by the courts: and ultimately it will prove to be in this area of judge-made law that our elusive journey’s end will be found.”

I pause to observe that I find some difficulty in reconciling this approach with the well-established principle that the subject is only to be taxed by clear words.

By contrast with those who had gone before him Lord Roskill, referring to the *Duke of Westminster*’s case said, at p. 515:

“1936, a bare half-century ago, cannot be described as part of the Middle Ages but the ghost of the *Duke of Westminster* and of his transaction, be it noted a single and not a composite transaction, with his gardener and with other members of his staff has haunted the administration of this branch of the law for too long. I confess that I had hoped that that ghost might have found quietude with the decisions in *Ramsay* and in *Burmah*. Unhappily it has not. Perhaps the decision of this House in these appeals *will* now suffice as exorcism.”

Lord Bridge of Harwich appears to have taken the view that the *Westminster* doctrine is only applicable in the case of a single transaction. He said, at p. 516:

“Of course, the judiciary must never lose sight of the basic premise expressed in the celebrated dictum of Lord Tomlin in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1, 19 that: ‘Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be.’”

He continued, at p. 517:

“The strong dislike expressed by the majority in the *Westminster* case for what Lord Tomlin described, at p. 19, as ‘a doctrine that the court may ignore the legal position and regard what is called “the substance of the matter,”’ is not in the least surprising when one remembers that the only transaction in question was the duke’s

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A covenant in favour of his gardener and the bona fides of that transaction was never for a moment impugned. When one moves, however, from a single transaction to a series of interdependent transactions designed to produce a given result, it is, in my opinion, perfectly legitimate to draw a distinction between the substance and the form of the composite transaction without in any way suggesting that any of the single transactions which make up the whole are other than genuine. This has been the approach of the United States federal courts enabling them to develop a doctrine whereby the tax consequences of the composite transaction are dependent on its substance, not its form. I shall not attempt to review the American authorities, nor do I propose a wholesale importation of the American doctrine in all its ramifications into English law. But I do suggest that the distinction between form and substance is one which can usefully be drawn in determining the tax consequences of composite transactions and one which will help to free the courts from the shackles which have for so long been thought to be imposed upon them by the *Westminster* case. I shall attempt no exhaustive exposition of all the criteria by which, for the purpose I suggest, form and substance are to be distinguished. Once a basic doctrine of form and substance is accepted, the drawing of precise boundaries will need to be worked out on a case by case basis."

I come finally to the speech of Lord Brightman with which all other members of the Judicial Committee agreed. Having examined in some detail the judgments in *Floor v. Davis* [1978] Ch. 295 and the judgments both at first instance and in this court in *Dawson* itself, gently chiding those who delivered them for what appeared to him to be a determination to resist any inroads into the principles of the *Duke of Westminster* case, he said, at p. 527:

"The formulation by Lord Diplock in *Inland Revenue Commissioners v. Burnmah Oil Co. Ltd.* [1982] S.T.C. 30, 33 expresses the limitations of the *Ramsay* principle. First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax—not 'no business effect.' If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied."

This last quotation, in my view, embodies the limits of the *Ramsay* principle. The limitations of the principle therein stated are such that, in my view, the Crown must fail in the present cases for in none of them can the ultimate transaction be considered as part of a pre-ordained series. But in my view *Dawson* leaves many questions unanswered. Taking the last two sentences of the quotation, the question arises as to the consequences of disregarding the share exchanges and land fragmentation for fiscal purposes when the effect of the transactions has

already been stated by Parliament to have no immediate fiscal results. What happens when the new holdings are ultimately sold? What would have happened on the land fragmentation in the *Bowater* appeal if it had resulted in realised development value not offset by the taxpayer company's free allowance? How can one look at the end result and *then* see how the end result is to be taxed when the terms of the taxing statute do not apply to the real legal result unless the *Duke of Westminster* case and indeed the four principles are overruled? How does one reconcile the fact that what finally attracted tax, according to the Crown, was the sale to the ultimate purchaser which neither legally, beneficially or in reality was made by the taxpayer? I would find it easier to follow if the result were said to be that the taxpayer lost the advantage of the share exchange or the fragmentation as the case may be, but this would be to give it fiscal consequences not to deny it such consequences. The merit would, however, be that one would not be left in a situation when, in the share cases, the taxpayer has in his hands the new holdings which would attract tax if there were a gain on disposal.

More generally, if it is to remain the case that the subject is chargeable only by statute and only by clear and express words, how can it be right to say that taxing the subject is not suitable to be dealt with by the blunt instrument of statute but must be probed and developed by judicial decision?

All these questions will no doubt be answered by their Lordships when they deal, as it seems inevitable that they will, with appeals from this court. For myself, I am unable to answer them and am thankful that it is unnecessary for me to do so. One way or another it appears to me that the ghost of the pre-*Westminster* doctrine which that case sought to lay to rest would, if the present appeals are to succeed, have to be resurrected. At present, I am of the clear view (1) that the Crown's contention in these cases is to borrow Lord Tomlin's words "nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable;" (2) that to extend the *Ramsay* principle to the present cases would involve substituting "the uncertain and crooked cord of discretion for the golden and straight metwand of the law;" and (3) that for the commissioners to determine the fiscal end result of a series of transactions and then apply the statute is a process which involves determining that a taxable transaction has occurred before looking at the language of the statute instead of seeing whether any and which words of the statute can fairly be read as applying to what has taken place. Where every step is artificial as in *Ramsay* and *Burmah* I find no difficulty in understanding that the statute cannot be read as covering the so-called loss thereby created. Where, as in *Dawson*, the transactions are conducted so that the first survives only for a "scintilla temporis," I find it less easy to understand but do not need to for I am bound by the decision in the *Dawson* case. It may be that *Dawson* can be further extended but I do not think that this court can extend it to cover these cases. The House of Lords can, of course, do so but, as presently advised, I cannot see how it can be done without overruling, at least to some extent, many of their previous decisions.

On the detailed analysis of the facts and all other points I agree with and have nothing to add to the judgments of Slade and Mustill L.JJ. which I have had the opportunity to read in draft.

I too would dismiss the appeals.

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- A MUSTILL L.J. I also agree that these appeals should be dismissed. A study of the speeches delivered in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* and *Eilbeck v. Rawling* [1982] A.C. 300; *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* (1982) 54 T.C. 200 and *Furniss v. Dawson* [1984] A.C. 474 would appear to warrant the following propositions. (1) The fiscal consequences of a transaction or group of transactions are to be determined by applying the words of the taxing statute to the facts of the individual case. If the outcome of the transaction, properly understood, falls within the words of the statute, also properly understood, the appropriate fiscal consequence will follow. Otherwise it will not. (2) When considering the application of the statute to the facts of the individual case the court must view both the language of the statute and the components of the transaction in a broad fiscal perspective, and must not confine itself to the narrower focus which would be appropriate if the purpose was to elucidate and enforce the private rights created by the documents in which the transaction is embodied. (3) Nevertheless, the determining factor will always be the language of the statute. The subject is not to be taxed on the intendment or the equity of the Act. (4) Unless the enactment specifically so provides, a transaction which falls properly into one fiscal category is not to be transferred to another simply because the motive or one of the motives for embarking upon it is to obtain a fiscal advantage. (5) A document is not to be treated as a sham unless it is intended to convey to third parties or the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations which the parties intend to create. (6) If the transaction under scrutiny consists of a single element the court will look behind the language of the relevant document only for the purpose of considering whether or not it is a sham. If it is not, its fiscal consequences will be ascertained solely by reference to its legal effect. (7) If, however, it is contended that the relationship between the taxpayer and the other relevant parties is of a composite nature consisting of a number of linked transactions, the inquiry does not end at the point when the fact-finding tribunal has concluded that none of the documents which embody the relevant elements can be discarded as a sham. The court must, it is true, recognise that these documents may have lasting legal consequences—in the sense, for example, that they create enforceable contractual rights, or effect a transfer of title, or alter the capital structure of a company. But the process of matching the facts to the words of the statute is not necessarily confined to an examination of these consequences. The fact finding body must also look to see whether there stands behind the legal relationships a unitary business relationship by reference to which the application of the fiscal statute ought to be determined. (8) A business relationship may be regarded as unitary notwithstanding that the performance of all its stages was not assured by contractual obligations already in existence when the first of the steps was put in train. (9) If it is found that the individual elements did together create a unitary business relationship, and if it is necessary to decide what account should be taken of this relationship when applying the taxing statute, it is material to consider whether any of the individual elements which are said to make it up was taken with a view to the avoidance of tax, and without any other business purpose. (10) The question to be considered when applying the last stated proposition is
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whether the step in question had a business *purpose*. The inquiry is not limited to whether it had any enduring business or legal *consequence*.

The problem raised by the present group of appeals is to determine the breadth of the concept which, in the propositions just stated, has for the moment been indicated by the word "unitary." (I have made use of this word to avoid begging any of the questions which may be raised by concentrating on a single one of the expressions which are found in the reported cases.) Do the principles of *Ramsay* and *Dawson* extend to a case where the multiple transactions take the same general shape as was intended when the first step was embarked upon, but where there is an unforeseen interruption in the execution of the series, or where the later stages are carried through in different terms, or with different parties, from what had originally been planned? If the tests for the application of the principle are satisfied, is the outcome in a fiscal sense limited to the disregarding of the steps which have no business purpose, or are there other consequences? What is the status of the steps which are ultimately disregarded, at a time when the plan is in suspense or is being reformulated?

Understandably, much of the argument before this court concentrated on the expression "a pre-ordained series of transactions" and "a single composite transaction," for these and other closely related formulations are stamped with authority by the speeches in the three leading cases. I believe, however, that this direct approach must be adopted with some caution. On one side, there may be an inclination to read the various formulae as if they formed part of the taxing statute itself. Too minute a scrutiny of the bare words may cause their context to be overlooked. Thus, at one stage of the argument, it was proposed that there should be recourse to a dictionary, to ascertain the precise meaning of "pre-ordained." This cannot be the right method. On the other hand, if too much regard is paid to the context, the reader may be led to believe that the new principles apply only to situations on a par with those discussed in *Ramsay* and *Dawson*. The speeches delivered in the *Dawson* case make it plain how misguided this would be. In these circumstances I believe that it is useful to begin by looking at the way in which the law has arrived at its present state, and then going on to consider the practicability of applying one reading rather than another to transactions, different from those under examination in *Ramsay* and *Dawson*, which may commonly arise in practice.

Accordingly, I think it appropriate to begin by identifying the steps by which the doctrine has evolved. In *Ramsay* itself the chain of relevant dealings began at a time when a transaction had already been concluded in "the real world" with consequences which were fiscal as well as contractual: namely, the taxpayers had made a chargeable gain. Nothing in what followed was designed to modify this transaction in any way. Instead, the intention was to conjure up a new situation in which the taxpayers would, without in reality making a gain or suffering a loss, have attributed to them a loss which could for fiscal purposes be set against the existing chargeable gain. Since the two aspects were entirely separate, it was possible for the House of Lords to concentrate on the later dealings (which alone were carried out with tax avoidance in mind), to view them in the round, and to recognise that, because their elements nullified each other, they were entirely sterile in the result, even if possessing transient legal effects when viewed in isolation. This feature made it possible for the House to disregard the second group of

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A transactions in their entirety, so far as their fiscal consequences were concerned.

The position in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.*, 54 T.C. 200 was in one important respect the same: namely, that before the tax avoidance manoeuvres were set in train there had been anterior transactions with real fiscal as well as contractual consequences. In fact, there had been two such transactions. In one, the taxpayers had realised gains which were assessable for corporation tax. In the other the taxpayer company had suffered a loss in the shape of a bad debt owed by Holdings, which was not allowable against the liability for corporation tax. The difference between this case and *Ramsay* was that, whereas in the latter the self-cancelling tax avoidance transactions were entirely distinct from the dealing which had brought about the gain, the scheme in *Burmah* was intended to convert the fiscal outcome of the second anterior transaction from a bad debt owed by Holdings into an allowable loss on the realisation of the taxpayer company's shares in Holdings. Notwithstanding this difference, it was possible to focus on the later group of transactions, and to recognise that, when viewed in the round, they did not lead to any disposal of the real asset—the B.P. shares—or any real loss in the sense contemplated by the statute. The essence of the decision was that the tax avoidance dealing could be disregarded for fiscal purposes: and it is, in my view, significant that Lord Diplock, at p. 215F, referred to the intermediate circular book entries as being “ignored.”

When the House came to consider *Furniss v. Dawson* [1984] A.C. 474 it was faced with a very different situation. No longer was there a free standing anterior transaction which could remain intact once the tax avoidance dealings had been stripped away. Instead, the integrated plan had a genuine commercial object: namely, the disposition of the asset by the taxpayer (“A”) and its acquisition by a third party buyer (“C”). The tax avoidance element was introduced, not after the genuine transaction was complete, but by the interpolation into the planned future transaction of a commercially superfluous party, in the shape of Greenjacket Investments Ltd. (“B”). These two elements were knitted together in the scheme, so that the nullification of the artificial tax avoidance aspects, with the consequent exposure of its true fiscal implications, could not be achieved simply by treating the redundant dealings as if they had never occurred: for, if the transfers from A to B, and thence from B to C were ignored, there would be nothing left to bridge the gap between A and C. The process of reasoning in *Dawson* was therefore different from that of the two earlier cases. Instead of merely *subtracting* the commercially meaningless steps by ignoring them, the court had to give effect to an *additional* underlying fiscal reality which was not reflected in the documents actually executed: viz. a direct transfer from A to C, for which the consideration was furnished by C to B, at the request of A. The *Dawson* case demonstrates that, in what has been called a “linear” as distinct from a “circular” transaction, the court must carry out the following exercise: (i) consider whether all the dealings under scrutiny form part of a single transaction; (ii) consider whether any of the steps have no commercial purpose; (iii) discard those that have no such purpose and (iv) identify what Lord Brightman called the end result of the single transaction. Precisely how the end result is to be taxed will then depend on the terms of the taxing statute which it is sought to apply.

It is against this background of a developing doctrine that the tests formulated in *Ramsay* and *Burmah*, and reiterated in *Dawson*, must properly be understood. In *Dawson*, as in the other two cases, the documents creating the inserted steps were not a sham. It follows that they did have real legal effects. They created obligations which were enforceable in law, they effected transfers of legal or equitable interests which were valid as against third parties; they brought about real changes in the capital structure of the various companies. Moreover, their nature was such that, at least when considered in isolation, they were capable of having fiscal consequences of their own. Yet they had to co-exist with another underlying transaction which gave rise to different fiscal consequences. This caused no practical problems in the *Dawson* case. The scheme went through in a short space of time exactly as planned. A precisely specified outcome had been contemplated at the outset, and precisely this outcome had been achieved by the end. No lasting rights were created by the intermediate dealings. Moreover, any fiscal consequences which may have theoretically flowed from these dealings were so transient that they could have caused no problems in practice. Then replacement by the fiscal consequences of taxing A as on a direct transfer to C took place so quickly that the problem of the way in which the dispositions from A to B and B to C should be taxed could never directly arise.

The same ready solution is not, however, available when in timing or execution there is a discontinuity between the stages by which the end result is reached. Here, the earlier steps may possess in the real world fiscal as well as legal consequences of their own, which are not so easily disregarded when the later stages come to be performed. It seems to me that an understanding of the language used in *Ramsay*, *Burmah* and *Dawson* must take account of the apparent tension between the two or more sets of legal and fiscal consequences; and that the words of the speeches should not be read as extending the principle to situations where these consequences cannot genuinely co-exist. By way of illustration, one may take a hypothetical case much pressed in argument. Imagine that the taxpayer, A, envisages that on some future occasion he may wish to dispose of an asset, or engage in some other commercial transaction, with an independent third party, of whose identity he has at present no idea. He recognises that, if the transaction ever does take place, there will be a fiscal advantage if it is channelled through an intermediary, B. Against this contingency he decides to carry out the transaction with B straight away, and does so, with consequences which are reflected by entries in registers of title or shares, and by appropriate debits and credits in the accounts of the two companies. Assume also that the dealing with B has a fiscal consequence so far as A is concerned—whether by way of chargeable gain, or allowable loss, or in some other manner. At this stage, there can be no ground on which the revenue could abstain from assessing, or the taxpayer from paying, the relevant kind of tax by reference to the transaction as actually carried out. Ix hypothesi the transaction is not a sham. Nor, consistently with the principles set out by Lord Wilberforce in *Ramsay* [1982] A.C. 300, 313-314, could the argument for the Crown be carried to the length of suggesting that, in the absence of express statutory warrant, the existence of an ulterior motive could be a ground for taking the transaction fiscally otherwise than at its face value. Unless it falls into an exempted category, the outcome of the transaction will fall to be brought into

A account as loss or gain, or in some other way, when A's overall tax position is computed. Indeed, if the interval of time is long enough, his liability may be actually assessed and paid. Let it now be assumed that, after a substantial interval, A decides to implement the original scheme by causing B to carry out with C a transaction of the type which A had contemplated from the outset. In its argument on the present appeals, the Crown asserted that the *Ramsay/Dawson* principle requires A to be re-taxed on the basis of a direct disposition from himself to C. But, if this is so, what is to be the fiscal status of the concluded transaction between A and B, and of the crystallised version of A's overall tax position founded upon it? Mr. Sher suggested that the fiscal position might be reconstituted by means of an appeal by one party or the other against the original assessment. But an appeal could succeed only if the original tax return by A and the assessment based on it could properly be treated as erroneous, and apt for correction. Yet there seems no sense in which it is possible to say that the return and assessment were wrong when made, and Mr. Sher was unable to cite any authority in support of the notion that they could be retrospectively invalidated when the transaction with C went through. As an alternative, Mr. Sher suggested that the whole matter could be disentangled by reworking A's accounts for the current and earlier years on the basis that the transaction with B had never taken place, and then by extra-statutory concession giving credit for any tax actually paid in respect of the transaction in earlier years against the assessment which brings into account a notional transfer direct from A to C. With due respect to the resourceful arguments of Mr. Sher, this expedient seems to me only to paper over the intellectual difficulties which arise from trying to force this situation into the mould of a doctrine conceived by the House of Lords in quite different circumstances. The only link between the two dealings is the common fiscal purpose. It is, however, quite plain from the authorities that this alone is not enough. It must also be possible to treat the dealings as part of a single transaction. In the example stated there are, to my mind, two transactions, not one.

F Another example may be given. Imagine that the plan made by A contemplates that the sale by B to C will be made on terms which may be labelled "X." After the transaction between A and B has been completed, a difficulty is encountered, as a result of which it is possible to complete the second stage only if its terms are changed to "Y." If it is held that, in the real world, there is a triangular transaction between A, C and B, what are its terms? The transfer away from A was never on terms "Y"; the transfer to C was never on terms "X." So also if the example is varied to make the breakdown in the plan relate to the identity of the purchase, rather than the terms on which he buys; the essence of the problem is the same.

H I must emphasise that the purpose of these examples—and they are only examples—is not to repeat the argument over double taxation which was disposed of by Lord Brightman in *Dawson*. The problems arising from the Crown's argument on the present appeals are of a different nature. Still less is there any intention to hint that the clock should be set back to where it was before *Ramsay*. The principle is firmly established and, if its application within its necessary limits gives rise to problems, these must be solved. It is, however, legitimate to recognise that such limits do exist. The House has entrusted to the courts the task of elaborating this doctrine, which is still in a state of

evolution. When considering its thrust and effect, and working out how to apply it in new situations, an examination of the circumstances in which the House has held that it can successfully be applied, and of the practical difficulties of applying it in other circumstances, must surely help to arrive at an understanding of what the speeches were intended to convey. Approaching the matter in this way, I would conclude that the doctrine cannot have been intended to have the wide compass for which the Crown contends. This is indeed the opinion which I would have formed simply by reading the language used by their Lordships in *Ramsay* [1982] A.C. 300, *Burmah*, 54 T.C. 200 and *Dawson*, [1984] A.C. 474 in what would seem to be its natural sense. Given the importance of the issue, it may be permissible to set out at a little length the expressions actually used. Taking the speeches in the order in which they were delivered, we find *per* Lord Wilberforce in *Ramsay*: “a nexus or series of transactions” (p. 323H); “a series or combination of transactions, intended to operate as such” (p. 324A); “a composite transaction intended to be carried through as a whole” (p. 324B); “a composite transaction” (p. 325B); “an indivisible process” (p. 326E); “a [scheme] planned as, a single continuous operation” (p. 326E); and *per* Lord Fraser of Tullybelton: “each step . . . so closely associated with other steps with which it formed part of a single scheme” (p. 337); “a complete prearranged scheme” (p. 337E); “a complete scheme” (p. 338A); “inter-connected transactions” (*per* Lord Diplock in *Burmah* at p. 2149); “[a . . . transaction] planned as a single scheme” from *Dawson* (*per* Lord Fraser at p. 513D); “a series of interdependent transactions” (*per* Lord Bridge of Harwich at p. 517B); “interlocking, interdependent and pre-determined transactions” (*per* Lord Bridge at p. 517G) and “one single composite transaction” (*per* Lord Brightman at p. 527c). In view of the weight of argument directed to the precise meaning of “pre-ordained” in the authoritative formulation by Lord Brightman in *Dawson* at p. 527c, it is important to register that his Lordship treats the expression “a pre-ordained series of transactions” as interchangeable with “one single composite transaction.”

It is, of course, essential to avoid the mistake of confusing a description of the case before the court with a definition of the principle to be applied in future cases, but I confess that, quite apart from the practical considerations already mentioned, I can see nothing in any of the speeches to sustain the Crown’s proposition that the *Ramsay* principle extends to all cases where an initial step is taken with an ultimate tax advantage in mind, and there is subsequently, after whatever interval and in whatever precise form, another step of the kind originally envisaged.

Against this background I turn to the individual appeals. These have already been discussed in detail by Slade L.J., and I may therefore deal with them very shortly. In each case the start and finish must be the words of the statute. I believe that a valuable touchstone was furnished by Lord Diplock and Lord Fraser of Tullybelton in *Burmah* when they spoke of “the real” loss and by Lord Scarman when he spoke of the need to determine “where the profit, gain, or loss is really to be found.” Of the three appeals, the *Craven v. White* cases offer the most scope for debate, since at the time when the first stage of the transaction was carried out a sale by Millor to Jones was on the cards, and such a sale did take place, within a relatively short time span on terms which were, at least as to price, not dissimilar to those originally contemplated.

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Craven v. White (C.A.)

Mustill L.J.

A Nevertheless, I cannot find in the events leading up to the sale any
ground for holding that “the real disposal” by the taxpayers was to
Jones rather than Millor. At the time when the shares ceased to be the
property of the taxpayers they were destined for Millor and nowhere
else. There was then no formulated plan fixing the identity of the
ultimate recipient, or the terms on which the shares would be transferred;
B nor any settled intention on the part of Oriel or Jones that the latter
should participate in a triangular dealing such as was revealed by the
House of Lords in *Dawson*. Whatever the precise boundaries of the
word “pre-ordained,” it cannot, in my view, be stretched to cover a
series of dealings so intermittent in execution and so unformed at the
outset. In my judgment, there was not here a single composite
transaction or operation, but two distinct transactions, and the fiscal
C implications of the two stages ought to be ascertained by reference to
the legal effect of the contracts from which they sprang.

I have reached the same conclusion in relation to *Inland Revenue
Commissioners v. Bowater Property Developments Ltd.* As subsequent
events demonstrated, there was a hope and an expectation, at the time
when the land was transferred to the five companies, but there was in no
sense a practical certainty, that an onward sale would be made to Milton
D Pipes on the terms negotiated a few months previously by B.U.K.P. In
the event, the sale did ultimately go through, but on different terms,
and after a lapse of 20 months. This discontinuity must, in my view, rule
out any treatment of the dealings as an indivisible whole, or the
treatment of the sale by the taxpayer company to its affiliates as if, in a
fiscal sense, it had never happened. So far from being pre-ordained, the
E transaction might well have never happened at all—or, if it had
happened, might have been concluded between different parties, if
another buyer had come forward before the change of mind by Milton
Pipes.

For my part, I would regard the *Baylis v. Gregory* cases as the
plainest of the three appeals, so far as concerns the issue which is
common to all. On 11 March 1974, when the exchange with Holdings
F took place, not only was Hawtin not visible on the horizon as a potential
purchaser, but there was no sale to anyone presently in contemplation.
For the reasons already stated, I cannot follow how, on any understanding
of what was said in the three leading cases, events which occurred nearly
two years later could retrospectively convert the share exchange into one
element in a composite transaction of which the timing, terms, parties
and even existence were at that stage quite unpredictable. *Ramsay* and
G its successors demand that dealings which have none but a fiscal purpose
should not be allowed to camouflage an underlying transaction which
exists in the real world, but this is no warrant for compressing into a
supposed unity two transactions which are in truth distinct. In my
judgment the disposal was to Holdings, and to Holdings alone. It is
true, as was emphasised in argument, that this opinion carries with it the
consequence that an operation performed for reasons of what has been
H called “strategic tax planning,” by which the first stage of a linear series
of transactions is carried out in isolation in the expectation that it may
prove useful in the future, will escape the taxation net if it is followed at
some later stage by a dealing of the type envisaged. Certainly, the
Ramsay principle is open to elaboration; its frontiers are not yet
determined. But I would regard the argument advanced by the Crown
as involving not simply an expansion of the principle, but a striking out

into a whole new field of judicial legislation in a manner inconsistent with the constraints announced at the time when the doctrine itself was being propounded.

As to the other two issues arising on the appeal from the decision of Vinelott J. I have nothing to add to what has been said by Slade L.J., with whose conclusions I respectfully agree.

For these reasons, therefore, I also would dismiss all these appeals.

Appeals dismissed with costs.

Leave to appeal in Craven v. White cases on terms as to payment of costs and as to repayment of tax already paid with interest.

Leave to appeal refused in Inland Revenue Commissioners v. Bowater Property Developments Ltd. and Baylis v. Gregory cases.

16 July. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Ackner and Lord Oliver of Aylmerton) allowed petitions by the Crown in *Inland Revenue Commissioners v. Bowater Property Developments Ltd.* and *Baylis v. Gregory* for leave to appeal.

Solicitors: Solicitor of Inland Revenue; Berwin Leighton (first and third appeals); Charles W. S. Goodger.

[Reported by MRS. HARRIET DUTTON, Barrister-at-Law]

3 W.L.R.

A

[ARCHES COURT OF CANTERBURY]

In re ST. MARY'S, BANBURY1986 March 21;
Oct. 4

Sir John Owen, Dean of the Arches

B

Ecclesiastical Law—Faculty—Pews—Petition to remove pews and replace with chairs—Pews allotted and sold pursuant to local Act in 1790—Claims to three specific pews established—Nature of claimants' rights—Whether jurisdiction to authorise removal of pews—Church used as concert venue—Removal of pews facilitating such use and use of central altar for communion—Whether faculty to be granted

C

A church, built in 1797 following a local Act of Parliament of 1790 which enabled building to be funded by, inter alia, the allotment and sale of pews, had a square nave with 20 rows of pews on each side of the nave aisle. The altar was at the east end of the sanctuary, a long way from the congregation, and there was no room for an altar either in the nave or at the foot or top of the chancel steps. The church fulfilled an important civic function by providing a venue for about eight concerts each year. With the twin objectives of bringing the priest and the choir nearer to the congregation and of improving the arrangements for concerts, proposals were put forward which included the removal of the pews and their replacement by chairs on a circular carpeted area beneath the dome and the introduction of a mobile altar. The proposals having received the approval of a majority of the parochial church council, the team rector and churchwardens petitioned for a faculty to authorise works, inter alia, to remove all the pews from the nave and to concrete and carpet a circular area under the dome and to provide a mobile altar. The petition was opposed by eight parishioners, two of whom, together with a third person who was not a party to the proceedings, claimed rights to occupy certain pews. The chancellor held that the claimants had established rights to use their pews which could not be removed by faculty and that, as those pews could not be taken down, a faculty for the removal and replacement of the pews in the nave must be refused since an arrangement of chairs with three pews in their midst would be untidy and unattractive.

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On appeal by the petitioners:—

Held, dismissing the appeal, that, as a matter of construction, the Act of 1790 created perpetual rights to the exclusive use, during divine service and other religious observances at times when the church was open for worship, and subject to the regulations of the church, of individual and identifiable pews; that those rights were tied to the geographical locations of the pews as originally sited; that the pews could not be permanently removed without the consent of the owners and the owners' rights could not be destroyed by a faculty; and that, accordingly, a faculty could not be granted authorising the removal of the pews in the nave, as to remove all but three would be absurd (post, pp. 723G—724A, B, C–E).

Brumfit v. Roberts (1870) L.R. 5 C.P. 224 and *Nickalls v. Briscoe* [1892] P. 269 considered.

Guidelines for determining issues as to re-ordering where the interests of worship and the interests of conservation conflict (post, pp. 725G—726B).

G

H

In-re St. Mary's (Arches Ct.)

[1987]

Per curiam. (i) The listing of a church as a building of special architectural or historic interest pursuant to the Town and Country Planning Act 1971 indicates that a faculty which might affect the special nature of such interest should only be allowed in cases of clearly proved necessity. When a church has received a sum such as £80,000 of public money towards repairs there must be an obligation to consult the Department of the Environment (post, p. 720B-D).

(ii) The Faculty Jurisdiction Rules 1967 require speedy amendment. If proper and informed decisions are to be made in cases where there are valid, concerned and yet conflicting interests, it is vital that the Department of the Environment, the local planning authority and the various voluntary bodies should be able to give their evidence, preferably orally, but if that is impossible, in writing (post, p. 722A-B).

Decision of Boydell Q.C., Ch. [1986] Fam. 24; [1985] 3 W.L.R. 885; [1985] 2 All E.R. 611 affirmed.

The following cases are referred to in the judgment:

Brumfitt v. Roberts (1870) L.R. 5 C.P. 224

Holy Innocents, Fallowfield, In re [1982] Fam. 135; [1982] 3 W.L.R. 666

Nickalls v. Briscoe [1892] P. 269

Peek v. Trower (1881) 7 P.D. 21

Philipps v. Halliday [1891] A.C. 228, H.L.(E.)

APPEAL from Boydell Q.C., Ch. at the Oxford Consistory Court.

By a petition dated 20 September 1983 the petitioners, the Reverend Ronald Mitchinson, Mr. Jim Church, Mr. William Yarnold and Mr. Jack Billington, the team rector and churchwardens of the parish of Banbury, sought a faculty to authorise, inter alia, (1) the removal of all the pews from the nave of St. Mary's Church and the concreting and carpeting of a circular area beneath the dome of the church; (2) the provision of a mobile altar and platform in the nave to the west of the chancel; (3) the repositioning of the pulpit to a more northerly position in the church; and (4) the removal of the chancel wall and choir stalls. The petition was opposed by eight parishioners, Mr. K. H. Bolton, Mrs. G. M. Jakeman, Mr. C. D. Hone, Mrs. A. Hopcraft, Mr. C. F. Herbert, Mr. John Williamson, Mr. M. S. Hedges and Mrs. E. Palmer. On 21 February 1985 the chancellor, inter alia, refused to authorise the removal of the pews and the provision of a carpeted area beneath the dome and the provision of a mobile altar and platform in the nave. The petitioners appealed against that refusal.

The facts are stated in the judgment.

Sheila Cameron Q.C. for the petitioners.

Jonathan Henty for the first and second parties opponent.

The other parties opponent did not appear and were not represented.

Cur. adv. vult.

4 October. SIR JOHN OWEN, DEAN OF THE ARCHES, read the following judgment. On 21 February 1985 Boydell Q.C., Ch. [1986] Fam. 24 gave judgment in the Consistory Court of Oxford. His judgment was a model of clarity of thought and expression and fully revealed his learning and industry. This is an appeal from that part of the judgment which provided that the petitioners, they being the team rector and the

3 W.L.R.

In re St. Mary's (Archds Ct.)

A three churchwardens of the parish of Banbury, should be refused a faculty for (1) the removal of the main block of pews in the nave of St. Mary's Church and for the provision of a circular carpeted area in the nave beneath the dome and consequential work and (2) the provision of a mobile altar and platform in the nave.

B The chancellor found against the petitioners on two main grounds: (1) that two of the parties opponent, namely Mr. Bolton and Mrs. Jakeman, and also a Mr. Strange who was not a party to the proceedings, are entitled, by statutory rights now vested in them but originally created by an Act of Parliament of 1790 (30 Geo. 3, c. 72), to the use in perpetuity [1986] Fam. 24, 37c "during divine service and other religious observances at times when the church is open for worship, subject to the regulations of the church," of enclosed pews in the main block, those pews being of the same nature and in the same position as those constructed in 1797: these rights he found to be not removable by faculty and in practice to be such as to make the whole proposed scheme impractical; and (2) that, even if there had been power to remove such pew rights by faculty, in his discretion he would have found against the petitioners and, even if there had been no established rights to pews as to which there is no doubt, he would probably have refused the faculty on the basis that on a consideration of all the factors relevant the petitioners had not persuaded him that it would be right at this stage to authorise the removal of such pews.

E By their notice of appeal the petitioners raised a number of objections. As a result of the way in which the appeal has been argued it is possible to say that there are two main questions. (1) What are the present pew rights of Mr. Bolton, Mrs. Jakeman and Mr. Strange? (2) If there was a discretion to grant the faculty, was the chancellor right in exercising it against the petitioners?

Boydell Q.C., Ch., in his judgment, dealt with the essential history of the church. It is not necessary for me to repeat all of this. Certain aspects are, however, crucial to a proper consideration of the two questions.

F Under the provisions of the Act of 1790 the existing medieval Banbury parish church was demolished, in part by gunpowder, in that year. The Act was necessary to raise the money required for rebuilding; a main source was to be the sale of pews or seats. Samuel Pepys Cockerell designed the replacement church which was opened, before completion, in 1797. The replacement was completed in 1822 to the further design of his son, Charles Robert Cockerell. The original and completion designs, which included box pews, if not those at present in situ then others of a similar nature and location, have led to the construction of a church which has been described as neo-classical. In 1864 the interior was remodelled by A. W. Blomfield, who added a chancel and may well have had the existing box pews cut down in size. I see no reason to differ from the chancellor's conclusion [1986] Fam. 24, 30H that "The present pews are the pews of 1797 which were remodelled in the 1870s." I also agree with the chancellor that the date of the existing pews is not of great importance in determining whether they should now be removed. It is to be noted that Blomfield, at a time when they were not well-regarded, still retained the box pews. It seems likely that he regarded them as a necessary and integral part of the Cockerells' building.

On 9 April 1952 the church was listed as a building of special

architectural or historic interest. It is now listed as a building Grade A. If it were not for the ecclesiastical exemption in section 56(1)(a) of the Town and Country Planning Act 1971 the effect of this listing would be to make it a criminal offence under section 55 to execute any works *to the building* which would affect its character as a building of special architectural or historic interest. By section 54(9) of the Act of 1971 "any object or structure fixed to a building . . . shall be treated as part of the building." An argument based solely on this consideration was not developed at the hearing of the appeal and it is sufficient to state that, although the exemption is necessary so that in such cases the dead hand of the past shall not prevent the proper use of a building consecrated to the worship of God, a listing does indicate that a faculty which might affect the special nature of the architectural or historic interest—and certainly the removal of all the pews from this church would do this—should only be allowed in cases of clearly proved necessity.

The faculty jurisdiction must and does treat churches such as St. Mary's, Banbury, as treasures not only for the people of the parish, whether churchgoing or not, not only for the Anglican Church, but also for the country at large. When, as here in 1977-1981, the church has received some £80,000 of public money towards repairs, there must be an obligation to consult the Department of the Environment which it is now clear, although this played no part in the decision of either the chancellor or this court, was at first favourable to the petitioners but subsequently was not. As I shall make it clear, I do not agree with this original, but subsequently changed, attitude.

The arguments used by the petitioners to support the petition are both liturgical and secular. The liturgical argument, as I understand it, is that the priest and choir and congregation should be much closer together than is possible at present and that there should be a central altar around which the priest and congregation should be able to worship together, the priest in a westward facing position and the congregation gathered around and close to the altar. The churchmanship which supports such an approach to worship is perfectly reasonable and by no means uncommon; when, as here, it is desired by the incumbent and the parochial church council it should normally lead to a re-ordering, if there is no listing and if this can be done without necessitating any permanent *and* irreversible change to the building. Where such a change would be necessitated it will be necessary to balance the claims of the congregation against the claims of conservation.

The secular argument is that the removal of the pews would facilitate the provision of important public musical concerts which have been held in the church, at an average annual rate of eight concerts, for many years but which could more economically, more effectively and more comfortably be provided if the faculty were to be granted and all the pews were to be removed. It is apparent from the team rector's evidence that the plans on which the petition is based came into existence as a result initially of a desire to act in accordance with a recommendation, made by the director of a fund raising campaign in 1977 to raise money for roof repairs, that the work necessary to make it possible to use the church as a top class concert hall should be completed. Whilst this again is an interest to be considered it can only be considered in the light of the undoubted fact that the primary purpose of a church is as a place of worship.

3 W.L.R.

In re St. Mary's (Arches Ct.)

A The Diocesan Advisory Committee report dated 12 September 1983 enthusiastically supported the present proposals. Some might think the language of the report rather extreme and hard to justify. The passage I have in mind states:

B "This unique baroque church, designed by the Cockerells, was more a theatre than a church, though later alterations added a chancel and removed the east section of the four galleries. It was further marred by the huge blocks of pews, cramped and uncomfortable, the boards beneath them were apparently laid on bare earth and are now rotting. We thought Mr. Gotch's plans most commendable, creating a central carpeted space under the dome, with three groups of chairs, restoring the baroque appearance of the church. Cockerell père et fils would surely be delighted by these proposals."

C I merely note that the church is not a baroque church and far from the church being marred by a later addition of pews they were a necessary and integral part of the original Cockerell design.

D At the hearing before the chancellor there was no evidence from the Council for the Care of Churches; this was because no witness could attend on the days fixed for the hearing. Criticism was made of the chancellor because he did not take into account letters written on behalf of the council. Miss Cameron says that, because the council is a body entitled by rule 6(2) of the Faculty Jurisdiction Rules 1967 (S.I. 1967 No. 1002) to appear and give evidence, the chancellor should not have insisted ([1986] Fam. 24, 26) on rejecting the written representations unless the other side agreed to his admitting them, which they did not, but should have received those letters whilst rejecting written representations from the Department of the Environment and the various interested specialist bodies. The chancellor was told that both the Department of the Environment, whose representations he did not see although I have now seen the original letter, and the council, whose representations he did see, changed their attitudes to the proposals—but in different directions from each other—between their earlier and later written submissions. In these circumstances the chancellor decided, at p. 27:

"in the absence of witnesses from those, and the other, bodies whose evidence could be tested it would have been neither just nor helpful to have had regard to their various and diverse written representations."

G Rule 6(1) of the Faculty Jurisdiction Rules 1967 provides that the evidence at the hearing shall, unless the judge otherwise orders, be given orally. At the outset the chancellor made it clear that he would not otherwise order. He was, in my judgment, entitled and correct in the circumstances to exclude the council's written representations. I am able to add that having seen the written representations it seems clear that they would not—even if received in evidence—have affected the chancellor's decision or shaken his acceptance of much of the evidence of Mr. Peter Howell, a distinguished member of both the Victorian Society and the Oxfordshire Architectural and Historical Society, who was called as a witness by one of the parties opponent.

H There was also no evidence from the Department of the Environment or from the Georgian Group, the Oxford Architectural and Historical Society or other such societies. Such evidence would not, under the

Rules, have been receivable. The Rules require speedy amendment. If proper and informed decisions are to be made in cases such as this where there are valid, concerned and yet conflicting interests, it is, in my judgment, vital that the Department of the Environment, the local planning authority and the various splendid voluntary bodies should be able to give their evidence preferably orally, but if that is impossible, in writing. Paragraph 191 of the Report of the Faculty Jurisdiction Commission 1984 recommends a change in the Rules which would allow the reception of such evidence. I trust and hope that this change will soon be made.

I now turn to the two questions raised by the notice of appeal.

(1) *What are the present rights of pewholders?*

It is common ground between the petitioners and the respondent parties opponent that each of the three named pewholders, two of whom are parties whilst the third is not, has good title by succession to whatever initially passed to his or her original predecessor in title.

A convenient starting point for the consideration of the extent of those rights is the proposition that although a right to use a particular seat or pew may have been acquired by a faculty or presumed faculty there is no right at common law to buy or sell a seat or pew. There is no question here of faculty rights. Although the common law is so restricted Parliament is not. Acts of Parliament conferring pew or seat rights have not been uncommon. The two pewholders who are parties opponent claim rights under the Act of 1790. Miss Cameron, for the petitioners, argues that on a proper construction of the Act each pew-right holder is entitled to no more than to be seated for divine services and other religious observances in a position in the church which is no less advantageous in relation to other seats and to the altar than the pew allotted to his or her predecessor in title. If she is right the pew-right holder's property rights can present no absolute bar to the grant of the faculty now sought by the petitioners. Mr. Henty, for the first and second parties opponent, argues that the pewholders are entitled to the use for divine services and other religious observances of their allotted and numbered pews as and where they now are. A faculty cannot overrule a statutory right and it is clear that if Mr. Henty is right the petition must, in all common sense, fail.

Both Miss Cameron and Mr. Henty agree that the Act of 1790 created interests, each in the nature of an easement, and that to ascertain the nature and extent of that right it is necessary to construe the Act. In *Brumfitt v. Roberts* (1870) L.R. 5 C.P. 224 Bovill C.J., having stated, at p. 232:

"The right in a pew is essentially a right to use it for the services of the church, and, at times when it is open for use, subject to the regulations of the church; and there is no right of access to it or to use it for other purposes or in any other manner"

further stated, at p. 233, that the interest which passed by the statute considered in that case was

"not an interest in land, but an interest of a peculiar nature created by the Act of Parliament, and more in the nature of an easement, though there are attached to it incidents of perpetuity of possession which could only be attached to such a right by the power of

3 W.L.R.

In re St. Mary's (Arches Ct.)

- A legislation. The statute has created a special interest in the pews and seats not known to the common law, and such interest exists by force of the statute; . . .”

B On all of this there is agreement. The difference, as I understand it, between the contention of Miss Cameron and that of Mr. Henty is that, whereas Miss Cameron claims that the right is not in an individual geographically fixed pew or seat but in a seat or seats of some kind in an area from which the originally allotted pew and its geographical location may have been excluded, Mr. Henty claims that the pew-rights originally conferred were, as are the present rights, in specific pews, whether similarly constituted or not, in specific permanent, originally allotted locations.

- C Under the description “Allotment of Pews” the Act provides that the trustees:

D “shall allot and appoint to and for the use of each person who shall subscribe ten pounds or upwards towards the expenses of taking down and rebuilding the said church, chancel, and tower, such one pew or seat as shall be sufficient to contain commodiously such subscriber, and his or her family; and the said trustees are hereby directed, at any time or times after such allotments and dispositions of such pews or seats as aforesaid shall have been made to or for the use of the subscribers as aforesaid, to sell and dispose of all or any of the residue of such pews or seats, and allot the same to any person or persons, and in such manner as they shall think fit and proper; and all such pews or seats shall be vested in the said subscribers and purchasers thereof respectively, his and her heirs and assigns, immediately upon the allotting of the same . . .”

The Act further provides:

F “when the pews and seats are allotted or appointed as aforesaid, the said trustees . . . shall cause them to be numbered, and such numbers to be entered in a book, with the names of the persons to whom the pews or seats shall be allotted or appointed; . . . Provided always, that for the better preservation of uniformity in the pews or seats of the said church, no person entitled to any pew or seat therein, shall be permitted to affix any lining thereto, or to paint the same, under a penalty of ten pounds . . .”

G Accordingly, the Act empowered the trustees of the scheme to create pew or seat rights to individual and identifiable pews or seats. It is common ground that the Cockerell design provided for pews such as those which the petitioners now seek to remove and that the original allocations were to pews, i.e., not to movable chairs but to enclosed seats affixed to the floor of the building and “vested” in the purchasers or subscribers.

H I have to gather the effect of the statute by considering it in its entirety. I cannot accept that it was ever contemplated by the original purchasers and subscribers that the rights created by the Act were not tied to the geographical locations of those pews as originally sited. I have no hesitation in finding that the Act, the original trustees and the original subscribers and purchasers contemplated statutory rights to the use on religious occasions of specific fixed numbered pews: the purchasers would not have paid for uncertainly located seats.

Indeed, there being an undoubted right to grant a faculty for the exclusive use of a specific identified pew I see no reason to think that the scheme contemplated by the Act contemplated any less. In this connection Mr. Henty submits that the nature and the extent of the rights created may be appreciated by a consideration of the remedy for interference. *Philipps v. Halliday* [1891] A.C. 228 is authority for saying that where, by means of a faculty, there is an exclusive right to the use of a numbered pew, the destruction of that pew will entitle the faculty holder to bring an action of disturbance in order to maintain it. I see no reason why the sale of a pew should pass a lesser right.

Miss Cameron argues that the Act could not have contemplated perpetual rights but, in my judgment, the Act did confer perpetual rights just as did the Act considered in *Brumfit v. Roberts*, L.R. 5 C.P. 224. The use of the term "sale" is only consistent with a perpetual right and so also is the provision that "all such pews or seats shall be vested in the said subscribers and purchasers thereof respectively, his and her heirs and assigns," for before 1822 the only way of creating a fee simple by a direct grant inter vivos was by such a limitation to the grantee and his or her heirs.

I am sure that the chancellor was correct when he held that each existing pew-right is a right to use the existing relevant numbered pew during divine service and other religious observances at times when the church is open for worship, subject to the regulations of the church.

Further, I am satisfied that the pews cannot be permanently removed without the consent of the owners—any other decision would be inconsistent with any form of ownership—and that no faculty may destroy the statutory rights created by the Act. This is sufficient to decide the appeal against the petitioners, for the petition is for a faculty to remove all the pews and to remove all but three would be absurd. I shall, however, also consider the second question.

(2) *Assuming a discretion in the chancellor to grant a faculty was he right in exercising it against the petitioners?*

Sitting as I now do as the appellate judge I may draw any inferences of fact which might have been drawn by the chancellor. I may give any judgment or direction which the chancellor ought to have given. I may remit the matter with a direction for rehearing and determination by the chancellor's court or I may allow the appeal substituting my own discretion if the chancellor's exercise of discretion was based on an erroneous evaluation of the facts taken as a whole. I intend to take none of these courses since I am satisfied that the chancellor was correct in his decision that even if such discretion had been available to him he would not have exercised his discretion in favour of the petitioners.

I am satisfied that the chancellor gave full and proper weight to the evidence of the team rector, to the almost unanimous support of the parochial church council and to the favourable report of the Diocesan Advisory Committee. These factors are important. They were clearly in the chancellor's mind and were evaluated by him. However, it was necessary also to have in mind the law as stated by Lord Penzance, Dean of the Arches, in *Nickalls v. Briscoe* [1892] P. 269, 283:

"The notion that the matter here in question should be decided by the wishes of the majority of the parishioners proceeds, in my opinion, upon an entirely mistaken view of the law. The appellants

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- A have put forward their attachment to the old church and its interesting connection with times gone by; but they seem to forget that the sacred edifice has a future as well as a past. It belongs not to any one generation, nor are its interests and condition the exclusive care of those who inhabit the parish at any one period of time. It is in entire conformity with this aspect of the parish church that the law has forbidden any structural alterations to be made in it, save those which are approved by a disinterested authority in the person of the Ordinary, whose deputed discretion and judgment we are here to exercise today."
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- C It is accordingly apparent that a chancellor cannot only consider the views, especially liturgical views which are notoriously subject to change, of the incumbent and congregation: he cannot only consider the views of conservationists. He is appointed by law to be a disinterested but informed and committed guardian of all interests and he must consider all relevant factors. Then, bearing in mind that the burden is on those who propose changes (see *per* Lord Penzance, Dean of the Arches, in *Peek v. Trower* (1881) 7 P.D. 21, 27–28), he must decide whether or not there should be a faculty for change.

- D Nothing would be gained by my setting out all the other factors which Boydell Q.C., Ch. rightly took into account in this case. The comfort or discomfort of pews and especially these pews; the aesthetic acceptability of carpeting; the fact that the chancellor has given permissions which will allow the petitioners to construct a permanent platform, which can be used for divine services and for concerts, and to have an altar at the top of the chancel steps; the fact that there are three pewholders whose rights would be gravely affected and others were no doubt all considered by the chancellor but, in my opinion, these are all minor when weighed against the fact that St. Mary's is a building of special architectural and historic interest and the removal of the pews, which were an integral part of the design of the church and which have been there since the church was built, would gravely damage those interests.
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- G That and the further fact that there is no clearly proved necessity for change are sufficient to decide the second question against the petitioners, but it will be helpful to add a few general observations which will indicate the attitude of this court to these problems when there is a conflict, as here, between the interests of worship and the interests of conservation. The following principles may act as guidelines. (a) It must never be forgotten that a church is a House of God and a place for worship. It does not belong to conservationists, to the state or to the congregation but to God. (b) In deciding whether to allow a re-ordering the court will not only have in mind the matters listed e.g., by Spafford Ch. in *In re Holy Innocents, Fallowfield* [1982] Fam. 135, 137–138, but also these other matters: (i) the persons most concerned with the worship in a church are those who worship there regularly although other members of the church may also be concerned. (ii) When a church is listed as a building of special architectural or historic interest a faculty which would affect its character as such should only be granted in wholly exceptional circumstances, those circumstances clearly showing a necessity for such a change. When the faculty rules have been amended it should be possible to add "and should never be granted unless the evidence, oral or written, of every concerned body has been invited, and if
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tendered, considered." A re-ordering of such a church solely to accommodate liturgical fashion is likely never to justify such a change. (iii) Whether a church is so listed or not a chancellor should always have in mind not only the religious interests but also the aesthetic, architectural and communal interests relevant to the church in question. (iv) Although the faculty jurisdiction must look to the present as well as to the future needs of the worshipping community a change which is permanent and cannot be reversed is particularly to be avoided.

In the circumstances the appeal fails. I shall, if necessary, hear arguments as to costs at a later date.

Appeal dismissed.

Solicitors: Hancocks, Banbury; Aplin Stockton, Banbury.

C. N.

[COURT OF ECCLESIASTICAL CAUSES RESERVED]

In re ST. STEPHEN'S, WALBROOK

1986 Dec. 15, 16, 17;
1987 Feb. 17

Sir Anthony Lloyd, Bishop of Rochester,
Bishop of Chichester, Rt. Revd. K. J. Woollcombe
and Sir Ralph Gibson

Ecclesiastical Law—Faculty—Holy Table—Petition to install large block of sculpted marble as Holy Table—Whether capable of being Holy Table—Whether Holy Table properly described as "altar"—Whether sculpture aesthetically suited to church—Weight to be given to non-expert evidence—Relevance of wishes of non-resident parishioners—Whether faculty to be granted

The rector and a churchwarden of a parish in the City of London petitioned for a faculty authorising the provision of an altar, sculpted by a leading sculptor from a cylindrical piece of marble eight feet in diameter and weighing 10 tons, on a footpace in the centre of the church beneath the dome. The church, designed by Sir Christopher Wren, was oblong with a superstructure supported by 16 slender Corinthian columns and was listed as a building of special architectural or historic interest. The petition was supported by the parochial church council and was unopposed, an appearance being entered by the archdeacon to put the petitioners to proof of their case. Temporary permission was granted for the altar to be introduced into the church, which was undergoing extensive restoration, to enable witnesses and the chancellor to see it in its proposed position. The chancellor dismissed the petition, holding that the altar was not capable of being a Holy Table and that, as a matter of discretion, he would not have granted a faculty because the altar was not congruent with the architecture of the church.

3 W.L.R.

In re St. Stephen's⁸ (Eccl.Ct.)

A On appeal by the petitioners:—
 Held, allowing the appeal, (1) that a Holy Table was no longer illegal merely because it was not movable or because it was made of stone; that a table could be defined as a horizontal surface raised above the ground used for meals and other purposes; and that the subject matter of the petition clearly fell within the wide bounds of what could reasonably be called a Holy Table and would not be unlawful (post, pp. 730D–G, 735D–E, 754E–F, 758E–F).

B (2) That the chancellor's decision that, as a matter of discretion, it would be wrong to allow the permanent introduction of the altar into the church was based on an erroneous evaluation of the evidence; that the opposing views of experts as to the congruence in terms of aesthetic judgment of the altar with the architectural design of the church were of equal weight and validity; that the cumulative weight of opinion in favour of retaining the altar from witnesses who, without special knowledge of Wren's architecture, were nevertheless experienced in matters of aesthetic judgment showed that the presence of the altar would cause very few to be unable to derive as much delight and inspiration from the beauty of the church as they would were the altar not there; that the undisputed and exceptional excellence of the altar as a work of art was a factor of separate and substantial weight in favour of granting a faculty unless there was some sufficient reason for rejecting it; that the chancellor had failed to give proper weight to the wishes of the rector and those who though non-resident parishioners were directly concerned with the care of the church; and that the benefits to be obtained by the grant of a faculty greatly outweighed the fact that some future worshippers and visitors might wish that the altar was not there (post, pp. 735B–C, 743D–E, 746F–H, 748C–D, H—749B, 750B–C, 757A–D, 758E–F).

E Per curiam. (i) A doctrine of the Eucharistic sacrifice which is not that of a repetition of the sacrifice of Calvary can lawfully be held in the Church of England and consequently the Holy Table can lawfully and properly be called an altar (post, pp. 732E, 753F–G, 758E–F).

F (ii) The fact that an ecclesiastical building is listed as a building of special architectural or historic interest is a relevant consideration in deciding whether or not to grant a faculty. But it is not right to say that in such a case a faculty which would affect its character as such should only be granted in circumstances clearly showing a necessity for such change (post, pp. 734G—735A, 752E–F, 758A).

G Dicta of Sir John Owen, Dean of the Arches, in *In re St. Mary's, Banbury* [1987] 3 W.L.R. 717 disapproved.

Decision of Newsom Q.C., Ch. [1986] 3 W.L.R. 790; [1986] 2 All E.R. 705 reversed.

The following cases are referred to in the judgments:

Faulkner v. Litchfield and Stearn (1845) 1 Rob.Eccl. 184

Nickalls v. Briscoe [1892] P. 269

Peek v. Trower (1881) 7 P.D. 21

St. Edburga's, Abberton, In re [1962] P. 10; [1961] 3 W.L.R. 87; [1961] 2 All E.R. 429

St. Gregory's, Tredington, In re [1972] Fam. 236; [1971] 2 W.L.R. 796; [1971] 3 All E.R. 269

St. Mary's, Banbury, In re [1987] 3 W.L.R. 717; [1987] 1 All E.R. 247

St. Michael and All Angels, Great Torrington, In re [1985] Fam.81; [1985] 2 W.L.R. 857; [1985] 1 All E.R. 993

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St. Paul's, Jarrow, In re (unreported), 15 May 1984
Westerton v. Liddell (1857) Moo. Special Rep. 133, P.C.

A

The following additional cases were cited in argument:

Ladd v. Marshall [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, C.A.

Liddell v. Beal (No. 2) (1860) 14 Moo. 1, P.C.

Roffe-Silvester v. King [1939] P. 64; sub. nom. *In re St. Hilary, Cornwall* [1938] 4 All E.R. 147

St. John the Divine, Richmond, In re [1953] P. 155; [1953] 2 W.L.R. 921; [1953] 1 All E.R. 818

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St. Luke's, Chelsea (Rector and Churchwardens) v. Wheeler [1904] P. 257

St. Matthew's, Wimbledon, In re [1985] 3 All E.R. 670

Woodward v. Parishioners of Folkestone Parish (1880) Trist. 177

APPEAL from Newsom Q.C., Ch. in the London Consistory Court.

By a petition dated 25 March 1985 the rector of the parish of St. Stephen's, Walbrook, in the City of London, Revd. Prebendary Edward Chad Varah, and the churchwarden of the parish in charge of restoration, Mr. Peter Garth Palumbo, sought a faculty authorising the provision of a travertine stone altar, sculptured by Mr. Henry Moore O.M., set in the space under the dome of the church on a footpace of two steps also in travertine. No appearance was entered in opposition, and, at the request of the consistory court, the Archdeacon of London entered an appearance to put the petitioners to proof of their case. On 20 February 1986 the chancellor dismissed the petition.

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The petitioners appealed by notice of appeal dated 30 April 1986 on the grounds that (1) the chancellor erred in law in determining that the Henry Moore altar was incapable in law of constituting "a convenient and decent table of wood, stone or other suitable material . . . for the celebration of the Holy Communion" and was thus outwith Canon F2 of the Canons of the Church of England; (2) further or alternatively, if (which was not admitted) the Henry Moore altar was incapable of constituting a table, the chancellor erred in law in determining that the petition must therefore fail as a matter of law, notwithstanding the continued presence within the church of the altar which had been situated therein since the consecration of the church and incontestably constituted a table within Canon F2; (3) further or alternatively, the chancellor's exercise of his discretion to refuse the faculty was unreasonable where (a) the petition was supported unanimously by the rector, the churchwarden, the parochial church council and the joint patrons of the living, (b) the petition had the support of the archdeacon who entered an appearance solely at the chancellor's request, (c) there was no dispute as to the intrinsic beauty of the Henry Moore altar which was designed specifically for the church, and (d) there was in evidence a very substantial body of expert opinion to the effect that the altar would enhance the church both aesthetically and liturgically; and (4) further or alternatively, the chancellor wrongly declined to grant a faculty permitting the altar to remain in the church for an interim period of three years so that its aesthetic, liturgical and pastoral effect could be evaluated following the restoration of the fabric of the church and its contents and following the resumption of worship therein.

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Peter Boydell Q.C. and *Charles George* for the petitioners.

Spencer Maurice and *Andrew Lloyd-Davies* for the acting archdeacon.

Cur. adv. vult.

17 February. The following judgments were handed down.

3 W.L.R.

In re St. Stephen's (Eccl.Ct.)

A BISHOP OF CHICHESTER. This is an appeal from a decision given in the London Consistory Court by Newsom Q.C., Ch. on 20 February 1986. By his decision the chancellor refused a faculty for the introduction of a stone altar, carved by Mr. Henry Moore O.M., into the Church of St. Stephen, Walbrook, in the City of London. The petition for a faculty was dated 25 March 1985 and was presented by the Reverend Prebendary Edward Chad Varah, rector of the parish of St. Stephen's, Walbrook, and Mr. Peter Garth Palumbo, one of the churchwardens of the parish, with the unanimous support of the parochial church council. No appearance was entered in opposition to the citation but at the request of the chancellor the then Archdeacon of London, the Venerable Francis William Harvey, entered appearance to put the petitioners to proof. The appellants are the rector and Mr. Palumbo. The Court of Ecclesiastical Causes Reserved has asked for an intervention by the archdeacon similar to that in the original hearing. Since the appeal was lodged, however, the Archdeacon of London has died and the Bishop of London, acting under the provisions of section 9 (3) of the Faculty Jurisdiction Measure 1964, has appointed Mr. D. W. Faull to act in his place for the purposes of the appeal.

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D Whereas it seems to have been assumed at the outset of the hearing in the consistory court that the matters at issue were architectural and aesthetic, in the course of the hearing questions were raised about the distinction between an altar and a table and the nature of the Eucharist which caused the chancellor to decide that in law he could not grant a faculty for the Henry Moore altar. He has therefore certified in relation to the appeal that the case involved questions of doctrine, ritual or ceremonial, and that brings the appeal to this court rather than to the Arches Court of Canterbury as provided by the Ecclesiastical Jurisdiction Measure 1963, section 10.

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The chancellor, having determined the question of law to his satisfaction, went on to consider whether if he were wrong on that point and had power to allow the introduction of Mr. Moore's sculpture into the church he could correctly exercise his discretion by so doing. His conclusion was that if he had a discretion in law he ought not to exercise it by granting the permanent faculty sought by the petition. He concluded that in such circumstances he ought not to grant a faculty.

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This case therefore falls into two principal parts. The first concerns the question of what constitutes a Holy Table and involves a consideration of whether the Eucharist or the Lord's Supper is in any sense a sacrifice. The second concerns the suitability of the Henry Moore artefact to be placed in the Church of St. Stephen, Walbrook.

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As regards the first of these questions it is to be noted that section 45(3) of the Ecclesiastical Jurisdiction Measure 1963 declares that the present court is not bound by any precedents set by decisions of the Judicial Committee of the Privy Council in relation to any matter of doctrine, ritual or ceremonial. The background to the passing of that Measure, as evidenced by the reports of the Canon Law Commission 1947, the Ecclesiastical Courts Commission 1954 and the Church and State Commission 1952, shows that there was a widespread desire to free the Church from the binding effects of decisions of the Judicial Committee of the Privy Council in ecclesiastical cases. Most of those decisions had been given in a period of acute theological controversy and there was a desire that they be reviewed in the light of changed circumstances, further historical research into the period of the English

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Reformation, and the more recent ecumenical developments in the understanding of Christian doctrine. This court is therefore free to consider the issues afresh, taking account of more recent legislation and of historical and theological knowledge which was not available to the courts in the mid-nineteenth century. The important case of *Faulkner v. Litchfield and Stearn* (1845) 1 Rob.Eccl. 184, on which the chancellor relied heavily, does not have the same force for us as he felt it to have for him.

The decision as to what is and what is not a Holy Table is in the first place affected by the Holy Table Measure 1964 and Canon F2 of the Canons of the Church of England passed in consequence of that Measure. Section 1 of the Measure provided that the Holy Table "may be either movable or immovable and may be made of wood, stone or other material suitable for the purpose for which the Table is to be used." The Measure of 1964 was repealed by the Church of England (Worship and Doctrine) Measure 1974 leaving the question governed by Canon F2 which requires that

"in every church and chapel a convenient and decent table, of wood, stone, or other suitable material, shall be provided for the celebration of the Holy Communion."

The Canon does not refer explicitly to the question of movability but we hold that the chancellor was correct in saying [1986] 3 W.L.R. 790, 796:

"I do not think that the Canon should be construed, following as it does the Measure of 1964, so as to restore the restriction on immovability removed by the Measure. It follows that a Holy Table is no longer illegal merely because it is not movable, or because it is made of stone."

I did not find it easy to follow the philosophical argument put forward by counsel for the archdeacon concerning the concept of "tableness." I find myself in sympathy with Dr. Johnson's definition of a table as "A horizontal surface raised above the ground, used for meals and other purposes," and I prefer this to the definition in the *Shorter Oxford English Dictionary* on which the chancellor relied, at p. 797, which described a table as

"An article of furniture consisting of a flat top of wood, stone, or other solid material, supported on legs or on a central pillar, and used to place things on for various purposes . . ."

Such a definition would exclude those many Holy Tables in English churches and cathedrals which resemble rather more a tomb chest or a sideboard. I have no doubt that the Henry Moore altar falls within the wide bounds of what can reasonably be called a Holy Table.

Before finishing with this part of the case attention must, however, be given to the chancellor's view that there is a fundamental difference between a table and an altar and that the Henry Moore artefact has more the character of an altar and is therefore illegal. I do not think that great weight should be attached in this respect to the words of the rector quoted by the chancellor in his judgment, at p. 794. They are somewhat confused, capable of differing interpretations, and it is not at all clear how much attention Mr. Moore himself paid to them. In my view, I must attend rather to the chancellor's own words where he said at p. 795:

3 W.L.R.

In re St. Stephen's (Eccl.Ct.)

Bishop of Chichester

- A "The distinction between 'altar' and 'table,' when the words are correctly used, is in itself essential and deeply founded, since 'altar' signifies a place where a sacrifice is to be made, a repetition at every Mass of the sacrifice of our Lord at Calvary. This was the view of the Mass as held in the unreformed Church of England immediately before the Reformation, whatever may have been the case in the earliest ages of the Church. The reformers took the other view, viz., that the Holy Communion was not a renewed sacrifice of our Lord, but a feast to be celebrated at the Lord's table."
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It is not clear whether the words "as held in the unreformed Church of England" are intended to mean the popular religion which prevailed in the unreformed Church of England or the official teaching of that Church. Again, the phrase "the reformers took the other view" either limits the Reformation to a short period of time or assumes a uniformity of outlook among the "reformers" which makes no allowance for their differences. What the chancellor says about the pulling down of the medieval altars and the substitution of wooden tables in the period following the publication of the Prayer Book of 1552 is correct, but he greatly oversimplifies the doctrinal questions which lay behind this and does not appear to take account of the long period of development between the Prayer Book of 1552 and that of 1662.

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- E The chancellor's argument appears to be as follows. To call the Holy Table an altar means that it is a place of sacrifice, and to speak of sacrifice in relation to the Eucharist means "a repetition at every Mass of the sacrifice of our Lord at Calvary." But no Anglican theologian of whatever churchmanship would maintain that the celebration of the Eucharist is a repetition of the sacrifice of Calvary and it is highly improbable that any Roman Catholic would do so either. Even at the time of the Reformation Bishop Gardiner of Winchester, defending the traditional faith against Cranmer, wrote:

- F "The oblation and sacrifice of our Saviour Christ was, and is, a perfect work, once consummate in perfection without necessity of reiteration, as it was never taught to be reiterate, but a mere blasphemy to presuppose it." (See: Stone, *Doctrine of the Holy Eucharist* (1909), vol. ii, p. 151).

- G In the 1662 Communion Office the first of the two prayers after the distribution of the Holy Communion refers to "this our sacrifice of praise and thanksgiving" and behind that lies the Latin liturgical phrase *sacrificium laudis*.

In 1897 the Archbishops of Canterbury and York in their formal response to the condemnation of Anglican Orders by Pope Leo XIII expounded the Anglican Communion rite, and in particular the prayer just quoted, as follows:

- H "we think it sufficient in the Liturgy which we use in celebrating the holy Eucharist,—while lifting up our hearts to the Lord, and when now consecrating the gifts already offered that they may become to us the Body and Blood of our Lord Jesus Christ,—to signify the sacrifice which is offered at that point of the service in such terms as these. We continue a perpetual memory of the precious death of Christ, who is our Advocate with the Father and the propitiation for our sins, according to His precept, until His coming again. For

first we offer the sacrifice of praise and thanksgiving; then next we plead and represent before the Father the sacrifice of the cross, and by it we confidently entreat remission of sins and all other benefits of the Lord's Passion for all the whole Church; and lastly we offer the sacrifice of ourselves to the Creator of all things which we have already signified by the oblations of His creatures. This whole action, in which the people has necessarily to take its part with the Priest, we are accustomed to call the Eucharistic sacrifice." ("Answer of the Archbishops of England to the Apostolic Letter of Pope Leo XIII on English Ordinations," paragraph XI.)

Such words could be paralleled by quotations from a long line of Anglican divines from the 16th century to the present day as well as by the Agreed Statement on the Eucharist of the Anglican-Roman Catholic International Commission, recently approved by the General Synod as consonant in substance with the doctrine of the Church of England. Further evidence concerning this part of the case was supplied to this court by counsel for the petitioners in the affidavit of the Reverend Dr. Douglas Geoffrey Rowell and has been most helpful. An affidavit on the subject of sacrifice by the Reverend Dr. Ulrich Simon was also supplied by counsel for the archdeacon. I note that Dr. Simon says that he had read Dr. Rowell's affidavit and that he would not dispute the historical evidence which Dr. Rowell gives. I note also that Dr. Simon says

"I do not think myself that at even the most superstitious time before the Reformation any Christian, except a madman, could have conceived of the altar as a place of real immolation."

It is clear, in my view, that a doctrine of the Eucharistic sacrifice which is not that of a repetition of the sacrifice of Calvary can lawfully be held in the Church of England and consequently that the Holy Table can lawfully and properly be called an altar. I leave the last word on this to Lancelot Andrewes, Bishop, successively, of Chichester, Ely and Winchester, in the reign of James I:

"If we agree about the matter of Sacrifice, there will be no difference about the Altar. The Holy Eucharist being considered as a *Sacrifice* (in the representation of the Breaking the Bread and pouring forth the Cup), the same is fitly called an *Altar*; which again is as fitly called a *Table*, the Eucharist being considered as a *Sacrament*, which is nothing else but a distribution and an application of the Sacrifice to the several receivers. The same Saint Augustine that in the place alleged doth term it an Altar saith in another place, *Christus quotidie pascit. Mensa Ipsius est illa in medio constituta. Quid causae est, o audientes, ut mensam videatis, et ad epulas non accedatis?* The same Nyssen in the place cited, with one breath calleth it θυσιαστηριον, that is an *Altar*, and ιερα τραπηζα that is, the *Holy Table*. Which is agreeable also to the Scriptures; for the *Altar*, in the Old Testament, is by Malachi called *Mensa Domini*. And of the *Table*, in the New Testament, by the Apostle it is said, *Habemus Altare*. Which, of what matter it be,—whether of stone, as Nyssen, or of wood, as Optatus,—it skills not. So that the matter of Altars makes no difference in the face of our Church." (From "Two Answers to Cardinal Perron," quoted in More and Cross, *Anglicanism* (1935), p. 497.)

I conclude that the chancellor misdirected himself as to the question

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A of law and I must therefore go on to examine the second part of his judgment in which he stated that if he had a discretion in law he ought not to exercise it by granting the permanent faculty sought by the petition.

B The correct approach to the question was laid down by this court in *In re St. Michael and All Angels, Great Torrington* [1985] Fam. 81 following a dictum of Sir Henry Willink Q.C., Dean of the Arches, in *In re St. Edburga's, Abberton* [1962] P. 10, 15. That approach has also been adopted in a case involving purely aesthetic consideration in *In re St. Paul's, Jarrow* (unreported), 15 May 1984. That was an appeal to the Chancery Court of York against the refusal of Garth Moore Ch. in the Durham Consistory Court to grant a faculty for the introduction of a stained glass window. The judgment of the Auditor, Owen Q.C., is not binding on this court but we have found it useful as a guide in dealing with an appeal against an aesthetic decision. He said:

C "The general rule governing appeals of this kind is well established and is that I may allow the appeal by substituting my own discretion for that of the chancellor if I am satisfied that the discretion of the chancellor was exercised on an erroneous evaluation of the facts taken as a whole."

D These last words are not entirely consistent with the Auditor's statement that he takes comfort from the fact "that this appeal is mainly concerned with aesthetics, where the chancellor's tastes will have no greater validity than my own." In fact, as the judgment shows, his decision was not based simply on his aesthetic liking of the proposed window but on a careful evaluation of the evidence produced for and against it. This evidence consisted of the opinions of the Diocesan Advisory Committee and the Council for the Care of Churches which were against the proposal and a body of witnesses expert and of authority in the realms of stained glass and of Anglo-Saxon art and architecture. The Auditor found the arguments of the Diocesan Advisory Committee and the Council for the Care of Churches serious but not convincing and was persuaded by the evidence of the experts to grant the faculty.

E In the present case when the London Diocesan Advisory Committee formally considered the proposal for the Henry Moore altar and recorded a vote it was equally divided, there being seven votes in favour and seven against. The chairman then gave his casting vote against. There appears to be no record of any expression of opinion by the Council for the Care of Churches, though evidence was given against the proposal by Mr. J. A. Newman, a member of that council and chairman of its conservation committee and also a member of the Georgian Group. The chancellor clearly considered that the weightiest evidence against was that of Mr. Ashley Barker and I agree with the chancellor. I have studied carefully Mr. Barker's written submission and the chancellor's notes on his examination. His evidence was presented with care and modesty and with an obvious readiness to be convinced that the Moore altar would be right in St. Stephen's. He was not, however, so convinced. His argument is almost entirely concerned with the geometry of the church and the interference which in his view the proposed altar would cause to that geometry. I note, however, that at the end of his submission Mr. Barker says:

"I recognise that the considerations which I have attempted to set out are not the whole of the issue. . . . They are not offered, as is

sometimes the case with such evidence, out of a passionate belief that they must at all costs prevail, but as matters of architectural opinion which deserve to be given due weight."

A

I note also that among those giving evidence against the petition there was a general recognition of the importance of Henry Moore's altar as a work of art and a desire that it should find a place in some church. The principal exception to this was Mr. Newman who alone among all the witnesses said that he regarded the Moore altar as a second-rate work.

B

When we turn to the evidence submitted on behalf of the petitioners we find a similar mixture of architectural experts and general practitioners, the latter including Sir Roy Strong and Sir Derman Christopherson who was until recently chairman of the Royal Fine Arts Commission. The principal witnesses whose evidence matches that of Mr. Ashley Barker were Mr. Robert Potter and Professor Kerry Downes. Mr. Potter has been responsible for the professional care of St. Stephen's Church since 1972 and in charge of the extensive restoration of the building which has been going on for many years and is now nearing completion. Professor Downes is a leading authority on Sir Christopher Wren. He has studied Wren and his school for 35 years and published a number of books on the subject including two on Wren himself. This adds special weight to the concluding paragraph of his evidence in which he says:

C

D

"The petition is for the introduction of a very special liturgical fitting into a very special church. It is for the placing of a beautiful object, of beautiful material, fashioned by the leading sculptor of his time and of 20th century Britain, in the position for which it was commissioned and which the sculptor took fully into consideration when he designed the altar. This proposal is not merely more imaginative, but simply better, than any addition to any Wren church during the last 40 years and perhaps a great deal longer."

E

It is a matter for some concern that in his judgment the chancellor only mentions Mr. Potter twice and not in the context of expert evidence and that he dismisses the evidence of Professor Downes in one sentence. Counsel for the petitioners suggested that the chancellor took a dislike to the Henry Moore altar at an early stage and to the witnesses who supported it. This received some support from the chancellor's notes supplied to this court. Counsel's further submission that the chancellor was unduly swayed by the geometrical evidence of Mr. Ashley Barker is borne out by the unbalanced nature of that part of the judgment which deals with the evidence of witnesses.

F

G

Our attention was directed to a recent judgment by Sir John Owen, Dean of the Arches, in an appeal from a judgment by Boydell Q.C., Ch. in *In re St. Mary's, Banbury* [1987] 3 W.L.R. 717. Towards the end of his judgment the Dean of the Arches laid down certain principles to act as guidelines for courts in relation to petitions for faculties to enable alterations to churches which are listed buildings. One of those guidelines is stated as follows, at p. 725H:

H

"(ii) When a church is listed as a building of special architectural or historic interest a faculty which would affect its character as such should only be granted in wholly exceptional circumstances, those circumstances clearly showing a necessity for such a change."

It has been pointed out to us that the Dean of the Arches has here gone

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A further than is the case in the secular field: see Circular No. 23/77 issued by the Department of the Environment entitled "Historic Buildings and Conservation Areas—Policy and Procedure." Certainly this court is not bound by so strict a rule and, in my view, should not consider itself so bound.

B All the members of this court have visited St. Stephen's, Walbrook, where the Henry Moore altar is at present in place in accordance with a temporary permission granted by the chancellor. There are difficulties in the way of gaining an accurate impression of what the altar will look like when the restoration is complete. Altogether there are many things, including the seating, the lighting and the ornaments, which will affect the general appearance and require a further faculty petition or petitions. As regards the question immediately before us, however, the chancellor did, in my view, make an erroneous evaluation of the evidence submitted to him, and a faculty should be issued in accordance with the petition presented on 25 March 1985 by the Reverend Prebendary Edward Chad Varah and Mr. Peter Garth Palumbo.

C The court can consider and permit only the work specified in the petition. It is noted that the Royal Fine Arts Commission prefers Caen stone to travertine for the footpace and that is also the view of Mr. Potter. It will be necessary for application to be made for a further faculty to permit Caen stone and it is hoped that this application will not be opposed.

E SIR RALPH GIBSON. For the reasons given by the Lord Bishop of Chichester, I agree that there is no obstacle in law to the installation in St. Stephen's, Walbrook, of the Henry Moore altar. I agree also that on the evidence before him the chancellor went wrong in the exercise of his discretion in refusing to allow the introduction of the altar into this church. My reasons are as follows.

F The history of the case and a description of the facts appear from the judgment of the chancellor [1986] 3 W.L.R. 790. I shall not repeat them. The chancellor held that the root of the case was the question whether it was possible to justify the introduction into this church, which is a work of great geometrical precision, of an artefact which is very large absolutely and relatively to the building; which is in a "totally different idiom;" and which, with its footpace and circle of seats, would become the "dominant feature of the inside of the church."

G The chancellor directed himself that in law the onus lay on the petitioners to satisfy him that he ought to exercise discretion in their favour: see *Peek v. Trower* (1881) 7 P.D. 21 where Lord Penzance, Dean of the Arches, said, at p. 27, that the burden is cast on those who propose changes. He reviewed very briefly the witnesses called by the petitioners and concluded that the whole of that evidence, considering it "strictly," failed to satisfy him that the evidence of Mr. Ashley Barker, a witness called by counsel for the archdeacon, who was opposed on "architectural" grounds to the introduction of the altar into this church, was "wrong." Therefore, "on the technical evidence" the petitioners had failed to make out their case and the petition must be dismissed. The conclusion of the chancellor was not in terms that he, as a matter of his aesthetic judgment, agreed with that of Mr. Ashley Barker, or found it more convincing; but that, since the petitioners had failed to show that the evidence of Mr. Ashley Barker was wrong, and had failed to prove any separate grounds for the grant of the faculty which could override

the evidence of Mr. Ashley Barker, such as a need for the Henry Moore sculpture in historical grounds, the petitioners must fail since the burden of proof in law was on them.

It is necessary to set out the substance of the evidence of Mr. Ashley Barker, which is the view of the Chancellor: the petitioners had failed to show to be wrong, and to set that evidence in the context of the other evidence. It is the case of a speech in a passage in his written proof part of which is set out in the judgment and which I shall set out in full:

It is my opinion that to place a circular altar in the centre of this space is to make a false resolution in favour of the centralised plan against the essential interpretation and so obscure Wren's intentions. The plan of the old weaving plans with the intersecting alleys under the dome we notice: (i) that there is a negative rather than a positive event at this point—i.e. two open alleys and open vistas crossing, thus allowing a continued view in each direction; and (ii) that there is no indication of the domed or circular form at this level. This begins only above the entablature of the Corinthian order. The essence of the lower space in which we stand is square.

The presence of the great solid form of the proposed altar under the domed centre would be to create an expectation of symmetry all about it by blocking the longitudinal and cross axes and establishing a false centre—reflecting each incident axis in turn—which, in my contention, cannot have been the architect's intention. My personal note made at the time of the Diocesan Advisory Committee discussions reads: 'It is open to question whether the return to a circular centre beneath the dome would not render Wren's interaction between cross-plan and domed-plan pointless by resolving drama in favour of the circular motif—so that the tension is released and the whole architectural drama rendered noise.' For this reason I take the view that the proposal does not comply with the test set down [in 1884] by the Grocer's Company which I made my starting point: that of respect for the intention of the great master.

In addition the Chancellor cited a passage from the evidence of Mr. Ashley Barker in cross-examination to the following effect:

The numerical geometry is at the heart of [Sir Christopher Wren's design]. This balance is at the heart of classical architecture. What has made the building admired, even when the detail was inauspicious, is the underlying geometry. To Wren, the natural beauty of architecture was from geometry. Having now seen the altar, I think what I have said in [the written proof cited above] is right.

Apart from Mr. Ashley Barker the witnesses called for the archdeacon were Mr. Michael John Gillingham, F.S.A., and Mr. John Arthur Newman, who both testified in favour of installing the altar. The matter was considered by the Diocesan Advisory Committee and it was said in evidence that he had not changed his view. He had found the views of both sides—those for and those against—to be worthy of respect and he was in favour because of the historical interest and the architectural merits. He was concerned, however, that the alterations of installing the altar would in practice make it

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A impossible to remove it even if a change in liturgical fashion should make removal desirable to those using the church.

Mr. Gillingham had been for many years a member of the Diocesan Advisory Committee and was an expert dealer in Chinese works of art. His proof contained the statement:

B "The plan of St. Stephen's is intentionally to create a tension between the longitudinal, Latin-cross arrangement of the ground plan . . . and the central upward emphasis of the dome. This tension would be lost if the eye were to be captured by a central altar."

C Mr. Newman is a senior lecturer at the Courtauld Institute of Art where since 1967 he has taught the history of British architecture. He has been a member of the Historic Buildings Council from 1977 to 1985 and thereafter of the successor body, the Historic Buildings Advisory Committee of English Heritage. He is a member of the Council for the Care of Churches and of the Georgian Group. It was his opinion that the altar would cause an unacceptable visual and historical disruption of the interior of the church which is a uniquely important example of Wren's architecture. Using terms more emphatic than those of Mr. Ashley Barker he said that the altar would do "drastic violence" to the church and that the "fundamental geometry" of Wren's design would no longer "still be there." This witness alone expressed the view that the altar was in itself a second-rate work because, unlike other objects made by Henry Moore, it was "compromised by being designed for use."

E The chancellor reviewed some of the petitioners' witnesses to assess the weight of their evidence against that of Mr. Ashley Barker. I shall take them in turn, first stating the substance of the evidence given by each witness and then the comment on the evidence of that witness by the chancellor. The witnesses had praised the altar as a work of art. Mr. Palumbo, in particular, contended that, at the highest levels of excellence, styles from different ages can live together harmoniously. The chancellor commented that he would like to believe that proposition to be a universal law but "some limit" must be put to it and the answer must depend on congruity. The Revd. Peter Delaney, who had trained at the Royal College of Art as a graphic designer specialising in stained glass and was a member of the Diocesan Advisory Committee, gave evidence that

G "the placing of the circular altar directly under the dome will strengthen the feeling of space and engage those who visit and worship around it in Wren's original intention of a community under the dome. . . . the Moore altar will sit comfortably on specially constructed steps in proportion to both dome and altar. . . . the axis of the building is controlled by the dome and pillars and is centrally placed and the simplicity of the circular Moore altar relates directly in form and texture to the classical pillars and ceiling and yet retains a contrast in its bulk form to the detail of the rest of the building. By its very complementary nature it will emphasise the simplicity of form of the Wren interior."

H The chancellor's comment on his evidence was that it added nothing significant to that of Professor Kerry Downes. Mr. Delaney had also spoken of "creative embellishment." The chancellor's comment was that Mr. Ashley Baker had replied to the effect that "where there is the sort

of creative order that there is in this building it is difficult to envisage 'creative embellishment' at all."

Sir Roy Strong, the director of the Victoria and Albert Museum since 1974, a member of the Cathedrals Advisory Council, and adviser to Westminster Abbey and to St. Paul's Cathedral, a member of the Arts Council and a churchwarden in Herefordshire, had given evidence that in his opinion the altar would

"give the church what it had always needed—a central altar . . . The subtlety of line, the beauty of the marble and the care taken to relate it to the building in terms of both of the axes and the pillars make it an impressive focus of worship and an enhancement of Wren's building."

The chancellor acknowledged that this evidence was weighty, coming from so considerable an authority, but observed that in cross-examination Sir Roy Strong had agreed that he was not an authority on Wren, and the chancellor continued,

"I find it a little difficult to understand how the building can always have 'needed' a central altar when Sir Christopher Wren was designing it for the liturgical practice of his day and thought of it as an 'auditory,' so that the pulpit and not the altar needed the most important place."

The Revd. Canon David Bishop, A.R.I.B.A., a qualified architect and custos of Norwich Cathedral, fellow of the Royal Society of Arts, and chairman of the Norwich Diocesan Advisory Committee for the care of churches and art in churches, gave his opinion in evidence that the altar was

"correct in scale and proportions in relation to the building. . . . in a sense contrasting with the classical orderliness . . . in its own way is every bit as disciplined as the church and speaks to us of a 20th century approach to worship."

He added that when the church

"is empty of worshippers, others will continue to come in, and will be fed by the visual and tactile impressions that they receive from this building and its contents. The new altar will say many things to them, not all of them by any means expressible in words, but to limit the understanding to the easily expressible is to limit understanding indeed."

The chancellor observed of this witness that in cross-examination he had said that he thought the altar to be of a "comely" size and "severely practical." The chancellor found it difficult to think that the altar, eight feet in diameter, was "severely practical" and he contrasted the view of Mr. Newman, a witness for the archdeacon, that the footpace and surrounding circles of chairs would be "a tremendously dominant ensemble."

It was, in the view of the chancellor, Professor Kerry Downes who, on behalf of the petitioners, dealt "most cogently," with the architectural issues. Professor Downes is professor of the history of art in the University of Reading. He has taught the history of European classical architecture for many years. The work of Sir Christopher Wren has been his special study for 35 years and he has published several books on that

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A subject. In a written proof he considered the history of the church (by
reference to the evidence of Mr. Robert Potter, the architect supervising
the work of repair and restoration to the church) and the history of
liturgy and architecture. There was attached to the proof an appendix of
seven pages containing analyses of the design and geometry of St.
Stephen's by nine different writers starting with *Godwin and Britton*,
B *The Churches of London* (1839), including the passage from Nikolaus
Pevsner, *An Outline of European Architecture* (1945) and ending with
the passage from Margaret Whinney's book *Wren* (1971). His opinion
was that, of the approximately 50 churches in London and Westminster
designed by Wren, St. Stephen's is more consistently regular and more
geometrical than any other. In form it is the nearest Wren came to the
total symmetry of the Greek cross with a central dome. In his view:

C "Many factors contribute to the perceived beauty of the interior,
including its simple lines, the proportions of its parts, the emphasis
on right angles in plan and elevations, the distribution of lighting,
the bilateral symmetry about the west-east axis, the shape of the
dome, the detailing of the capitals, mouldings and the unusually
rich plasterwork of the dome. One factor is indeed the ambiguity
D between different readings of the interior, centralised or basilican,
square based or circle based, axial or radial. The elements themselves
are clearly seen and clearly located, but the ways in which they are
related are complex and changeable."

E In his written evidence Professor Downes had defined the way in which
he used the words "reading" and "ambiguity." He said that by "reading"
he meant the understanding and interpretation by the intellect of the
various perceptions that we accept and interpret as our experience of a
building, both as a whole and as the sum of the parts. By "ambiguity"
he meant

F "the possibility or even the inevitability of a particular group of
components being readable in more than one way with differing
senses. . . . An example of architectural ambiguity that will be
known to many people is the plan of Hawksmoor's church at
Spitalfields, with its side entrances reinstated. Here what at first
sight may seem to be a long basilican church can also be read as a
series of concentric rectangles set out around two axes, that of the
portico and altar and that of the north and south doors."

G Professor Downes continued:

H "St. Stephen's has long since lost the box pews which occupied the
beholder's foreground and which Wren had in mind when he
designed the high pedestals to his columns. This loss is the more
significant because the division of the pews by aisles clearly marked
the two axes intersecting under the centre of the dome. . . . The
original reading is thus now a matter of imagination, and any
interpretation we make of what we see must be different from the
original. . . . But the proposed altar would not only be in accord
with the geometry of Wren's design. The altar itself is an artefact of
high quality of design, workmanship and material, rare in the City
churches nowadays. Today as in the past the clergy make the
justifiable claim that the Christian message is maintained and
proclaimed not only through liturgy and teaching but also during all
the hours that churches are open through the buildings themselves

and their contents. It is not possible to quantify the results, but every churchman and indeed every committed layman must know of individual cases of persons who entered a church for the music or the works of art and came away with the germ of what religious writers call a conversion."

Professor Downes considered in his proof the evidence of Mr. Gillingham, mentioned above, to the effect that "tension" would be lost if the eye were to be captured by a central altar, and commented that tension is something quite different from ambiguity. He knew of no evidence that Wren intended to create a tension in this plan or any other, and he pointed to the fact that the idea is not to be found in any of the analyses set out in his appendix. All those analyses agree that the ground plan should not be read as merely "a longitudinal Latin cross arrangement." The reading of the dome as having "central upward emphasis" is simplistic because the dome also reads downwards and concentrically and the light proceeds downwards from the lantern and the surrounding windows. If the immediate impression of St. Stephen's is one of great simplicity and lucidity, the analyses appended nevertheless show the complexity of the means by which this impression is made. Finally, since the altar is only 3 feet 5 inches high it is hard to see how it can "capture" an adult eye to the exclusion of other things, even from a sitting position. Professor Downes concluded as follows:

"The petition is for the introduction of a very special liturgical fitting into a very special church. It is for the placing of a beautiful object, of beautiful material, fashioned by the leading sculptor of his time and of 20th century Britain, in the position for which it was commissioned and which the sculptor took fully into consideration when he designed the altar. This proposal is not merely more imaginative, but simply better, than any addition to any Wren church during the last 40 years and perhaps a great deal longer."

There was also before the chancellor the evidence of Mr. Robert James Potter, F.R.I.B.A., F.S.A., the architect who has had the professional care of St. Stephen's since 1972, who devised and supervised the work of structural repair, and who has been concerned with the designs for the proposed installation of the Henry Moore altar in the church. Mr. Potter has been the surveyor to the fabric of Chichester Cathedral for the past 25 years and of St. Paul's Cathedral from 1978 to December 1984. His opinion was that the proposal would have commended itself to Wren and that "Wren's most beautiful dome [could] play its part as the canopy to the liturgical focus of the building without detriment to its architecture."

The chancellor made no reference to the substance of the evidence of Professor Downes nor did he carry out any express examination or assessment of it. He made no reference at all to the evidence of Mr. Potter. Of course the chancellor had all this evidence in mind in weighing the evidence as a whole. The consequence of the absence of any express discussion of the evidence of Professor Downes and Mr. Potter is that we do not know why it had, in the chancellor's judgment, either less or no more weight than that which he gave to the evidence of Mr. Ashley Barker, or what it was in the evidence of Professor Downes which was "wrong" when compared with that of Mr. Ashley Barker, or in what sense the petitioners had failed to make out a case on "technical" evidence.

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A Before coming to the criticisms of the judgment of the chancellor put forward on behalf of the petitioners it is necessary to mention some other points, which were dealt with by the chancellor in his judgment, and which further explain his reasoning; in his view they all pointed in the same direction. I shall set them out in brief summary. (1) The chancellor paid "great attention" to the fact that Henry Moore had designed this altar for this place in this church but, like any artist, Mr.

B Moore must be influenced by the terms of his commission which was to produce a circular altar. The chancellor added, "It is its character as a circular altar about which Mr. Ashley Barker has expressed doubts." (2) The chancellor noted that the problem in the case was primarily architectural and Mr. Ashley Barker's evidence was a careful architectural analysis. If a central altar of the shape, size and character of the Henry

C Moore altar had "great pastoral merits to recommend it" the court could allow those merits to prevail but, in his view, no such pastoral case was made out. No thought had been given over some 20 years to any other form of Holy Table more conformable to current liturgical ideas. (3) The petitioners had failed to persuade the Diocesan Advisory Committee to recommend the proposal: the vote in that committee had been eight against and seven for the proposal. (4) The proposal of the petitioners

D had the unanimous support of the parochial church council and in most cases the consistory court tries to give effect to the views of the parishioners but "this is not an ordinary parish." Apart from the inhabitants of the Mansion House the rector knew only one resident. The rector had done over 30 years a great work, especially as founder of the Samaritans, but "the sacred edifice has a future as well as a past. It

E belongs not to any one generation . . ." (*per* Lord Penzance, Dean of the Arches, in *Nickalls v. Briscoe* [1892] P. 269, 283). (5) Lastly, if in later years it should be desired to remove the altar from the church then the difficulties in law and practice of effecting a sale pursuant to a faculty (see *In re St. Gregory's, Tredington* [1972] Fam. 236), and in making a hole in the wall of the church for physical removal of the altar, would be such that the arrangement proposed would "in practice be

F reversible only with great difficulty, trouble and expense." This consideration lent support to the chancellor's conclusion and "alone . . . might perhaps . . . have been decisive."

On behalf of the petitioners Mr. Boydell submitted that this case was an unusual and special case concerned with the purpose of the petitioners to install in a great City church, by means of the efforts and generosity of those having the immediate care of the church, a work of art made by

G an English artist universally recognised as a great artist. It must be right, he submitted, for the Church to encourage such efforts and generosity by accepting what is offered and for the law to allow that acceptance unless there is some sufficient reason to require rejection. Mr. Boydell invited this court to set aside the order of the chancellor, notwithstanding the fact that the order was made by him after he had heard the witnesses and in the exercise of his discretion on a matter of aesthetic judgment, on the ground that the chancellor had acted on an erroneous evaluation of the facts.

H

Mr. Boydell submitted that (1) the chancellor was demonstrably out of sympathy with the form of artistic expression typified by the altar and with the evidence of those who expressed their admiration for such form; (2) the chancellor was unduly swayed by the assertions of Mr.

Ashley Barker that the altar is not congruent with the architectural design of Wren and in particular with the "numerical geometry" of that design; (3) the chancellor failed to allow proper weight to the evidence of those who regard the altar as not only in accord with the geometry of Wren's design but as in itself a great piece of work by a great sculptor, in short, something of exceptional excellence; and (4) the evaluation of the evidence by the chancellor did not at any point depend on his having seen and heard the witnesses, who are all accepted as entirely sincere and credible; and, therefore, this court, being in as good a position as the chancellor to evaluate the evidence, should conclude that the petitioners had clearly made out their case for the grant of the faculty sought by them.

In reply Mr. Spencer Maurice disputed each of these points. The intrinsic beauty of the altar was, he said, nothing to the point. The chancellor was right to conclude that the Henry Moore altar would "interfere with" the architecture of Wren's church. On the issue of architectural congruity the only views which were of any significance were of those witnesses who had expert knowledge and understanding of Wren's architecture. Mr. Potter's view that the dome would make a "canopy to the liturgical focus of the building" was no more than a bald statement. Only Mr. Ashley Barker had explained in detail the basis of his opinion in architectural terms.

Mr. Lloyd-Davies, who followed Mr. Spencer Maurice on behalf of the archdeacon, pursued this last point in detail in support of the submission that, of the expert evidence, the evidence of Mr. Ashley Barker was more considered, analytical and authenticated in describing what Wren had achieved in his design for St. Stephen's, the background geometry of that design and the impact on that design of the installing of the Henry Moore altar. He contended that in contrast the evidence of Professor Downes was generalised, lacking in explanation, without understanding of what Wren was doing, and adversely affected by a tendency to cloud the architectural issue with literary and philosophical concepts.

In conclusion it was submitted by Mr. Spencer Maurice that there was no ground on which this court could properly interfere with the decision of the chancellor who, it was said, had correctly identified the issues, properly weighed the evidence and concluded as he did because no liturgical need had been shown to justify interference with the architecture of this church.

Mr. Spencer Maurice relied also on a new point which does not appear in the chancellor's judgment and for which reliance is placed on a decision of Sir John Owen, as Dean of the Arches Court of Canterbury, in a case decided after the chancellor gave judgment in this case. The point is concerned with the effect of the listing of this church as a building of special architectural and historic interest. For reasons which I shall explain at the end of the judgment, I consider that this point has no separate force on the facts of this case.

The proper attitude of this court when asked to interfere with the exercise of a discretion by a diocesan chancellor in faculty proceedings was laid down by this court in *In re St. Michael and All Angels, Great Torrington* [1985] Fam. 81, 85-86, where Sir Hugh Forbes, giving the unanimous judgment of the court, adopted and applied the statement of the law by Sir Henry Willink Q.C., Dean of the Arches, in *In re St. Edburga's, Abberton* [1962] P. 10, 15:

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In re St. Stephen's (Ecc'l.Ct.)

Sir Ralph Gibson

A “Counsel were in agreement that the attitude of this court should
correspond with that adopted by the Court of Appeal and I accept
this as correct. What this attitude should be has been quite recently
described with the highest authority by the House of Lords in
B *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370. It will differ
according to the circumstances of the case. For example, it will be
strongly affected in favour of upholding the judgment of the trial
judge where his decision is based upon the credibility of witnesses
whom he has seen. But in the circumstances of this appeal the
proper attitude for the court is thus defined by Lord Reid [at
p. 376]: ‘. . . in cases where there is no question of the credibility or
reliability of any witness, and in cases where the point in dispute is
C the proper inference to be drawn from proved facts, an appeal court
is generally in as good a position to evaluate the evidence as the
trial judge, and ought not to shrink from that task, though it ought,
of course, to give weight to his opinion.’ Elsewhere in the speeches
in that case a distinction is drawn between the finding of primary
facts and their evaluation when so found. A faculty case gives rise
to the exercise of discretion, but if it appears to this court that the
discretion of the chancellor has been based upon an erroneous
D evaluation of the facts taken as a whole, it is within the jurisdiction
of this court to allow an appeal.”

For reasons which are set out below, and with great respect to a
most learned and experienced chancellor, I find that the main submission
for the petitioners, namely, that the chancellor's decision was based on
an erroneous evaluation of the facts, is made out.

E The decision of the chancellor rested, as I have said, on two main
points: first, as a matter of law the onus lay on the petitioners to satisfy
him that his discretion ought to be exercised in their favour; and,
secondly, the evidence called on behalf of the petitioners taken as a
whole was not such as to show that Mr. Ashley Barker was “wrong” in
his opposition to the altar on architectural grounds. The chancellor
F regarded that opposition as resting on technical evidence.

As to the first point, Mr. Boydell did not question the principle set
out in the judgment of Lord Penzance, Dean of the Arches, in the
Arches Court of Canterbury in *Peek v. Trower*, 7 P.D. 21, 27, cited by
the chancellor. That case was also concerned with a Wren church in the
City, that of St. Mary-at-Hill. The chancellor of London, Dr. Tristram,
G had granted a faculty for making changes in the internal arrangements
and furnishings of the church including the lowering of the pews and the
refixing of the backs of the pews so as to make them more comfortable.
The faculty had been sought by the rector and churchwardens and the
plans for the proposed alterations had been approved by the vestry. The
granting of the faculty was opposed by Sir Henry Peek, a parishioner
H who held the alternate patronage of the rectory, and, in his opposition,
he was supported by a large number of ratepayers on grounds which
included contentions that the alterations were wholly unnecessary having
regard to the comfort and convenience of the parishioners and were not
in harmony with the architectural design of the church which was
restored by Wren. Lord Penzance, Dean of the Arches, stated the
principle, at pp. 27–28:

“Two widely different principles present themselves. The court
might say this: If some of the parishioners desire this change, and

there is a fund out of which it may be made without placing a burden on others, then, unless those who oppose it can show that it will work mischief, that it will impair the capacity, the fitness, or the convenience of the church for the purposes of public worship, it ought to receive the sanction of the court. The objection to such a principle of decision is that it would open the door wide to all capricious changes—would give no heed to those feelings of attachment and regard with which tradition and long time are apt to invest old churches in the eyes of those whose families have sometimes worshipped for generations in the same spot, under the same roof, and with the same surroundings. There are in these matters, as in most others of the kind, two classes of people—those who are prone to believe that all changes must be improvements and those who love the things that be, and who regard all changes, though they may be improvements, with reluctance and the vigilance of a jealous eye. To give unlimited indulgence to the caprices or whims of the one class would be to wound without need the feelings of the other. And then come questions of architectural beauty and the endless controversies of taste, which, though always subordinate to utility, have a fair place in the controversy when utility is not in question. A principle of decision such as I am now discussing would make short work of all these. On the other hand, the court might say this: All presumption is to be made in favour of things as they stand. If you and others propose to alter them, the burden is cast upon you to show that you will make things better than they are—that the church will be more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate, or more adequate to its purposes than it was before; and if you cannot show this to the court, at least show the court that a majority of those for whose worship the church exists desires the alterations which you propose. And this is, I think, the language which in substance the court ought to hold. The burden of proof does, I think, properly devolve upon those who propose a change, and unless that proof is clear and manifest as to the benefits to be obtained by such change, the court ought to be satisfied that there is a general desire on the part of the parishioners, or at least of the actual worshippers being parishioners, that the change should be made. In the present case all proof of this general desire is not only wanting, but such proof as the court has before it is in the opposite direction.”

It seems to me that the principle there expressed is right and I am content to apply it to this case.

As to the second point, namely, that the petitioners had failed to show that the opinion of Mr. Ashley Barker was wrong, it seems to me that the chancellor was in error in his approach to the evidence of Mr. Ashley Barker and as to the nature of the difference of opinion between him and Professor Downes. I have difficulty in understanding in what sense the opinion of Mr. Ashley Barker could have been shown to be “wrong,” or why the difference of opinion between him and Professor Downes was seen as “technical.” At the hearing it was not suggested that the witnesses on either side who were experts in architecture had gone wrong on any issue of ascertainable fact or that either side had left out of account any principle or factor by reference to which aesthetic judgment should be exercised in this context.

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In re St. Stephen's (Ecl.Ct.)

Sir Ralph Gibson

A I have considered the detailed note of the cross-examination of
Professor Downes and of Mr. Ashley Barker having regard to the
submission made by counsel for the archdeacon that the evidence of Mr.
Ashley Barker was in some sense more convincing in terms of expert
argument. Professor Downes answered questions about the placing of a
B central altar in St. Stephen's and the use of central altars in other
particular churches; about the proper definition of a "classical" and
"neo-classical" church; about the rightness of "creative embellishment"
of a church such as St. Stephen's and the difference between embellishing
a building which is used and embellishing a work of art such as a picture
which is not in that sense used; about his use of the word "ambiguity" in
the reading of a building such as St. Stephen's; as to why in his view the
C Henry Moore altar in its place beneath the dome is not "overwhelming;"
as to the need in this church for a "sense of the centre" which
nevertheless did not require the centre to be empty; about "congruity"
existing in the eye of the beholder who comes, however, with a whole
range of expectations, enthusiasms and prejudices; and as to the absence
of any difficulty in getting the market price for the Henry Moore altar so
as to make practical the removing of the altar if there should be a
D change of heart in the future about having it. There was no suggestion
to Professor Downes that in forming and expressing his opinion that the
altar was in accord with the geometry of Wren's design he had gone
wrong in any technical sense whether by leaving out of account any
matter of importance or by misapprehending the design or its geometry
in any way. The question put to him was to this effect: "Would it not be
E wrong aesthetically to depart so far from any plan which Wren could
possibly have imagined?" His reply was:

"[Wren] made new solutions to new and old problems. St. Stephen's
is a new solution to the problem of what Wren called an 'auditory.'
As a practising member of the Church of England, he would say
they have changed it all round, but that is church-going and not
architecture. The intention here is not merely to accommodate
F liturgical change but to do something very remarkable for this
building and for God. The chosen sculpture is on the same level as
Wren. The intention is to do something artistic which accords with
the spirit of Wren's building . . ."

G I have set out the nature of this cross-examination in some detail
because it shows, in my view, that the contest between the opinion of
Professor Downes and that of Mr. Ashley Barker was conducted and
explored in terms of aesthetic judgment and not at any point on the
basis that either was or could be shown to be right or wrong on any
matter of technical analysis or understanding. The chancellor, however,
appears to have regarded the issue of geometry as "essential" and
"crucial:" he recorded these comments in his note against passages in
H the evidence of Mr. Ashley Barker. It seems to me that Mr. Ashley
Barker's references to the "numerical geometry" as being at the heart of
Wren's design were explanations of his own informed understanding of
and delight in Wren's work and of his respectful but firm dislike of the
presence in Wren's church of Moore's altar. He acknowledged, of
course, that the fundamental geometry of the church would be the same
if the altar should remain but in his view the altar would bring little

advantage to the church or the church to the altar. The answers in cross-examination of Mr. Ashley Barker were consistent, moderate and well reasoned but those answers, together with his evidence as a whole, provided no basis in my view for a judicial conclusion that the differences in aesthetic preference between Mr. Ashley Barker and Professor Downes were concerned with issues of technical rightness or wrongness or that the opinion of either on the issue of congruity could be shown to be right or wrong in any relevant sense.

It is my view that, on what the chancellor saw as primarily an architectural problem, the evidence of Professor Downes, of Mr. Potter and of Canon Bishop—the first an acknowledged expert in the work of Wren and the other two architects of long experience with reference to church buildings—was in all respects at least of equal weight and force to that of Mr. Ashley Barker, of Mr. Gillingham and of Mr. Newman. The differences between them were, as Mr. Ashley Barker acknowledged at one point in his evidence, matters of taste. I have considered the detailed submission of Mr. Lloyd-Davies to the effect that the evidence of Professor Downes was demonstrably inferior to that of Mr. Ashley Barker as “generalised” or “lacking in explanation,” etc., and I reject it. Professor Downes was in my view as careful in his architectural analysis and as mindful of and understanding of the geometry of Wren’s design as was Mr. Ashley Barker. The position on the evidence, with reference to congruity, therefore, was that there were two opposing views each carefully considered and argued as to the congruence in terms of aesthetic judgment of the Henry Moore altar with the architectural design of Wren’s church. I have referred to the evidence of Professor Downes, of Mr. Potter and of Canon Bishop being, in my view, of at least equal weight to the contrary opinion of Mr. Ashley Barker, of Mr. Gillingham and of Mr. Newman. I have formed, as I am sure have the other members of this court, my own opinion on the aesthetic merits of the opposing arguments. We all viewed the altar in its place in the church where the work of restoration is far from complete. The view of the altar in its relationship to the rest of the church was impaired by the presence of scaffolding. To me the altar, on the first view of it, seemed large and to an extent dominating. After some time spent in the church looking at the altar from different points of view that impression of a dominating effect was for me entirely gone. I do not think it necessary or useful to try to explain in detail my individual views of the merits of the arguments on aesthetic congruence. On the basis that the opinion of Professor Downes is of at least equal weight and validity to the contrary opinion of Mr. Ashley Barker on the issue of congruence the petitioners have, in my judgment, made out a clear case for the grant of the faculty which they seek. There are benefits to be obtained by the grant of the faculty which, in my view, greatly outweigh the fact that some who worship in the church and who visit it out of artistic or architectural interest will in the future share the aesthetic preference of Mr. Ashley Barker and wish that the Henry Moore altar was not there.

Mention must be made at this point of the relevance of expert understanding of Wren’s work. It was part of the submissions of counsel for the archdeacon on this appeal that the only views which were of significance were those of witnesses who had expert knowledge and understanding of Wren’s architecture. It seems to me that the chancellor in substance accepted that proposition. I have discussed already his reference to the technical evidence. In addition he appears to have

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A discounted to some extent the evidence of Sir Roy Strong on the ground
that he was not an authority on Wren. In my view, counsel's proposition
is incomplete. In a case of this nature the evidence of those with expert
knowledge of Wren's architecture was essential to enable the court and
the other witnesses to understand the nature of the building in question
and the subtlety and beauty of its design. The knowledge and training of
B the experts enable them to see aspects of the proposals which may
escape the observation of those who are not expert and to express their
view with precision and with the help of historical allusion. Their
learning and experience improve their ability to detect what in their own
liking and disliking, or in that of others, may be attributable to fashion
or personal preference rather than to the application of more enduring
criteria of judgment. But when their expert knowledge has been
C deployed and their separate and opposing aesthetic judgments explained
it seems to me that the reasoned opinions of men and women of
experience in matters of aesthetic judgment but of no special skill or
authority on the architecture of the building are of value, provided that
their opinions, and the reasons they give for holding them, withstand
scrutiny in the light of the evidence of the experts. Most of those who
will worship in this church or who will visit it out of aesthetic or artistic
D interest will have no special expertise in the architecture of Wren.

In my judgment, the chancellor was in error in his assessment of the
weight and importance of the evidence of those who, without being
expert in the architecture of Wren, supported the installation of the
Henry Moore altar in this church. Apart from the evidence of Sir Roy
Strong, to which I have referred, I would mention the evidence of Sir
Derman Christopherson F.R.S., and of Lady Morse. The chancellor did
not refer to these witnesses and it is clear from his notes that, having
formed the view that the main issue in this part of the case turned on
technical evidence, he regarded their evidence as of no significance. Sir
Derman Christopherson was the master of Magdalene College,
Cambridge, from 1979 to 1985. Magdalene College is joint patron of St.
Stephen's with the Grocers Company. He is one of the churchwardens
E of the church. He was from 1979 to 1985 chairman of the Royal Fine
Art Commission. His opinion was that the altar was appropriate to the
size of the space in which it was to form the focus within the church;
and that it would be appropriate for this work of Henry Moore to be
placed in St. Stephen's in its resurrected form since Moore is the artist
who will be seen by future generations as the recorder in his shelter
drawings of the underground life of London during the blitz in the last
war. Lady Morse has been a churchwarden at St. Stephen's since 1982.
She has no artistic qualification but is a registered tourist guide for the
City of London and has an informed liking for and interest in the fine
buildings of the City. In her written proof she gave her reasons for her
opinion that the altar is suited to the church and, as representative of
the parochial church council, she expressed the desire of all those who
F are actively involved with St. Stephen's for the altar to remain in the
church. The evidence of these witnesses is, in my view, of value and
importance and their opinions are not shown to be ill-founded by
reference to the evidence of those more expert.
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It is convenient at this point to mention some additional evidence
which was admitted in this court on the application of the petitioners.
Sir Derman Christopherson gave his evidence personally and not on
behalf of the Royal Fine Art Commission of which he had been

chairman. The additional evidence is that of the Right Honourable Norman St. John Stevas M.P. who was appointed chairman of the Royal Fine Art Commission in 1985. By the terms of its charter the commission is charged "to inquire into questions of public amenity and/or of artistic importance." For reasons which do not matter there was no opportunity for the commission to form an opinion concerning the placing of the Henry Moore altar in St. Stephen's prior to the hearing before the chancellor. At its meeting of 12 March 1986 the commission resolved to support the proposal and concluded that

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"the Henry Moore altar was a particularly fine piece of sculpture by one of our greatest contemporary sculptors, which complements the space created by Wren beneath the dome and is wholly congruent with the building."

I think it probable that if this evidence had been before the chancellor he would have been impressed by the cumulative weight of opinion in favour of the retention of the altar in this church from witnesses who, without special knowledge of Wren's architecture, are nevertheless experienced in and concerned about matters of aesthetic judgment. The whole of this evidence shows, in my view, that in all probability the presence of the Moore altar in St. Stephen's will cause very few indeed, whether worshippers in the church or visitors, to be unable to derive as much delight and inspiration from the beauty of Wren's church as they would get if the altar were not there.

I turn next to consider what benefit or positive good will on the evidence be achieved by keeping the Henry Moore altar in its place beneath Wren's dome in St. Stephen's. Mr. Boydell submitted, and I accept, that the chancellor appears to have failed to allow due weight to what I regard on the evidence as the undisputed and exceptional excellence of the altar as a work of art. I have noted the one piece of evidence, that of Mr. Newman, in which the altar was described as "a second-rate work." All the other evidence on both sides acknowledged its excellence. In his submission to the chancellor and before us Mr. Spencer Maurice expressly acknowledged that the altar is universally recognised as a great work of art. The chancellor said that he had paid great attention to the fact that Henry Moore had designed the altar for this place in this church. The court was told that Henry Moore saw a full-sized fibre glass model of the altar in its intended position. The chancellor said that he accepted without reservation that the altar was beautiful and that he need not further discuss that part of the evidence. His comment on the fact that this was a beautiful sculpture by a sculptor of outstanding eminence was that the altar was round because he had been commissioned to produce a round altar and it was its character as a round altar that had caused Mr. Ashley Barker to express his doubts about it. In my view, this is to allow too little weight to what Mr. Boydell rightly described as exceptional excellence. I see force in the points made by witnesses called for the petitioners to the effect that the presence in the church of such an artefact is likely to "say things" both to worshippers and to visitors to the church and that the Christian message may be proclaimed not only through liturgy and teaching but also through the buildings and their contents. It seems to me that the undisputed and exceptional excellence of the altar as a work of art is a factor of separate and substantial weight which should properly have disposed the chancellor to grant a faculty for its installation in the

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A church unless there was some sufficient reason for rejecting it. I agree that if the evidence, when properly assessed, was found to support the view that the altar was damagingly incongruous to the design of the church, which had been designed by another artist of outstanding eminence, then sufficient reason would be made out for rejecting it. For the reasons set out above, however, the evidence on architectural congruity was at its highest no more than evenly balanced and it did not, in my view, constitute sufficient reason for rejecting the faculty.

I turn now to the chancellor's treatment of the wishes of the rector and of the parishioners. The chancellor formed the view that no case on pastoral grounds had been made out such as to outweigh the adverse view of Mr. Ashley Barker on architectural grounds; and, further, that the wishes of the parishioners, expressed by the unanimous support of the parochial church council for the application, could not prevail having regard to that adverse view. I have on this part of the case also reached a different conclusion.

The chancellor, of course, acknowledged the principle that in most cases the consistory court tries to give effect to the views of the parishioners. That principle was considered in the case mentioned by the chancellor, *Nickalls v. Briscoe* [1892] P. 269, where opponents to a faculty for the installation of a stained glass memorial window in the chancel of a church appealed against the grant of such a faculty by the Rochester Consistory Court. Lord Penzance, Dean of the Arches, in the Arches Court of Canterbury, in dismissing the appeal, said, at pp. 282-283:

"It is said that the majority in the parish object to the proposed alteration. I will assume that this was established by the evidence for the purpose of argument; but it constitutes no answer to the present application. The notion that the matter here in question should be decided by the wishes of the majority of the parishioners proceeds, in my opinion, upon an entirely mistaken view of the law. The appellants have put forward their attachment to the old church and its interesting connection with times gone by; but they seem to forget that the sacred edifice has a future as well as a past. It belongs not to any one generation, nor are its interests and condition the exclusive care of those who inhabit the parish at any one period of time. It is in entire conformity with this aspect of the parish church that the law has forbidden any structural alterations to be made to it, save those which are approved by a disinterested authority in the person of the Ordinary, whose deputed discretion and judgment we are here to exercise today. That the grant or refusal of a faculty is a matter which lies in the judicial discretion of the bishop, the learned counsel for the appellants do not deny; but if a majority of parishioners is to settle the question, what, it may be asked, becomes of this discretion? I am far from saying that the wishes of the parishioners have no place in that balance of opposing considerations which is involved in the exercise of a judicial discretion—but the weight to be given to them depends upon many and various circumstances. In the first place, the opinions of the parish, to be of much value, should be opinions formed in relation to the proposed alteration itself and its effect on the convenience or beauty of the church, and not, as in the present case, upon the motives or objects of those who propose it. A divided opinion, moreover, reduces its value very much. Is the proposed alteration an improvement? Does it render the edifice more

commodious or more fit for its purposes? Or, if not this, does it add to its architectural beauty or suitable decoration? If the proposed alteration cannot be supported upon any of these grounds, those who propose it should at least be able to assert that it is supported by a very general desire on the part of the parishioners."

The chancellor, as noted above, with reference to the views of the parishioners as expressed by the unanimous support of the parochial church council said that he must bear in mind that this is "not an ordinary parish" because there is only one resident and the parish is a "very limited constituency" which depended greatly on the present rector, Prebendary Chad Varah. In my view, the chancellor gave too little weight to the purpose and wishes of the rector and of those who as non-resident parishioners are directly concerned with and responsible for this great church of Sir Christopher Wren. The principle which accords importance to the views of the parishioners is not, in my view, limited in its application to the familiar parish, where most of those who worship in and accept responsibility for the care of a church live within the parish boundaries, but is to be applied also to those who care for and worship in a City church such as St. Stephen's. The principle, as it seems to me, recognises the importance of the commitment of parishioners to their church and the value to the church of encouraging and supporting that commitment by giving a positive response to their pastoral work and efforts when such a response is justifiable. Prebendary Chad Varah has been rector for over 30 years and is much loved. He has, as the chancellor acknowledged, done a great work especially as founder of the Samaritans. He has been supported throughout in his desire to install this altar in the church by members of the parochial church council who have supported also his aim of creating a special pastoral role in the City for this church when fully restored. I see nothing in the evidence to require or to justify the setting aside of the wishes of the rector and parishioners of St. Stephen's that the Henry Moore altar be permitted to remain in their church. No physical change will be made to the fabric designed by Wren which is now close to full restoration. If hereafter those who worship in the church should wish to remove the altar for some good reasons, the removal will in probability be possible by the means of selling the altar in the market as a work of art by an artist of world-wide reputation. The altar itself is a work of exceptional artistic excellence. Opinions will differ as to the aesthetic congruence of the altar with Wren's design. Those who will find the altar congruent will find delight in the church and in the altar together. For those who will find the altar incongruous in the church there will remain delight in Wren's design and I see little reason to think that for them their delight need be much reduced.

I turn now to the new point raised by Mr. Spencer Maurice with reference to the status of the church as a listed building. The argument is based on the judgment of Sir John Owen, as Dean of the Arches Court of Canterbury, in *In re St. Mary's, Banbury* [1987] 3 W.L.R. 717, given on 4 October 1986. In that case Mr. Boydell, as chancellor of the Oxford Consistory Court, had refused a faculty for the removal of the main block of pews in the nave of the church, for the provision of a circular carpeted area in the nave beneath the dome, and for the provision of a mobile altar and platform in the nave. St. Mary's Church is listed as a building Grade A. By section 55(1) of the Town and Country Planning Act 1971 if a person executes or causes to be executed any works for the demolition of a

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A listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historical interest, and the works are not authorised under Part IV of that Act, he is guilty of a criminal offence. Works for demolition of a listed building or for its alteration or extension are authorised under the Act only if the local planning authority or the Secretary of State for the Environment have granted written consent. By section 56(3) [as amended by the Local

B Government Planning and Land Act 1980, Schedule 15, paragraph 8] in considering whether to grant permission for development which affects a listed building or its setting, and in considering whether to grant listed building consent for any works, the local planning authority or the Secretary of State is required to have special regard to the desirability of preserving the building or its setting or any features of special architectural

C or historic interest which it possesses.

Those special provisions, however, relating to works to a listed building, by reason of the ecclesiastical exemption contained in section 56(1) of the Act, do not apply to an ecclesiastical building which is for the time being used for ecclesiastical purposes. Sir John Owen, Dean of the Arches, expressed his view of those provisions in the context of the faculty jurisdiction, at p. 720A-D:

D “[The church] is now listed as a building Grade A. If it were not for the ecclesiastical exemption in section 56(1)(a) of the Town and Country Planning Act 1971 the effect of this listing would be to make it a criminal offence under section 55 to execute any works *to the building* which would affect its character as a building of special architectural or historic interest. By section 54(9) of the Act of 1971 ‘any object or structure fixed to a building . . . shall be treated as part of the building.’ An argument based solely on this consideration was

E not developed at the hearing of the appeal and it is sufficient to state that, although the exemption is necessary so that in such cases the dead hand of the past shall not prevent the proper use of a building consecrated to the worship of God, a listing does indicate that a faculty which might affect the special nature of the architectural or historic interest—and certainly the removal of all the pews from this church would do this—should only be allowed in cases of clearly

F proved necessity. The faculty jurisdiction must and does treat churches such as St. Mary’s, Banbury, as treasures not only for the people of the parish, whether churchgoing or not, not only for the Anglican church, but also for the country at large.”

G Later in his judgment, in dealing with the principles applicable when a conflict arises between the interests of worship and the interests of conservation, Sir John Owen, Dean of the Arches, said, with reference to the status of the church as a listed building, at p. 725H:

H “When a church is listed . . . a faculty which would affect its character as such should only be granted in wholly exceptional circumstances, those circumstances clearly showing a necessity for such a change.”

Mr. Spencer Maurice invited this court to follow and to apply the principles there stated by Sir John Owen, Dean of the Arches. St. Stephen’s, Walbrook, is also listed as a building Grade A. The retention of the Henry Moore altar would, he submitted, by reason of its size and of the great difficulty in removing it amount to works for the alteration of the church in a manner which would affect its character as a building of special

architectural or historic interest. Even if the evidence for the petitioners should be accepted in full there would be no evidence of "proved necessity" for the installation and retention of the altar and on this ground alone the appeal should be dismissed. When asked what meaning was to be given to the concept of "necessity" in this context beyond work required for the preservation of the building within the limits of financial capacity Mr. Spencer Maurice submitted that it could extend to liturgical necessity, i.e. to works necessary to permit the use of the church in the manner lawfully desired by the rector and parishioners. He drew attention to the fact that, as the chancellor had observed, the celebration of Holy Communion in the midst of the congregation at the central point beneath the dome could be carried out by means of a movable altar which could be taken away after the service so as to leave the appearance of the interior of the church unimpaired.

I do not accept this submission. The ecclesiastical exemption contained in section 55 of the Act of 1971 could have imposed on the courts exercising the faculty jurisdiction a restriction in the form stated by Sir John Owen, Dean of the Arches, but Parliament did not do so and I see no reason to impose it by judicial decision. I respectfully agree with the approach to the matter of listed ecclesiastical buildings which I understand to have been adopted by the Dean of the Arches in his judgment, namely, that in exempting ecclesiastical buildings from the provisions of the Act of 1971 Parliament relied on the care and responsibility of the ecclesiastical authorities, including those exercising the faculty jurisdiction, to ensure that churches of special architectural or historic interest are as fully protected in the interest of the general public as are secular buildings in the secular context. The principles applied in the faculty jurisdiction have, as the citations from decided cases set out in this judgment make clear, long recognised the obligation to protect for the whole community and for future generations churches of special architectural or historic interest against irreversible and inappropriate changes at the hands of those having the immediate care of the building. The extent of that obligation, however, is not, in my view, rightly defined by the concept of "proved necessity." The statute does not impose a limitation in such terms on the local planning authority or the Secretary of State in the exercise of the power to grant written consent for the execution of works of demolition or alteration, etc. to listed buildings (see section 56(3)); and I see no reason why the extent of the discretion to permit alterations to listed ecclesiastical buildings should be more limited than in the case of listed secular buildings.

The right approach, in my view, is to exercise the discretion as I think Parliament intended that it should be exercised, namely, in accordance with established principles; and that includes, of course, having full regard to all the circumstances including the interest of the community as a whole in the special architectural or historic attributes of the building and to the desirability of preserving the building and any features of special architectural or historic interest which it possesses. The discretion, however, is to be exercised in the context that the building is used for the purposes of the Church, that is to say in the service of God, as the Church, doing its best, perceives how that service is to be rendered; and the weight to be given to the various aspects of the particular case is to be determined accordingly. I doubt very much whether Sir John Owen, Dean of the Arches, intended to lay down any other principle. The point was not fully argued before him and the precise limits of any effect on the exercise of

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In re St. Stephen's (Eccl.Ct.)

Sir Anthony Lloyd

A

the chancellor's discretion by reason of the fact that a church is a listed building were not decisive of the appeal.

The faculty sought by the petitioners should, in my judgment, be granted.

B

SIR ANTHONY LLOYD. I agree with the judgments delivered by the Bishop of Chichester and Sir Ralph Gibson. I add a judgment of my own only because we are differing from the chancellor on both grounds of his decision.

C

The chancellor describes the distinction between an altar and a table, when those words are correctly used, as being "essential and deeply founded." This is a quotation from the judgment of the Judicial Committee of the Privy Council in *Westerton v. Liddell* (1857) Moo. Special Rep. 133, 176-177, to which the chancellor referred. It is worth quoting the passage in full:

D

"The appellants, in their pleadings, term these tables, 'Altars, or Communion Tables;' and in the argument they have referred to two recent statutes, in which the word 'Altar' is used to signify the 'Communion Table.' When the same thing is signified, it may not be of much importance by what name it is called; but the distinction between an 'Altar' and a 'Communion Table' is in itself essential and deeply founded, in the most important difference in matters of faith between Protestants and Romanists; namely, in the different notions of the nature of the Lord's Supper which prevailed in the Roman Catholic Church at the time of the Reformation, and those which were introduced by the Reformers. By the former it was considered as a sacrifice of the body and blood of the Saviour. The Altar was the place on which the sacrifice was to be made; the elements were to be consecrated, and, being so consecrated, were treated as the actual body and blood of the victim. The Reformers, on the other hand, considered the Holy Communion not as a sacrifice but as a feast, to be celebrated at the Lord's Table; though as to the consecration of the elements, and the effect of this consecration, and several other points, they differed greatly among themselves."

F

G

For the reasons given by the Bishop of Chichester, I would respectfully doubt whether the distinction between an altar and a table is as "essential and deeply founded" as was thought 130 years ago. The chancellor was, of course, bound by *Westerton v. Liddell*, so it is not surprising that he followed the same approach. But we are not so bound. We are free to construe Canon F2 as it stands, without regard to the doctrinal disputes of past centuries. I do not enter into those disputes now. It is sufficient to record that I do not accept Mr. Spencer Maurice's argument that to admit the Henry Moore altar would be, in his words, "to stand the Reformation on its head."

H

So I would not accept the chancellor's approach to the question whether the Henry Moore altar is capable of being the Holy Table. Nor would I accept his conclusion. The chancellor was clearly much influenced by the reasoning of Lord Penzance, Dean of the Arches, in *Faulkner v. Litchfield and Stearn*, 1 Rob.Eccl. 184. Again it would be sufficient for us to say that we are not bound by that decision. But I would go further. I doubt whether the chancellor was himself bound by that decision, despite its approval in *Westerton v. Liddell*, Moo. Special Rep. 133. The essence of the decision in *Faulkner v. Litchfield and Stearn*, as appears from the passages which the chancellor quotes, is that "a stone structure of amazing

weight and dimensions immovably fixed" would not normally be regarded as a table. But that decision has now to be read in the light of the Holy Table Measure 1964 which provided by section 1:

"The Holy Table used at the celebration of the Lord's Supper or Holy Communion . . . may be either movable or immovable and may be made of wood, stone or other material suitable for the purpose for which the Table is to be used."

One could be forgiven for thinking that the whole object of the Holy Table Measure 1964 was to reverse the decision in *Faulkner v. Litchfield and Stearn*, 1 Rob.Eccl. 184. The chancellor accepted that the repeal of the Holy Table Measure 1964 by section 6(3) of the Church of England (Worship and Doctrine) Measure 1974 did not reinstate the previous law. Yet he held that he was bound by the reasoning in the passages which he quoted. I find that hard to follow.

Mr. Spencer Maurice expressly conceded that the Holy Table need not have legs. He further expressly conceded that it need not resemble an ordinary domestic table. Yet he submitted that it must still have what he called "the quality of tableness." At this point the argument begins to remind one of Plato's *Republic*. If I put out of my mind the idea of a domestic table, I find it hard to say in what "the quality of tableness" consists, unless it be in a flat surface to put things on. This comes near Dr. Johnson's definition in *Johnson's Dictionary*, 2nd ed., vol. iii (1827), referred to in *Faulkner v. Litchfield and Stearn*, 1 Rob.Eccl. 184, 253-254, "(1) Any flat or level surface (2) A horizontal surface raised above the ground, used for meals and other purposes." As an example of the second meaning, Dr. Johnson quotes "If there is nothing else to discourage us, we may safely come to the Lord's Table and expect to be kindly entertained by Him when we do." Applying Dr. Johnson's definition, I have no doubt that the Moore altar, while not resembling a domestic table in any way, is, nevertheless, a table. It was not suggested that, if it is a table, it is not convenient and decent. It follows that it is capable of being the Holy Table within the meaning the Canon F2, by which alone we are bound. I would, therefore, respectfully disagree with the chancellor's conclusion to the contrary. I would only add that in answering the question whether the Moore altar is capable of being the Holy Table, I do not find it of much assistance to be told what it was that Mr. Henry Moore himself had in mind when designing the altar.

Having held that the Moore altar was not capable of being the Holy Table in law, the chancellor very naturally did not go on to consider whether, if he were wrong, the altar should nevertheless be excluded as a matter of discretion. I am not here referring to the discretion to exclude on aesthetic grounds, to which I shall come in a moment, but on the ground that the significance of the altar might be misunderstood, or that it might cause offence or become an object of superstition. In those circumstances it falls to us to exercise our own discretion. I do not doubt that we should exercise that discretion in favour of the petitioners.

I turn next to the second main point in the case. Was the chancellor right to exercise his discretion against the petitioners on aesthetic grounds? If not, are we entitled to intervene in the matter? In *In re St. Michael and All Angels, Great Torrington* [1985] Fam. 81 this court held that it would intervene in the exercise of a discretion if it could be shown that the consistory court had acted on an erroneous estimate of the facts. In so holding this court was following and adopting the language of Sir Henry

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In re St. Stephen's (EccI.Ct.)

Sir Anthony Lloyd

A Willink Q.C., Dean of the Arches, in *In re St. Edburga's, Abberton* [1962] P. 10, 15. How does that test compare with the test applied in the Court of Appeal? Mr. Boydell argued that the Arches Court and the Court of Ecclesiastical Causes Reserved are more relaxed than the Court of Appeal in reviewing the discretion of a court below. I do not find any support for that proposition, either in *In re St. Michael and All Angels, Great Torrington* or in *In re St. Edburga's, Abberton*. Indeed in the latter case

B the Dean of the Arches clearly thought that the tests should be the same. I also notice that Mr. J. F. E. Stephenson conceded in the course of his argument, at pp. 11–12, that in a matter of aesthetic judgment, it would require a wholly exceptional case for an appellate court to intervene:

C “If this were an aesthetic question, as so many faculty questions primarily are, whatever might be the position in law, an appellate court would be extremely reluctant to overrule the exercise of the chancellor’s discretion, and would need very strong evidence, pointing to something like reckless disregard of generally accepted views—some misconduct, almost, on the part of a consistory court—before doing so.”

D In my view, Mr. Stephenson’s argument goes too far. On the other hand I am not, as at present advised, prepared to go the whole way with Mr. Boydell. Fortunately, it is unnecessary to decide. For even on the strictest view of the circumstances in which an appellate court will intervene, I am satisfied that this appeal must be allowed.

E One starts with the fact that this particular altar was designed for this particular church by one of the world’s great sculptors. It may be that Mr. Henry Moore was not an expert in Wren architecture. But there is no suggestion that he ever had second thoughts about the size or shape of the altar he had designed. With the exception of Mr. Newman, there is universal agreement that the altar is a work of superb quality.

F Secondly, we have the evidence of Professor Kerry Downes, professor of the history of art at Reading University. He has spent 35 years in the study of Sir Christopher Wren and his school, and is the author of a number of books on the subject, including two on Wren himself. Professor Downes must therefore be regarded as an expert on the subject of Wren architecture. Mr. Spencer Maurice did his best to diminish the force of Professor Downes’s evidence. But so far as I was concerned he failed. Even if Mr. Spencer Maurice’s points had had superficial validity, I should have had some hesitation in accepting them, since they were never put in cross-examination. In his written submission, Professor Downes deals

G authoritatively and, to my mind, effectively with certain objections put forward in a paper dated 5 June 1985 on behalf of those members of the Diocesan Advisory Committee who opposed the petition. In Professor Downes’s opinion, the Henry Moore altar would not only be in accord with Wren’s design, but would positively enhance the essential geometry. It is worth quoting his concluding paragraph in full:

H “The petition is for the introduction of a very special liturgical fitting into a very special church. It is for the placing of a beautiful object, of beautiful material, fashioned by the leading sculptor of his time and of 20th century Britain, in the position for which it was commissioned and which the sculptor took fully into consideration when he designed the altar. This proposal is not merely more imaginative, but simply better, than any addition to any Wren church during the last 40 years and perhaps a great deal longer.”

That conclusion, coming as it does from an expert in this very field, is entitled to great weight.

Thirdly, there is the evidence of Sir Roy Strong and the Royal Fine Art Commission. Sir Roy Strong did not claim to be an authority on Wren. But he said:

"It seems to me to give the church what it has always needed—a central altar, something out of the question at the time when it was built, but fully consonant with modern liturgical developments. The subtlety of line, the beauty of the marble and the care taken to relate it to the building in terms both of the axes and the pillars make it an impressive focus of worship and an enhancement of Wren's building."

In cross-examination Sir Roy Strong said that the altar greatly enhanced the architecture. He said: "This proposal is something excellent. There has been nothing like it as long as I can remember."

The evidence of the Royal Fine Art Commission was not obtained until after the hearing before the consistory court. We decided to admit the evidence, in the form of an affidavit from Mr. Norman St. John Stevas, chairman of the commission, on the usual grounds. Since it was not subject to cross-examination, we approach the evidence with caution. Nevertheless, the views of such an eminent body are clearly entitled to great weight. It is sufficient to quote one paragraph:

"After discussion it was resolved that the commission should support the proposal. The commission concluded that the Henry Moore altar was a particularly fine piece of sculpture by one of our greatest contemporary sculptors, which complements the space created by Wren beneath the dome and is wholly congruent with the building. In reaching this conclusion the members were aware of the architectural importance of St. Stephen's, Walbrook, as one of Sir Christopher Wren's greatest masterpieces, and of the view expressed by the chancellor of the diocese that the altar was not congruent with the building."

If I omit the other distinguished witnesses, such as Canon David Bishop and Sir Derman Christopherson, who gave evidence in favour of the petitioners, it is not that I do not attach importance to their views. But it is time to turn to the evidence on the other side.

The principal witness was Mr. Ashley Barker, a distinguished architect, and long standing member of the Diocesan Advisory Committee. The substance of his evidence is set out in Sir Ralph Gibson's judgment. I do not repeat it here. It is sufficient to say that Mr. Ashley Barker laid much emphasis on the geometric qualities of Wren's design and the tension created by the circular dome and the square space beneath. A circular altar would, he thought, not only destroy the tension by "resolving the drama in favour of the circular motif," but also create a false centre in direct conflict with Wren's intentions. However, in cross-examination he made clear that he was not against a central altar as such. "On balance," he said, "but not without reservation there is no objection to a central altar." A little later he said, "the fundamental geometry of the church would be the same." His objection was not so much to the position of the Henry Moore altar beneath the dome, but to its size and shape. In this he was supported by Mr. Gillingham, who also gave evidence on behalf of those members of the Diocesan Advisory Committee who voted against the proposal, and by Mr. Newman. Again I would adopt, if I may, Sir Ralph Gibson's account of their evidence and qualifications.

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Sir Anthony Lloyd

A How then does the chancellor deal with all this evidence? His judgment focuses on Mr. Ashley Barker's evidence. He finds that the petitioners failed to satisfy him that Mr. Ashley Barker was wrong. I agree with Sir Ralph Gibson that this was not the right approach. The chancellor was asking himself a question which had no real meaning. For there are hardly ever any rights or wrongs in matters of aesthetics. There are differences of opinion; quot homines tot sententiae. The correct approach in a case such as the present is to weigh the expert evidence on both sides as carefully as possible, without being over influenced by our own personal views. Sir Ralph Gibson has assessed the expert evidence in favour of the petitioners as being at least of equal weight with that of Mr. Ashley Barker, Mr. Gillingham and Mr. Newman. I would myself go further. The balance of expert opinion at the hearing was, to my mind, clearly and heavily in favour of the petitioners; and is still more so, now that we have the views of the Royal Fine Art Commission. When I add to the expert evidence the views of the late Archdeacon of London, the rector, the churchwardens and the unanimous wishes of the parochial church council, I find the case in favour of the petitioners overwhelming.

B
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D So I would agree with Sir Ralph Gibson when he says that the chancellor asked himself the wrong question. This justifies our intervention. I would agree too with the Bishop of Chichester when he says that there is a certain lack of balance in the way the chancellor deals with the evidence. This also justifies our intervention. I find it strange that Professor Downes and Sir Roy Strong are each dismissed in a sentence or two. I appreciate that the chancellor had the advantage of seeing and hearing the witnesses, which we have not. But I cannot believe that the manner in which they gave their evidence was such as to deprive their opinions of the weight to which they would otherwise be entitled. Even on the strictest views of an appellate court's function in these cases, I would hold that we are entitled to intervene.

E
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G That leaves only Mr. Spencer Maurice's respondent's notice, by which he seeks to support the chancellor's judgment on the novel ground that, St. Stephen's being a listed building, a faculty should only be granted if the introduction of the Henry Moore altar can be shown to be a matter of necessity. For that proposition he relies on the judgment of Sir John Owen, Dean of the Arches, in *In re St. Mary's, Banbury* [1987] 3 W.L.R. 717. It is true that in that case the Dean of the Arches says that in the case of a listed building, a faculty which might affect the special nature of the architectural or historic interest should only be allowed in cases of "clearly proved necessity." A little later he proposes the following principle as a guideline, at p. 725H:

H "When a church is listed as a building of special architectural or historic interest a faculty which would affect its character as such should only be granted in wholly exceptional circumstances, those circumstances clearly showing a necessity for such a change."

The ecclesiastical exemption from planning procedures is, of course, of great importance to the Church of England. But I can find nothing in the relevant legislation to justify an approach as strict as that laid down in *In re St. Mary's, Banbury*, nor does the Dean of the Arches cite any authority in support of that approach. Listed building consent is given every day in ordinary cases which fall short of "clearly proved necessity." I see no reason why a different standard should prevail in the case of ecclesiastical

buildings. It appears that the point was not argued before the Dean of the Arches, and his views, though obviously entitled to great respect, were obiter. The fact that an ecclesiastical building is listed is a relevant consideration in deciding whether or not to grant a faculty. But I would respectfully, but firmly, disagree with the view that a faculty should only be granted in cases of clearly proved necessity.

Having held that we are justified in reviewing the chancellor's discretion, I am in no doubt that we should allow this appeal. I do not underestimate the strength of Mr. Ashley Barker's evidence or the evidence of those who share his views. But the evidence the other way is, as I have held, overwhelming. In my judgment, the petitioners are entitled to their faculty.

I am glad to have reached that conclusion, because I agree with Sir Roy Strong when he said that patronage should be given every encouragement, not least by the Church. The commission was first conceived by Mr. Palumbo in 1967, nearly 20 years ago, and the altar was completed as long ago as 1972. To deny the petitioners the faculty they seek after all these years would indeed be a harsh reward for their generosity.

Finally, I should like to express the court's gratitude to Mr. Spencer Maurice and those instructing him. As he pointed out, there was no party opponent in the strict sense. But the case was one of sufficient importance to justify the court in asking the archdeacon to be represented at the hearing of the appeal in this court, as in the court below. I am happy to record that, at the conclusion of the hearing before us, the petitioners offered to pay the archdeacon's costs of the appeal, whatever the outcome.

BISHOP OF ROCHESTER. I have read in draft the judgments to be handed down by the Bishop of Chichester, Sir Ralph Gibson and Sir Anthony Lloyd. I agree that for the reasons which they give the appeal should be allowed and a faculty granted as prayed.

RT. REV. K. J. WOOLLCOMBE. I have read in draft the judgments to be handed down by the Bishop of Chichester, Sir Ralph Gibson and Sir Anthony Lloyd. I agree that for the reasons which they give the appeal should be allowed and a faculty granted as prayed.

Appeal allowed.

Solicitors: John G. Underwood; Wedlake Bell.

C. N.

3 W.L.R.

A

[COURT OF APPEAL]

*In re M. AND H. (MINORS) (LOCAL AUTHORITY:
PARENTAL RIGHTS)*

1987 May 20

Glidewell and Balcombe L.JJ.

B

Minor—Custody—Access—Putative father's application for custody and interim access to children—Local authority having assumed parental rights—Whether court having jurisdiction to grant and hear application for access—Guardianship of Minors Act 1971 (c. 3), s. 9(1)

C

The putative father of two children, aged six and eight years old, stopped cohabiting with their mother in 1980. Early in 1982 the father went abroad. In July 1982, while he was still abroad, the mother placed the two children in the care of the local authority and subsequently refused to have them back. The children remained in care. In November 1983 the local authority passed a resolution under section 3 of the Child Care Act 1980 and in the absence of any objections by the mother, vested in themselves the parental rights and duties in respect of the children. In 1984, when the local authority were considering fostering the children with a view to adoption, the father returned from abroad and visited the children. In 1986 he applied pursuant to section 9 of the Guardianship of Minors Act 1971¹ for their custody and for interim access. The local authority opposed the application but the judge granted the father access to the children pending the determination of the issue of custody.

D

E

On appeal by the local authority:—

Held, allowing the appeal, that the court had jurisdiction to hear a putative father's application under section 9 of the Act of 1971 for interim access to children, but that where the local authority had statutory powers in respect of the children, the court could not interfere with the exercise of those powers in matters concerning the children and had no alternative but to refuse the application; and that, accordingly, since the local authority had assumed parental rights and duties under the Act of 1980, the judge had erred in allowing the application (post, pp. 765D–E, 766H–767B, E–H, 768D–E).

F

A. v. Liverpool City Council [1982] A.C. 363, H.L.(E.) applied.

In re H. (K. and M.) (Infants) [1972] 3 All E.R. 789, D.C. approved.

G

Reg. v. Oxford Justices, Ex parte D. [1987] Q.B. 199 doubted.

The following cases are referred to in the judgments:

A. v. Liverpool City Council [1982] A.C. 363; [1981] 2 W.L.R. 948; [1981] 2 All E.R. 385, H.L.(E.)

H

H. (K. and M.) (Infants), In re [1972] 3 All E.R. 769, D.C.

M. (An Infant), In re [1961] Ch. 328; [1961] 2 W.L.R. 350; [1961] 1 All E.R. 788, C.A.

Reg. v. Oxford Justices, Ex parte D. [1987] Q.B. 199; [1986] 3 W.L.R. 447; [1986] 3 All E.R. 129

Reg. v. Oxford Justices, Ex parte H. [1975] Q.B. 1; [1974] 3 W.L.R. 1; [1974] 2 All E.R. 356, D.C.

¹ Guardianship of Minors Act 1971, s. 9(1): see post, p. 763B–C.

- W. (*A Minor*) (*Wardship: Jurisdiction*), *In re* [1985] A.C. 791; [1985] 2 W.L.R. 892; [1985] 2 All E.R. 301, H.L.(E.)
- W. (*Minors*) (*Wardship: Jurisdiction*), *In re* [1980] Fam. 60; [1979] 3 W.L.R. 252; [1979] 3 All E.R. 154, C.A.

A

No additional cases were cited in argument.

APPEAL from Mr. Assistant Recorder Harrington sitting at Cardiff County Court.

B

On 3 November 1983 the local authority, South Glamorgan County Council, passed a resolution under section 3 of the Child Care Act 1980, vesting in themselves the parental rights and duties in respect of two children, M. and H. In the absence of any counter-notice the resolution took effect.

By application dated 4 September 1986, the putative father of the two children sought legal custody and access pursuant to section 9 of the Guardianship of Minors Act 1971. On 20 March 1987 Mr. Assistant Recorder Harrington granted the father interim access to the two children.

C

The local authority appealed on the grounds, inter alia, that the court had no jurisdiction to make the order for access, and alternatively, that if the court had jurisdiction to make the order, it ought to have declined to exercise the jurisdiction in view of the local authority's assumption of parental rights pursuant to section 3 of the Child Care Act 1980.

D

The children's mother took no part in the proceedings.

The facts are stated in the judgment of Glidewell L.J.

E

Malcolm Bishop for the local authority.

Philip Davies for the putative father.

GLIDEWELL L.J. This is an appeal by the South Glamorgan County Council against an order made by Mr. Assistant Recorder Harrington, sitting at Cardiff County Court on 20 March 1987 when he granted interim access to the applicant, the putative father, of two children, M. and H., pending the final determination of his application for custody of those children.

F

The facts are a little complicated, but thanks to Mr. Bishop's most helpful chronology they can be recited reasonably shortly. The father comes from the Yemen. He came to live in Cardiff in the 1970s. For some years in that decade he lived as man and wife with the mother, the first respondent to this application, who is respondent in name only because she has taken no part in the proceedings at all.

G

As a result of that association she bore three children of whom the applicant claims, and the mother accepts and the assistant recorder found, that he is the father. The oldest of those three children R., is now nearly 11 years of age. In this court no issue as to him arises. The two younger children, M. and H., are a boy aged nearly eight and a girl aged just over six years.

H

Until about 1980 father, mother and the two boys lived together as a family. But when the mother was pregnant with the little girl, the relationship between her and the father deteriorated. There seems, according to one of his affidavits, to have been a period when he spent some time with her and some time with his parents, who were also in

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In re M. and H. (Minors) (C.A.)

Glidewell L.J.

A Cardiff. But that relationship was terminated when on 16 December 1980 the mother married another man. When the younger child, H., was born she therefore took the mother's husband's surname, though it was accepted she was not his child. That marriage seems to have lasted a very short time, perhaps only a matter of months.

B In 1982 the father went back to the Yemen for a time. On 29 July 1982 the mother put all three of her children into the care of the local authority voluntarily, initially for a period of a month. But at the end of the month she refused to have them back and, despite the efforts of the officers of the local authority, the children remained in care. However in December 1982 she took back the oldest child, R., but she left the other two in care.

C In October 1983 the mother had a fourth child by another man and indeed, jumping forward in time a bit, she had a fifth child in December 1985.

D Going back to 1983, as a result of the mother's failure to take the children back out of care, on 3 November 1983 the local authority, by a resolution made under the powers of section 3 of the Child Care Act 1980, assumed parental rights over the two children, M. and H., the subject of this appeal. However they gave the mother a further opportunity to restore the relationship between her and her children, but she showed little or no interest in doing so, and eventually the local authority terminated her right to access to the two children in September 1984. She has not in fact seen the children since May 1984, and the evidence shows that, apart from sending them birthday and Christmas cards, there is now no contact between mother and children. So the mother really disappears from the scene. Meanwhile the two children have been living in a Roman Catholic children's home. I should say that the father is a devout Muslim.

E Some time before May 1984 the father returned to Cardiff. He did visit the two children at the home, on the last occasion when the mother visited them: in other words he accompanied her. Then he tried to visit them again a week later, but he turned up without appointment, failed to explain who he was and was not allowed to see them on that occasion.

F On 11 March 1985 the father himself married and he and his wife now have a child of their own and they are the tenants of a four-bedroomed council house.

G Some time after the marriage, in July 1985, the mother transferred R., the eldest child to the father and his new wife, and that child has lived with them since. So the family there consists of R., his father and his father's wife and the baby.

H In 1984 and 1985 the local authority were considering fostering M. and H. with a view to eventual adoption. However while they were considering this, the father made it clear that he wished to apply for custody of them. Eventually he made a formal application for custody of the two children on 4 September 1986. Pending the determination of that application the question of fostering them for eventual adoption has remained in abeyance and the children have stayed in the home.

Knowing of the father's desire to have custody of the children, in May 1985 the local authority assessed the father's and his wife's suitability and they arranged for them to have access to the two children on some nine occasions in the autumn and winter of 1985-86. On most of those occasions the access was at the children's home. On two

occasions it was at the home of the father and his wife. According to the local authority the access was by no means harmonious or successful, but that is in dispute, and we are not here concerned with the merits of the matter. However as a result of that the local authority in January 1986 refused to agree any further access for the father to these two children, and decided to oppose his application for custody. They also decided to continue with their plans for fostering and adoption.

The custody application has not yet been heard, but pending its hearing the father made the application, which leads him to this court, for interim access, and the assistant recorder on 20 March made an order for interim access, the details of which do not matter, because the operation of that order has been stayed pending the hearing of this appeal. In practical terms that means that the children have not seen their father since the early part of 1986.

Mr. Bishop for the local authority argued two alternative points before us. First he argued that the assistant recorder had no jurisdiction to make an order that the father should have access, and secondly, and alternatively, the assistant recorder erred in principle, because even if there is jurisdiction it is one which the court should normally not exercise in favour of granting an order for access.

It is right to say at once that neither of these arguments was advanced in the court below. So the assistant recorder did not have the benefit of any of the authorities to which we have been referred nor any of the arguments which we have heard. If he had, he might very well have come to a different conclusion. It is no discredit to him that he did not deal with the matters that are before us.

There was a question as to whether we should hear argument about jurisdiction, since the points were not taken in the court below, particularly the argument as to whether the assistant recorder had erred in principle. But Mr. Davies for the father very sensibly and properly, in my view, accepted that it will be futile for this court, being seized of the matter, not to pronounce upon the arguments that we have heard.

The origin of the jurisdiction, as I have already said, is to be found in section 3 of the Child Care Act 1980. Subsection (1), so far as material, provides:

“Subject to the provisions of this Part of this Act, if it appears to a local authority in relation to any child who is in their care under section 2 of this Act— . . . (b) that a parent of his— . . . (iv) is of such habits or mode of life as to be unfit to have the care of the child, or (v) has so consistently failed without reasonable cause to discharge the obligations of a parent as to be unfit to have the care of the child . . . the local authority may resolve that there shall vest in them the parental rights and duties with respect to that child . . .”

It is under that provision that the local authority has assumed the parental rights and duties in relation to these two children.

If a local authority passes such a resolution, then under section 3(2) of the Act of 1980 they must serve notice in writing of the passing of the resolution on the person whose parental rights and duties have vested in them, and give to that person notice that he or she has a right to object to the resolution, which right is to be exercised within a month. If there is no objection, or if an objection is subsequently overruled, then the

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A resolution comes into force. The mother here received notice, but did not object, and thus the resolution came into force.

“Parent” is defined in section 87(1) of the Act of 1980 in terms which expressly excluded a father of an illegitimate child. So it follows that the father in the present case was not a person upon whom it was necessary for the local authority to serve notice of their resolution and was not a person who had any right to object to the local authority assuming the parental rights and duties with regard to the two children.

The other statutory provisions that are relevant here are those contained in the Guardianship of Minors Act 1971. Section 9 provides:

“(1) The court may, on the application of the mother or father of a minor (who may apply without next friend), make such order regarding—(a) the custody of the minor; and (b) the right of access to the minor of his mother or father, as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father.”

By section 14(1) of the Act of 1971, the word “father” is defined as including the father of an illegitimate child.

So on the face of it, although the father being in that position was not entitled and had no power to object to the action of the local authority in resolving to take over the parental rights and duties, he is a person who prima facie was entitled to make an application under section 9 of the Act of 1971. It was of course under that section that he made the application for custody and then the application for an order of interim access.

We have been referred to a number of authorities, but those which deal with the points at issue are not binding upon us, as I shall explain. The first in point of time is the decision of a Divisional Court of the Family Division, *In re H. (K. and M.) (Infants)* [1972] 3 All E.R. 769. That was a case in which a local authority had made an order under the predecessor of section 3 of the Act of 1980, which was formerly section 2 of the Children Act 1948, vesting in themselves the rights and duties of the mother in respect of her two illegitimate children. As here, the putative father made an application under section 9 of the Act of 1971 for an order granting him access to the children. Justices granted him access. The local authority appealed contending that while they had no objection to the father having access, the discretion to grant access was theirs and not that of the court. According to the headnote of the report:

“Held—While H, as the putative father, had a right under sections 9(1) and 14(1) of the Act of 1971 to make an application to the justices for an order granting access, the fact that at the material time the local authority had already assumed parental rights by virtue of an order under section 2(1)(b) of the Children Act 1948, left the justices no alternative but to decline the application and leave the discretion with regard to access to the local authority; accordingly the appeal would be allowed and the order of the justices rescinded.”

The main judgment was given by Payne J., Latey J. agreeing with him. Payne J., having set out sections 9(1) and 14(1) of the Act of 1971, said, at p. 771:

“That clearly gives in appropriate circumstances to the father of an illegitimate child the right to apply to the court for custody and/or

access, and that has to be reconciled with the statutory powers of the local authority under the Children Act 1948. It so happens that this kind of conflict has received the consideration of the courts in a number of different circumstances and over a number of years; the authority to which we have been referred this morning is *In re M. (an Infant)* [1961] Ch. 328.”

He then sets out the facts in that case, which can be summarised as follows. An illegitimate child was taken into care by a local authority, and they passed a resolution that the rights and powers of the mother should be vested in them. She later made an application for the child to become a ward of the court. Payne J. said, at p. 772:

“That brought before the Court of Appeal in due course a problem similar to the one before us; what should the court do where on the one hand there is an order under the Children Act 1948, and on the other hand, in *In re M.*’s case [1961] Ch. 328, a wardship order in Chancery, in this case, an application to the justices under the Guardianship of Minors Act 1971. The conflict is resolved in this way. Lord Evershed M.R., said at p. 341: ‘What then is the effect of this statute to which I have made such references as occur to me to be necessary? I think that the effect may be stated in two propositions. First, the enactment is such that in a case like the present there is in the Act a clear and comprehensive scheme laid down, (what Lord Sumner called a *modus operandi* in *Attorney-General v. De Keyser’s Royal Hotel Ltd.* [1921] A.C. 508, 561) involving positive duties imposed by Parliament on the local authority and a precise formulation of the way in which the consequent powers are to be exercised, and, secondly, that as regards these duties and powers the discretion is conferred on the authority by the words—“appears to them”—which have occurred in the citations that I have made . . . On those premises, that is to say in the absence of any challenge as to the propriety of what the local authority or its officers have done as distinct from their wisdom, I feel compelled, by the clear indication of the language to which I have alluded in the statute, to conclude that this matter of judging the present best interests of the child in the circumstances of this case has been placed by Parliament in the exclusive jurisdiction of the local authority.’

“Speaking for myself, that is the way in which I would approach the present case. There is no challenge to the propriety of what the local authority have done. Their resolution was passed under section 2 with the concurrence of the mother and, although the father of the illegitimate child has the right given him by the Guardianship of Minors Act 1971 to apply to the court for an order for custody or access, the court must then apply section 9 under which it may, on the application of the father or mother, make such order as the court thinks fit. Bearing in mind the existence of the order under section 2 of the Children Act 1948, it seems to me that the justices in the circumstances of this case had no alternative but to decline the application of the father and to leave the discretion with regard to access to the local authority.”

That was applied in relation to custody in a case in the Divisional Court of the Queen’s Bench Division in *Reg. v. Oxford Justices, Ex*

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A *parte H.* [1975] Q.B. 1, in which Bagnall J. giving the judgment, with which Lord Widgery C.J. and Bridge J. agreed, cited a part of the judgment of Payne J. which I have just read, and then said, at p. 7:

B “It is to be observed that the attitude which the justices in the present case had taken is to answer what Payne J. called the second limb of the argument in the affirmative. But in that case itself it seems to me to be clear that the Divisional Court held that there was jurisdiction but that the jurisdiction had to be exercised in the light of the statutory scheme contained in the Act of 1948, and that when Payne J. observed that the justices had no alternative but to decline the application in front of them, his reference to no alternative existing in the circumstances of that case was consistent only with a view that the justices had jurisdiction to determine the case but had to take all circumstances, including the statute, into account.”

C That was also applied by Waite J. in *Reg. v. Oxford Justices, Ex parte D.* [1987] Q.B. 199 where he granted an order of mandamus requiring the justices to issue a summons on the application of a father.

D There are possible difficulties as to the extent of the order made by Waite J. I do not find it necessary to comment about that. But so far as the earlier authorities are concerned, while of course they are not binding upon us, I must regard them with respect as both correctly decided and as establishing the principles which we should apply.

E The first principle they do establish is that there is jurisdiction, that is to say the father was entitled to make his application for interim access under the Act of 1971. So one comes to the second point argued by Mr. Bishop that in the circumstances, where the rights and duties of the parents are vested in the local authority, a court faced with such an application really has no alternative, in Payne J.’s words, but to refuse the application.

F The same point but in a somewhat different form was the subject of a decision of the House of Lords in *A. v. Liverpool City Council* [1982] A.C. 363. In that case the local authority had a care order under section 1 of the Children and Young Persons Act 1969. The mother, who was originally allowed weekly access, was told that her access was going to be much restricted because the county council took the view it was not in the child’s best interests. In order to challenge that decision she commenced wardship proceedings seeking an order for defined access to the child and care and control of him. Balcombe J. held that while strictly there was a right for the application for wardship to be made, it should not be continued while the care order was enforced. On direct appeal to the House of Lords the appeal was dismissed. Lord Wilberforce said, at pp. 372–373:

H “It was suggested that, as the local authority is put effectively in the position of the natural parent (see section 24(2) of the Act of 1969), the High Court must have the same power, in the interest of the infant, to review and control its actions, as it undoubtedly has over those of the natural parent. But I can see no parallel between the responsibilities of a natural parent and those entrusted by Parliament by statute to a public authority possessed of the necessary administrative apparatus to form and carry out, if necessary against the wishes of the natural parent, its discretionary decisions. In my opinion Parliament has marked out an area in which, subject to the

enacted limitations and safeguards, decisions for the child's welfare are removed from the parents and from supervision by the courts. This is not to say that the inherent jurisdiction of the High Court is taken away. Any child, whether under care or not, can be made a ward of court by the procedure of section 9(2) of the Law Reform (Miscellaneous Provisions) Act 1949. In cases (and the present is an example) where the court perceives that the action sought of it is within the sphere of discretion of the local authority, it will make no order and the wardship will lapse. But in some instances, there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend. Sometimes the local authority itself may invite the supplementary assistance of the court. Then the wardship may be continued with a view to action by the court. The court's general inherent power is always available to fill gaps or to supplement the powers of the local authority: what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority."

Then he referred to *In re M. (An Infant)* [1961] Ch. 328 and *In re W. (Minors) (Wardship: Jurisdiction)* [1980] Fam. 60, and concluded that they were correctly decided. Lord Roskill said, at p. 377:

"I am of the clear opinion that, while the prerogative jurisdiction of the court in wardship cases remains, the exercise of that jurisdiction has been and must continue to be treated as circumscribed by the existence of the far-ranging statutory code which entrusts the care and control of deprived children to local authorities. It follows that the undoubted wardship jurisdiction must not be exercised so as to interfere with the day-to-day administration by local authorities of that statutory control."

That general principle was repeated by their Lordships' House in *In re W. (A Minor) (Wardship: Jurisdiction)* [1985] A.C. 791, to which we were referred, and from which I do not find it necessary to cite.

Mr. Davies argues with force that if the principle of *A. v. Liverpool City Council* [1982] A.C. 363 is applied to a case such as this where there is jurisdiction, that is to say there is the right for the father to make an application under the Act of 1971, but having made his application he must inevitably, or almost inevitably, fail because of the parental rights and duties being vested in the local authority under section 3 of the Act of 1980, that, says Mr. Davies, produces a nonsensical situation. It cannot be assumed that Parliament meant such a situation to arise out of these statutory provisions. And he suggests that the proper application of the principles of *A. v. Liverpool City Council* in relation to the present facts is that if the local authority had been willing to allow access, the court would have no power—and certainly should not exercise a power—to alter the terms of conditions of that access. But if what is in issue is the basic question whether there should be any access at all, then, since the statute clearly gives jurisdiction for an application to be made for access, the court must have power to determine that question and to determine it on the merits.

For my part it seems to me that in his judgment in *In re H. (K. and M.) (Infants)* [1972] 3 All E.R. 769 Payne J. correctly analysed the

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A position and really anticipated the decision of the House of Lords in *A. v. Liverpool City Council* [1982] A.C. 363. It seems to me that the basic
fundamental proposition enunciated in the passages from the speeches of
their Lordships to which I have referred apply equally in the
circumstances of this case.

B For that reason, in my judgment, the assistant recorder could only
properly exercise the power vested in him by refusing the application for
access made by the father. For those reasons I would allow the appeal
and quash the order for access that he made.

C BALCOMBE L.J. I agree. This case concerns two children who are in
the care of the local authority under a parental rights resolution made
under section 3 of the Child Care Act 1980. The applicant, the
respondent to this appeal, is their father, but they are not his legitimate
children. For the purposes of this appeal the local authority accepted
that this father can apply for custody of these children under section
9(1) of the Guardianship of Minors Act 1971, a concession which
depends, in part at any rate, upon the decision, to which Glidewell L.J.
has referred, of *Reg. v. Oxford Justices, Ex parte H.* [1975] Q.B. 1.
D Certainly for the purposes of this appeal, that concession having been
made, I am prepared to accept that he has such a right, and indeed that
the application, namely the application for custody, must be determined
on its merits and that, if it is successful, these children will cease to be
in the care of the local authority. I say "for the purposes of this appeal"
because, as I understand it, there is a possibility that the local authority
will wish to raise the question of jurisdiction on the custody application.

E Similarly, section 9(1) of the Guardianship of Minors Act 1971
confers the right on this father to apply for access to these children.
However *In re H. (K. and M.) (Infants)* [1972] 3 All E.R. 769, to which
Glidewell L.J. has already referred, if correctly decided—as Glidewell
L.J. has said it is a decision not binding on this court—is to the effect
that, although there is jurisdiction for the court to receive such an
application, it must, as a matter of course, refuse to exercise that
F jurisdiction, because, as Payne J. put it in the passage, at p. 272, to
which Glidewell L.J. has referred, it must not interfere with the exercise
by a local authority of its statutory powers in relation to children who
are in the care of that local authority.

G It is to be noted that Payne J. followed the decision of the Court of
Appeal in *In re M. (An Infant)* [1961] Ch. 328, and did it on the basis of
a point of principle, and *In re H. (K. and M.) (Infants)* [1972] 3 All
E.R. 769 is not, as Mr. Davies suggested to us, distinguishable on its
facts, in that, so he submitted, what was there in issue was not the
principle of access but the quantum of access. As I read that decision, it
is clear that both Payne J. and Latey J. took the view that although
there might well be jurisdiction, it was not a jurisdiction which should
be exercised where it would impinge on the statutory powers entrusted
H by Parliament to the local authority.

That approach is entirely consistent with the approach which has
since been adopted by the House of Lords in the two well known cases
of *A. v. Liverpool City Council* [1982] A.C. 363 and *In re W. (A Minor)*
(*Wardship: Jurisdiction*) [1985] A.C. 791. I do not need to refer to those
cases. Glidewell L.J. has referred to *A. v. Liverpool City Council*. Both
are so well known that they probably need no further reference or
citation on my part.

Finally I should mention the decision of Waite J. in *Reg. v. Oxford Justices, Ex parte D.* [1987] Q.B. 199. That case again concerned the father of an illegitimate child. He had applied for summonses, again under section 9 of the Guardianship of Minors Act 1971, seeking custody of, and access to, the child. The justices issued the summons for custody, but refused to issue a summons for access on the ground that they had no jurisdiction to order access to a child in the care of a local authority. The father then applied for judicial review. Waite J. granted judicial review, ordering mandamus directed to the clerk to the justices to issue a summons to hear the father's application for access.

For my part I am not certain that I would have come to the same decision in that case. Indeed I suspect I would not. As the judge said, undoubtedly there was jurisdiction. But if the decision of *In re H. (K. and M.) (Infants)* [1972] 3 All E.R. 769 was right—and in my judgment it clearly was right—then the issue of the summons was pointless, because when it came before the justices, they would have been bound to have said: "We cannot exercise this jurisdiction." Where Waite J. said, at p. 205:

"Those merits"—that is the merits of the father's access application—"will in due course have to be considered, for whatever strength or weakness they may have, by the justices when they hear the evidence and investigate all the circumstances of the case in detail."

in my respectful view he was wrong. The application should never have been heard on its merits. In those circumstances it may well be that as a matter of discretion he should have refused judicial review. It does not seem to me to be a useful way of exercising the jurisdiction to order judicial review to require the clerk to the justices to issue a summons, when the application must inevitably be refused.

I therefore agree that this appeal must be allowed and the order for interim access which the assistant recorder made be discharged, but adding, as I do, and concurring with Glidewell L.J., that the assistant recorder can hardly be criticised for making the order which he did when none of these points was taken before him and he did not have the assistance which we have had of both reference to the authorities and full argument from counsel.

Appeal allowed.

No order as to costs.

Legal aid taxation of applicant's costs.

Leave to appeal refused.

Solicitors: Chief Solicitor, South Glamorgan County Council; Edwards Geldard, Cardiff.

S. H.

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A

[PRIVY COUNCIL]

ALEXANDER ROBERT DOUGHTY APPELLANT

AND

GENERAL DENTAL COUNCIL RESPONDENT

B

[APPEAL FROM THE PROFESSIONAL CONDUCT COMMITTEE OF THE GENERAL
DENTAL COUNCIL]1987 June 24;
July 29Lord Bridge of Harwich, Lord Griffiths
and Lord Mackay of Clashfern

C

*Dentist—Discipline—“Serious professional misconduct”—Failure to
carry out treatment with reasonable skill and care—No allegation
of dishonesty—Whether serious professional misconduct—Dentists
Act 1984 (c. 24), s. 27(1)(b)*

D

A dentist was charged before the Professional Conduct Committee of the General Dental Council under section 27(1) of the Dentists Act 1984¹ with serious professional misconduct in (1) that he failed to retain the radiographs of 19 National Health Service patients for a reasonable period after completion of treatment and failed to submit them to the Dental Estimates Board when required to do so; (2) that he provided six patients with dental treatment in the course of which he failed to exercise a proper degree of skill and attention; and (3) that he provided four patients with dental treatment in the course of which he failed satisfactorily to complete the treatment required by the patient. The legal assessor advised the committee that in considering charge 3 they could take into account treatment which was not required as well as that which was not satisfactorily completed. The committee found the undisputed facts alleged in charge 1 proved, charge 2 proved with regard to five patients and charge 3 with regard to three patients. They judged the dentist to have been guilty of serious professional misconduct in relation to the facts proved against him in each charge, and directed that his name should be erased from the dentists' register.

E

F

On the dentist's appeal to the Judicial Committee:—

Held, dismissing the appeal, (1) that “serious professional misconduct” in section 27(1)(b) of the Dentists Act 1984 was not to be construed so that it had the same meaning as the repealed charge of “infamous or disgraceful conduct in a professional respect” within section 25(1)(b) of the Dentists Act 1957; that serious professional misconduct was a wide expression that was not restricted to dishonesty or moral turpitude but included all professional conduct, whether by acts of omission or commission, by which a dentist had seriously failed to attain the standards of conduct which members of the dental profession expected (post, p. 774D–H).

G

H

Felix v. General Dental Council [1960] A.C. 704, P.C. distinguished.

(2) That, although the legal assessor had wrongly advised the committee in relation to charge 3 that a failure to complete

¹ Dentists Act 1984, s. 27: “(1) Where the Professional Conduct Committee are satisfied that a registered dentist . . . (b) has been guilty of serious professional misconduct, they may, if they think fit, determine that his name shall be erased from the register or that his registration in it shall be suspended for such period not exceeding 12 months as may be specified in their determination.”

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satisfactorily the treatment which a patient required could include giving the patient unnecessary treatment, the misdirection had caused no prejudice to the dentist or miscarriage of justice and was of insufficient significance to invalidate the committee's decision; and that, therefore, since on an objective assessment of the particular patients' requirements no dentist of reasonable skill and care would have acted in the performance of his professional duties as the dentist had done, the Board was satisfied that the committee were entitled to find the dentist guilty of serious professional misconduct and to direct that his name should be erased from the register (post, pp. 772G-H, 773B, 775A-B, E, F-G).

Sivarajah v. General Medical Council [1964] 1 W.L.R. 112, P.C. applied.

The following cases are referred to in the judgment of their Lordships:

Felix v. General Dental Council [1960] A.C. 704; [1960] 2 W.L.R. 934; [1960] 2 All E.R. 391, P.C.

McEniff v. General Dental Council [1980] 1 W.L.R. 328; [1980] 1 All E.R. 461, P.C.

Rex v. General Council of Medical Education and Registration of the United Kingdom [1930] 1 K.B. 562, C.A.

Sivarajah v. General Medical Council [1964] 1 W.L.R. 112; [1964] 1 All E.R. 504, P.C.

The following additional case was cited in argument:

Libman v. General Medical Council [1972] A.C. 217; [1972] 2 W.L.R. 272; [1972] 1 All E.R. 798, P.C.

APPEAL (No. 15 of 1987) by Alexander Robert Doughty, a registered dentist, from a determination made by the Professional Conduct Committee of the General Dental Council on 12 March 1987, whereby the committee found that he had been guilty of serious professional misconduct in relation to three charges and directed that his name should be erased from the dentists' register.

The facts are stated in the judgment of their Lordships.

Kuldip Singh for the dentist.

E. J. Bevan for the General Dental Council.

Cur. adv. vult.

29 July. The judgment of their Lordships was delivered by LORD MACKAY OF CLASHFERN.

This is an appeal from a decision of the Professional Conduct Committee of the General Dental Council on 12 March 1987 that the appellant dentist had been guilty of serious professional misconduct in relation to three charges and that his name should be erased from the dentists' register. The three charges in question were:

"That being a registered dentist: 1. Between 10 January and 26 October 1984 you accepted 19 patients, whose names and addresses are shown on list 'A' (which is attached to the charge) for dental treatment as National Health Service patients, and thereafter provided them with dental treatment in the course of which, having

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A obtained radiographs of these patients, you: (a) failed to retain those radiographs for a reasonable period of time after completion of the treatment; (b) failed to submit those radiographs to the Dental Estimates Board when required to do so by a letter from the board dated 27 November 1984. 2. Between 5 June and 16 November 1984 you accepted six patients, whose names and addresses are shown on list 'B' (which is attached to the charge) for dental treatment as National Health Service patients and thereafter provided them with dental treatment in the course of which you failed to exercise a proper degree of skill and attention. 3. Between 21 August and 5 October 1984 you accepted four patients, whose names and addresses are shown on list 'C' (which is attached to the charge) for dental treatment as National Health Service patients, and thereafter provided them with dental treatment in the course of which you failed satisfactorily to complete the treatment required by the patient. . . . And that in relation to the facts alleged in each of the above charges you have been guilty of serious professional misconduct."

D At the close of the case for the General Dental Council submissions were made on behalf of the dentist. These were successful in relation to charge 4 which their Lordships have not narrated and with which this appeal is accordingly not concerned and also in relation to one of the patients mentioned in charge 2. At the conclusion of the evidence relating to the facts alleged the President announced the decision in the following terms:

E "the committee has decided, that the facts alleged against you in charge 1, which you have admitted, in charge 2, in relation to each of the five remaining patients and in charge 3 with the exception of those in relation to the patient Mr. Goldberger, have been proved to the satisfaction of the committee. In relation to the facts alleged against you in respect of Mr. Goldberger, you have not been guilty of serious professional misconduct."

F Thereafter the committee went on to hear evidence led on behalf of the dentist directed to whether the facts found proved constituted serious professional misconduct and heard counsel on that matter. The committee announced their decision in the following terms:

G "In relation to the facts alleged in head 1 of the charge which have been admitted, the committee finds that you have been guilty of serious professional misconduct. In relation to the facts alleged against you in charge 2 in respect of the five remaining patients and in charge 3 in respect of the three remaining patients, the committee finds that you have been guilty of serious professional misconduct."

H The committee directed that the dentist's name be erased from the dentists' register.

As the committee decision records, the facts alleged in charge 1 were admitted on behalf of the dentist. The facts alleged in charge 2 in respect of two of the named patients were admitted on behalf of the dentist. On charge 2 evidence was led from the remaining patients and from Mr. Taylor, a qualified dentist who was a member of the Dental Estimates Board and had been in general practice from 1958 until he

took up his position with the Dental Estimates Board in August 1978. He gave evidence criticising root canal treatment that had been given by the dentist to the three remaining patients in respect of whom the facts alleged in the charge were found proved. The criticism was offered under two heads, first, that the root canal treatments were not necessary and second, that the root canal treatments were not properly carried out. In respect of one of the patients criticism was offered under both heads and in respect of the remaining patients under one head for each. In relation to charge 3, evidence was given by the three patients in respect of whom the facts alleged in the charge were found proved and also by Mrs. Baker, an officer of the dental staff of the Department of Health and Social Security who qualified as a dentist in 1970 and took a diploma in orthodontics in 1977. She gave evidence in respect of two of these patients and evidence in respect of the third was given by Mr. Davidson, a registered dental practitioner qualified in 1950 now employed as an officer of the dental staff of the Department of Health and Social Security. Again criticism was offered under the same two heads: under both heads in respect of two of the patients and under the second head in respect of the third.

At the hearing of this appeal counsel for the dentist in his very clear and forceful submissions first pointed to the distinction in wording between charges 2 and 3. He submitted that charge 3 was not concerned with whether or not the treatment in question was necessary but only with whether it was satisfactorily completed. This question had been discussed at the hearing before the committee at the stage when counsel then appearing for the dentist was making submissions at the close of the evidence for the General Dental Council. After discussion the legal assessor to the committee gave his view as follows:

“The word ‘required’ is a simple English word which should be given a simple English meaning. It is wide enough to cover this aspect of the matter, namely, the provision of treatment which was not in fact necessary to be completed at all, although the patient may have agreed that it was; so that it is possible for you, under charge 3, to look at, as a head of the charge, the provision of root canal treatment which was not necessary as well as that which was poorly executed.”

Counsel for the General Dental Council submitted that the wording of charge 3 was wide enough to cover allegations that the treatment criticised was unnecessary.

Their Lordships cannot accept the General Dental Council’s submission. An allegation of failure “satisfactorily to complete the treatment required by the patient” cannot, by any stretch of language be read as including an allegation of having administered treatment which was not necessary. It follows that the legal assessor’s direction was erroneous but not necessarily that the committee’s decision was thereby invalidated. In *Sivarajah v. General Medical Council* [1964] 1 W.L.R. 112, 117, Lord Guest said:

“Thus what might amount to a misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the committee’s decision. The question is whether it can ‘fairly be thought to have been of sufficient significance to the result to invalidate the committee’s decision.’”

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A

This was followed in *McEniff v. General Dental Council* [1980] 1 W.L.R. 328, 332. In the present case there is not and could not have been any suggestion that the evidence given in relation to charge 2 was not covered by the words of that charge and it is difficult to see why the wording of charge 3 is different, since the evidence given criticising the dentist's treatment was broadly similar under both charges. No objection was taken to the evidence as it was being led and the dentist had full opportunity to meet it in his own evidence. In the whole circumstances of this appeal their Lordships are satisfied that the misdirection contained in the legal assessor's observations which have been quoted neither prejudiced the dentist nor caused any miscarriage of justice. It did not therefore invalidate the committee's decision.

B

C

The next point taken by counsel for the dentist was that in order to prove charges 2 and 3 it was necessary to show that the opinion held by the dentist in relation to the treatment was not honestly held by him and could not honestly be held by a dentist. This submission was founded principally on the observations of Lord Jenkins giving the judgment of this Board in *Felix v. General Dental Council* [1960] A.C. 704. His Lordship said, at p. 721:

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"With respect to the treatment alleged to have been unnecessary, the evidence (as their Lordships have already observed) showed that according to the appellant, he honestly believed it to be necessary (or likely to be found necessary), while the dentists who disagreed with him did not claim that the opinion expressed by the appellant was one which no dentist could honestly hold. In this state of the evidence their Lordships think it would be wrong to impute to the Disciplinary Committee an implied finding to the effect that the appellant did not honestly hold that opinion. An honestly held opinion, even if wrong, in their Lordships' view plainly cannot amount to infamous or disgraceful conduct."

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Counsel for the General Dental Council submitted that the evidence was sufficient to entitle the committee both to hold the facts alleged in charges 2 and 3 proved so far as they had done so and also to hold that those facts constituted serious professional misconduct.

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In considering the applicability of Lord Jenkins' observations to the circumstances of the present appeal, it has to be noted that Lord Jenkins was speaking of a case in which dishonesty was very much the issue and in the context of the statutory provision which was the basis of the proceedings in *Felix v. General Dental Council* namely, section 25 of the Dentists Act 1957. So far as relevant it was in these terms:

"(1) A registered dentist who either before or after registration . . .
(b) has been guilty of any infamous or disgraceful conduct in a professional respect, shall be liable to have his name erased from the register."

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At that time this was the only penalty available in respect of such conduct. Section 15(1) of the Dentists Act 1983 provided:

"For section 25(1) of the principal Act [the Dentists Act 1957] (erasure from register for crime or infamous conduct) there shall be substituted—(1) A registered dentist who (whether before or after registration) . . . (b) has been guilty of serious professional misconduct, shall be liable to have his name erased from the register, or to have his registration in it suspended, in accordance with section 26(3) of this Act; . . ."

The suspension referred to is suspension for such period not exceeding 12 months as may be specified in the committee's determination. Counsel for the dentist suggests that this change in language was not intended to effect a change in substance. In *Rex v. General Council of Medical Education and Registration of the United Kingdom* [1930] 1 K.B. 562, 569, referring to the statutory provision there applicable, namely "infamous conduct in any professional respect," Scrutton L.J. said:

"It is a great pity that the word 'infamous' is used to describe the conduct of a medical practitioner who advertises. As in the case of the Bar so in the medical profession advertising is serious misconduct in a professional respect and that is all that is meant by the phrase 'infamous conduct'; it means no more than serious misconduct judged according to the rules written or unwritten governing the profession."

In the General Medical Council's booklet entitled *Professional Conduct and Discipline: Fitness to Practise* (April 1985), p. 3, the General Medical Council stated:

"In proposing the substitution of the expression 'serious professional misconduct' for the phrase 'infamous conduct in a professional respect' the Council intended that the phrases should have the same significance."

Their Lordships readily accept that what was infamous or disgraceful conduct in a professional respect would also constitute serious professional misconduct but they consider that it would not be right to require the General Dental Council to establish now that the conduct complained of was infamous or disgraceful and therefore not right to apply the criteria which Lord Jenkins derived from the dictionary definitions of these words which he quoted in *Felix v. General Dental Council* [1960] A.C. 704, 719. Their Lordships consider it relevant, in reaching a conclusion upon whether Parliament intended by the change of wording to make a change of substance, to notice that in addition to this change and in close conjunction with it the additional and much less severe penalty of suspension for a period not exceeding 12 months was provided. Further, in terms of section 1(2) of the Dentists Act 1984 which is the statute presently applicable:

"It shall be the general concern of the Council to promote high standards of dental education at all its stages and high standards of professional conduct among dentists. . ."

In the light of these considerations in their Lordships' view what is now required is that the General Dental Council should establish conduct connected with his profession in which the dentist concerned has fallen short, by omission or commission, of the standards of conduct expected among dentists and that such falling short as is established should be serious. On an appeal to this Board, the Board has the responsibility of deciding whether the committee were entitled to take the view that the evidence established that there had been a falling short of these standards and also entitled to take the view that such falling short as was established was serious.

In the present case the three charges of serious professional misconduct of which the dentist has been found guilty do not impute any

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A dishonesty on his part. It was not suggested that he was carrying out unnecessary treatments for the purpose of enhancing his remuneration. What was suggested was that, judged by proper professional standards in the light of the objective facts about the individual patients that were presented in evidence to the committee, the dental treatments criticised as unnecessary would be treatments that no dentist of reasonable skill exercising reasonable care would carry out. It was for the committee with their expertise in this matter to judge as between the witnesses called by the General Dental Council and the dentist, who had every opportunity to give his own reasons and explanations for what he did, and to judge whether the allegation was made out subject to the matter already dealt with in relation to charge 3. The point taken by counsel for the dentist at this stage of his submission was pressed primarily in relation to the criticisms of the dentist's treatment as unnecessary. With regard to the other criticisms it appears to their Lordships that the failures admitted in relation to charge 1 and admitted in part and proved to a further extent in relation to charge 2 and proved in relation to charge 3 amounted to professional misconduct. Whether the misconduct was serious depended on a number of factors, for example in relation to charge 1 on the number of patients in respect of whom the failure occurred and the importance of preserving the record for the well being of the patient and as a basis for decision on future treatment of the patient. In relation to charges 2 and 3 the seriousness of the conduct depended on the appreciation of such factors as the number of patients involved, the number of treatments criticised in relation to each patient and particularly in relation to unsatisfactory treatments, the nature and extent of the failure to complete the treatment properly. On all of these matters the committee were particularly well qualified to reach a view and their Lordships see no reason to disagree with their findings.

Counsel for the dentist stated that the dentist had ceased practising in the middle of 1986 and that he had no present intention to return to practice but he was prosecuting this appeal in order to clear his name. Their Lordships are happy to make clear that in their judgment the findings against the dentist do not import any moral stigma. All the failures found proved related only to work which the dentist carried out as a dentist but in their Lordships' opinion these were failures of a kind which the committee were entitled to hold rendered it right for them to direct erasure of the dentist's name from the register of dentists. This is a matter very much for the professional judgment of the committee with which their Lordships see no cause to interfere.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The dentist must pay the General Dental Council's costs before this Board.

Solicitors: Chabra Cass & Co.; Waterhouse & Co.

S. S.

[1987]

[PRIVY COUNCIL]

YUEN KUN YEU AND OTHERS APPELLANTS
 AND
 ATTORNEY-GENERAL OF HONG KONG RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1987 May 5, 6, 7, 11;
 June 10

Lord Keith of Kinkel, Lord Templeman,
 Lord Griffiths, Lord Oliver of Aylmerton
 and Sir Robert Megarry

Negligence—Duty of care to whom?—Commissioner of Deposit-taking Companies—Statutory protection in Hong Kong for depositors—Commissioner registering company—Company's affairs allegedly conducted fraudulently, speculatively and to detriment of depositors—Whether commissioner in discharge of statutory powers owing duty of care to potential depositors—Deposit-taking Companies Ordinance (Laws of Hong Kong, 1983 rev., c. 328), ss. 10(1)(2)(e), 14(1)(d)

The Commissioner of Deposit-taking Companies registered a company as a deposit-taking company pursuant to section 10 of the Deposit-taking Companies Ordinance.¹ The company subsequently went into liquidation. The plaintiffs, who lost the moneys they had deposited with the company, brought an action for damages for negligence against the Attorney-General of Hong Kong, representing the commissioner, alleging that they had made the deposits in reliance upon the company's registration and that the commissioner knew or ought to have known had he taken reasonable care that the company's affairs were being conducted fraudulently, speculatively and to the detriment of its depositors, that he should have ensured the company's compliance with the Ordinance, and that he ought not to have registered the company or that he should have revoked its registration, under section 14(1) of the Ordinance before the plaintiffs made their deposits.* On an application by the Attorney-General to the High Court of Hong Kong under R.S.C., Ord. 18, r. 19, the judge ordered the plaintiffs' statement of claim to be struck out as disclosing no reasonable cause of action. The Court of Appeal of Hong Kong affirmed that decision.

On the plaintiffs' appeal to the Judicial Committee:—

Held, dismissing the appeal, (1) that a close and direct relationship between the parties had to be established before

¹ Deposit-taking Companies Ordinance, s. 10: "(1) Subject to subsection (2), the Commissioner shall, on receipt of an application in accordance with section 9, register a company as a registered deposit-taking company. (2) . . . the Commissioner shall refuse to register a company under subsection (1) if— . . . (e) it appears to the Commissioner that, by reason of any circumstances whatsoever, the company is not a fit and proper body to be registered."

S. 14: "(1) . . . the Commissioner may revoke the registration of a deposit-taking company if— . . . (d) it appears to him that—(i) the company is not a fit and proper body to remain registered; . . ."

* *Reporter's note.* In 1983 section 41 of the Deposit-taking Companies Ordinance was added, which provides: "(1) No liability shall be incurred by— . . . (b) the Commissioner: . . . as a result of anything done or omitted to be done by him bona fide in the exercise or purported exercise of any functions conferred or imposed by or under this Ordinance . . ."

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liability in tort for negligence could arise, and in determining that question all the circumstances had to be taken into consideration including the reasonable contemplation of harm being caused to the plaintiff by the defendant's failure to take reasonable care, although foreseeability of injury by itself was insufficient to create a duty of care; that although, on the plaintiffs' allegations, information about the company giving rise to the suspicion that its business was being conducted to the detriment of its depositors was available to the commissioner but not to members of the public, the commissioner had no power under the Deposit-taking Companies Ordinance to control the management of deposit-taking companies, and there was no special relationship between the commissioner and the company and its managers which placed the commissioner under a duty to take reasonable care to prevent the company and its managers causing financial loss to future depositors with the company; and that, therefore, in all the circumstances the relations between the commissioner and the plaintiffs were insufficiently close and direct for him to owe them, as members of an unascertained class of potential depositors with deposit-taking companies in Hong Kong, a duty in performing his functions under the Ordinance to take reasonable care to prevent them suffering financial loss by reason of the fraudulent and improvident conduct of the company's affairs (post, pp. 783C-D, 785G-786B, G-787B, B-D).

Dicta of Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580, 581, H.L.(Sc.) applied.

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004, H.L.(E.) distinguished.

Dictum of Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752, H.L.(E.) considered.

(2) That the commissioner was under no liability to the plaintiffs for negligent misrepresentation since the Ordinance merely placed him under a duty to supervise deposit-taking companies in the public interest and imposed no special responsibility on him towards individual potential depositors, and that by registering the company and allowing it to remain registered the commissioner was in fact making no representation as to the creditworthiness of the company on which the plaintiffs were entitled to rely; and that, accordingly, the plaintiffs' statement of claim had properly been struck out as disclosing no reasonable cause of action (post, pp. 787H-788A, B-C, 789F-G).

Hill v. Chief Constable of West Yorkshire [1987] 2 W.L.R. 1126, C.A. applied.

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465, H.L.(E.) distinguished.

Per curiam. For the future it should be recognised that the two-stage test in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752, is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care (post, p. 785F-G).

Decision of the Court of Appeal of Hong Kong [1986] H.K.L.R. 783 affirmed.

The following cases are referred to in the judgment of their Lordships:

Anns v. Merton London Borough Council [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.)

Baird v. The Queen (1983) 148 D.L.R. (3d) 1

Council of the Shire of Sutherland v. Heyman (1985) 59 A.L.J.R. 564

Curran v. Northern Ireland Co-ownership Housing Association Ltd. [1987] 2 W.L.R. 1043; [1987] 2 All E.R. 13, H.L.(N.I.)

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Cutler v. Wordsworth Stadium [1949] A.C. 398; [1949] 1 All E.R. 544, H.L.(E.)

Donoghue v. Stevenson [1932] A.C. 562, H.L.(Sc.)

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.(E.)

Hill v. Chief Constable of West Yorkshire [1987] 2 W.L.R. 1126; [1987] 1 All E.R. 1173, C.A.

Jaensch v. Coffey (1984) 58 A.L.J.R. 426

Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520; [1982] 3 W.L.R. 477; [1982] 3 All E.R. 201, H.L.(Sc.)

Leigh and Silavan Ltd. v. Aliakmon Shipping Co. Ltd. [1986] A.C. 785; [1986] 2 W.L.R. 902; [1986] 2 All E.R. 145, H.L.(E.)

McLoughlin v. O'Brian [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298, H.L.(E.)

Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210; [1984] 3 W.L.R. 953; [1984] 3 All E.R. 529, H.L.(E.)

Rondel v. Worsley [1969] 1 A.C. 191; [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993, H.L.(E.)

Smith v. Leurs (1945) 70 C.L.R. 256

States of Guernsey v. Firth (unreported), 14 May 1981, Court of Appeal of Guernsey (Civil Division) (Appeal No. 10 Civil)

The following additional cases were cited in argument:

Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd. [1986] A.C. 1; [1985] 3 W.L.R. 381; [1985] 2 All E.R. 935, P.C.

East Suffolk Rivers Catchment Board v. Kent [1941] A.C. 74; [1940] 4 All E.R. 527, H.L.(E.)

Fellowes v. Rother District Council [1983] 1 All E.R. 513

Muirhead v. Industrial Tank Specialities Ltd. [1986] Q.B. 507; [1985] 3 W.L.R. 993; [1985] 3 All E.R. 705, C.A.

Smith v. Littlewoods Organisation Ltd. [1987] 2 W.L.R. 480; [1987] 1 All E.R. 710, H.L.(Sc.)

Takaro Properties Ltd. v. Rowling [1978] 2 N.Z.L.R. 314

Tate & Lyle Food and Distribution Ltd. v. Greater London Council [1983] 2 A.C. 509; [1983] 2 W.L.R. 649; [1983] 1 All E.R. 1159, H.L.(E.)

APPEAL (No. 56 of 1986) by the plaintiffs, Yuen Kun Yeu, Lau Ka Kei, Ting Ah Lam and Liem Jen Djiang, with leave of the Court of Appeal of Hong Kong, from the judgment of the Court of Appeal of Hong Kong (Huggins V.-P., Fuad and Kempster JJ.A.) given on 7 March 1986 dismissing the appeal of the plaintiffs from the judgment of Jones J. on 9 July 1985 in the High Court of Hong Kong whereby it was ordered that the plaintiffs' statement of claim against the Attorney-General of Hong Kong for and on behalf of the Commissioner of Deposit-taking Companies be struck out under R.S.C., Ord. 18, r. 19, as disclosing no reasonable cause of action.

The facts are stated in the judgment of their Lordships.

Michael Beloff Q.C., *Nicholas Pirie* (of the English and Hong Kong Bars) and *Paul Stinchcombe* for the plaintiffs.

Michael Thomas Q.C., *A.-G. (Hong Kong)* and *Nigel Jacobs* for the Attorney-General of Hong Kong.

Cur. adv. vult.

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A 10 June. The judgment of their Lordships was delivered by LORD KEITH OF KINKEL.

B This is an appeal from an order of the Court of Appeal of Hong Kong made on 7 March 1986, whereby that court dismissed an appeal by the plaintiffs (the present appellants) against an order dated 9 July 1985 of Jones J. in the High Court of Hong Kong directing that the plaintiffs' statement of claim be struck out under R.S.C., Ord. 18, r. 19, as disclosing no reasonable cause of action. The appeal is brought with leave of the Court of Appeal.

C The plaintiffs are four residents in Hong Kong who between August and December 1982 made substantial deposits with a registered deposit-taking company called American and Panama Finance Co. Ltd. The company went into liquidation on 25 February 1983 and as a result the plaintiffs have lost all the money which they deposited with it. The respondent is the Attorney-General of Hong Kong as representing the Commissioner of Deposit-taking Companies. The plaintiffs' claim against him is for damages on the ground of negligence in the discharge of the commissioner's functions under the Deposit-taking Companies Ordinance. An alternative ground of breach of statutory duty was not argued. The damages claimed are quantified by reference to the amount of the plaintiffs' lost deposits with interest at the rates contracted for.

D The Ordinance was originally enacted in 1976 and has since been amended on a number of occasions. The preamble reads:

E "To regulate the taking of money on deposit and to make provision for the protection of persons who deposit money and for the regulation of deposit-taking business for monetary policy purposes."

F By section 3A of the Ordinance the Commissioner of Banking (appointed under section 4 of the Banking Ordinance) is appointed to be Commissioner of Deposit-taking Companies. Part III of the Ordinance places a number of restrictions on the taking of deposits, and these are fortified by criminal sanctions. In particular, section 6(1) prohibits the carrying on of the business of taking deposits except by a company which is either a registered deposit-taking company or a licensed deposit-taking company. Part IV deals with the registration of deposit-taking companies, requiring by section 9 that applications for registration should be accompanied by various documents relating to the company's business. Section 10(1) provides for the registration by the commissioner of a company as a deposit-taking company on receipt of an application satisfying section 9, but section 10(2) requires him to refuse registration in a number of circumstances including, by paragraph (e), if "it appears to the commissioner that, by reason of any circumstances whatsoever, the company is not a fit and proper body to be registered." Under section 12 the commissioner is to maintain a register of deposit-taking companies. The register is to be open to inspection by members of the public, along with documents lodged by the company on application for registration or annually under section 17, which covers such matters as profit and loss accounts and balance sheets, with auditor's reports. Section 13 requires the commissioner to publish in the "Gazette" at least once a year the names of all registered deposit-taking companies. Under section 14 the commissioner may, subject to giving the company an opportunity of making representations, revoke the registration of a

deposit-taking company in certain specified events. These include, by section 14(1)(d), "[i]f it appears to him that— (1) the company is not a fit and proper body to remain registered."

Part V contains detailed provisions in regard to the obligations of deposit-taking companies, fenced with criminal sanctions. These include section 17: to lodge accounts annually with the commissioner; section 18: to exhibit accounts at each place of business; section 19: to notify the commissioner of certain changes by the company in its business; section 19A: to report to the commissioner if the company is likely to be unable to meet its obligations or if it is about to suspend payment; section 20: to submit monthly returns to the commissioner showing its assets and liabilities together with such further information as the commissioner may require, including auditor's certificates; section 20A: to inform the commissioner, if so required, of shareholdings in any company exceeding 20 per cent. of the share capital; section 21: to refrain from representing that the company has been in any respect approved by the government, the Financial Secretary or the commissioner, subject to the proviso that this prohibition is not contravened by reason only that a statement is made to the effect that a company is registered or licensed under the Ordinance; section 21A: to maintain certain reserves; section 21B: to restrict the payment of dividends if certain financial criteria are not satisfied; section 21C: to refrain from making advances against the security of the company's own shares; section 22: to refrain from making to any one person or group of companies advances exceeding a certain proportion of the deposit-taking company's paid up capital and reserves; section 22A: to refrain, when so required by the commissioner, from making advances to a foreign bank; section 23: to limit the amount of advances made to a director of the company and certain other persons; section 23A: to limit the amount of advances made to any one of the company's employees; section 23B: to limit the holding of shares in any other company or companies so as not to exceed in value 25 per cent. of the paid-up share capital and reserves of the deposit-taking company; section 23C: to limit the holding of any interests in land so as not to exceed in aggregate value 25 per cent. of the paid-up share capital and reserves of the deposit-taking company; section 24A: to maintain at all times a minimum holding of certain specified liquid assets.

Part VI of the Ordinance, headed "Miscellaneous," deals with a variety of matters, including secrecy (section 25), criminal liability for false or negligent misrepresentation (section 28), liability in tort for such misrepresentation (section 29), criminal liability of directors and other officers (section 31), examination by the commissioner of the affairs of a deposit-taking company (section 31A), rights of appeal to the Governor in Council against refusal to register and revocation or suspension of registration (section 34), and investigation of a deposit-taking company by a person appointed by the Financial Secretary (section 38). It is to be observed that by amendment introduced in 1983, after the events giving rise to the present litigation, it is provided (section 41) that no liability shall be incurred by the Financial Secretary or the commissioner as a result of anything done or omitted to be done by him in the bona fide exercise of any functions under the Ordinance.

Part VII of the Ordinance contains a number of provisions concerned with the revocation and suspension of the registration of a deposit-taking company. Under section 45 the commissioner may suspend the

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A registration of a deposit-taking company for up to 14 days in circumstances of urgency, and under section 46 he may in other cases and subject to section 47 suspend registration for a period not exceeding six months. Section 47 requires an opportunity of being heard to be afforded to a company before its registration is revoked or suspended. Section 49 provides for publication in the "Gazette" of notice of revocation or suspension.

B In their amended statement of claim, the averments in which must for present purposes be taken to be true, the plaintiffs say that they made their respective deposits with the American and Panama Finance Co. Ltd.:

C "in reliance upon: (a) the fact that the company was registered by the commissioner under the Ordinance and that: (i) it was therefore a fit and proper body to be registered; (ii) it was the subject of 'prudential supervision' by the commissioner; (iii) and that such 'prudential supervision' would be continuing and did so continue;"

D and also in reliance upon certain statements by the Financial Secretary and the commissioner which led the plaintiffs to believe in the financial probity of deposit-taking companies (including the company) and in the commissioner's powers actually to control and regulate them.

The statement of claim goes on to detail a large number of matters connected with the affairs of the company between 1980 (when it was registered by the commissioner) and the end of 1982 which are alleged to indicate that these affairs were being conducted fraudulently, speculatively and to the detriment of depositors with it.

E The allegations of fault against the commissioner are, in substance, that he knew or ought to have known, had he taken reasonable care, that the affairs of the company were being conducted fraudulently, speculatively and to the detriment of its depositors; that he failed to exercise his powers under the Ordinance so as to secure that the company complied with the obligations and restrictions thereby imposed upon it (a considerable number of which are alleged to have been breached); and that he should either never have registered the company as a deposit-taking company or have revoked its registration before the plaintiffs made their respective deposits with it, so as to save them from losing their money when the company eventually went into liquidation.

F The issues in the appeal raise important issues of principle, having far-reaching implications as regards the potential liability in negligence of a wide variety of regulatory agencies carried on under the aegis of central or local government and also to some extent by non-governmental bodies. Such agencies are in modern times becoming an increasingly familiar feature of the financial, commercial, industrial and social scene.

G The foremost question of principle is whether in the present case the commissioner owed to members of the public who might be minded to deposit their money with deposit-taking companies in Hong Kong a duty, in the discharge of his supervisory powers under the Ordinance, to exercise reasonable care to see that such members of the public did not suffer loss through the affairs of such companies being carried on by their managers in fraudulent or improvident fashion. That question is one of law, which is capable of being answered upon the averments assumed to be true, contained in the plaintiffs' pleadings. If it is answered in the negative, the plaintiffs have no reasonable cause of action, and their statement of claim was rightly struck out.

The argument for the plaintiffs in favour of an affirmative answer to the question started from the familiar passage in the speech of Lord Wilberforce in *Ann v. Merton London Borough Council* [1978] A.C. 728, 751–752:

“Through the trilogy of cases in this House—*Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: . . .”

This passage has been treated with some reservation in subsequent cases in the House of Lords, in particular by Lord Keith of Kinkel in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210, 240, by Lord Brandon of Oakbrook in *Leigh and Silavan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] A.C. 785, 815, and by Lord Bridge of Harwich in *Curran v. Northern Ireland Co-ownership Housing Association Ltd.* [1987] 2 W.L.R. 1043, 1049. The speeches containing these reservations were concurred in by all the other members of the House who were party to the decisions. In *Council of the Shire of Sutherland v. Heyman* (1985) 59 A.L.J.R. 564 Brennan J., in the High Court of Australia, indicated his disagreement with the nature of the approach indicated by Lord Wilberforce, saying, at p. 588:

“Of course, if foreseeability of injury to another were the exhaustive criterion of a *prima facie* duty to act to prevent the occurrence of that injury, it would be essential to introduce some kind of restrictive qualification—perhaps a qualification of the kind stated in the second stage of the general proposition in *Ann*. I am unable to accept that approach. It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.’ The proper role of the ‘second stage,’ as I attempted to explain in *Juensch v. Coffey* [(1984) 58 A.L.J.R. 426, 437, 438], embraces no more than ‘those further elements [in addition to the neighbour principle] which are appropriate to the particular category of negligence and which confine the duty of care within narrower limits than those which would be defined by an unqualified application of the neighbour principle.’”

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A Their Lordships venture to think that the two stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended. Further, the expression of the first stage of the test carries with it a risk of misinterpretation. As Gibbs C.J. pointed out in *Council of the Shire of Sutherland v. Heyman*, 59 A.L.J.R. 564, 570, there are two possible views of what Lord Wilberforce meant. The first view, favoured in a number of cases mentioned by Gibbs C.J., is that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second view, favoured by Gibbs C.J. himself, is that Lord Wilberforce meant the expression "proximity or neighbourhood" to be a composite one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580. In their Lordships' opinion the second view is the correct one. As Lord Wilberforce himself observed in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 420, it is clear that foreseeability does not of itself, and automatically, lead to a duty of care. There are many other statements to the same effect. The truth is that the trilogy of cases referred to by Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751, each demonstrate particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning.

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Donoghue v. Stevenson [1932] A.C. 562 established that the manufacturer of a consumable product who carried on business in such a way that the product reached the consumer in the shape in which it left the manufacturer, without any prospect of intermediate examination, owed the consumer a duty to take reasonable care that the product was free from defect likely to cause injury to health. The speech of Lord Atkin stressed not only the requirement of foreseeability of harm but also that of a close and direct relationship of proximity. The relevant passages are at pp. 580, 581 and 582:

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"Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

G

"I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

H

"There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises."

Lord Atkin clearly had in contemplation that all the circumstances of the case, not only the foreseeability of harm, were appropriate to be

taken into account in determining whether a duty of care arose. *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 was concerned with the assumption of responsibility. On the facts of the case no liability was held to exist because responsibility for the advice given had been disclaimed, but there was established the principle that a duty of care arises where a party is asked for and gives gratuitous advice upon a matter within his particular skill or knowledge and knows or ought to have known that the person asking for the advice will rely upon it and act accordingly. In such a case the directness and closeness of the relationship between the parties are very apparent. *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 was an example of the kind of situation where a special relationship between a defendant and a third party gives rise to a duty on the part of the defendant to take reasonable care to control the third party so as to prevent him causing damage to the plaintiff. Some Borstal boys, under the supervision of prison officers, were encamped on an island off which yachts were moored. Some of the boys, in an attempt to escape from the island, boarded a yacht and manœuvred it so as to damage another. This was the very thing that might reasonably be foreseen as likely to happen if the prison officers did not take reasonable care to control the activities of the boys. The relationship of the officers to the boys was analogous to that between parent and children, a relationship described by Dixon J. in *Smith v. Leurs* (1945) 70 C.L.R. 256, 261–262, as capable of giving rise to a duty of control, saying:

“apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another’s actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognised that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger. Parental control, where it exists, must be exercised with due care to prevent the child inflicting intentional damage on others or causing damage by conduct involving unreasonable risk of injury to others.”

It is true that in the *Dorset Yacht* case [1970] A.C. 1004 a question arose as to whether the decision of the Home Office to give Borstal boys a measure of freedom in order to assist in their rehabilitation fell within the ambit of a discretionary power the exercise of which was not capable of being called in question. But that question did not reach into the conduct of the officers who were in charge of the boys in the circumstances prevailing on the island. Having regard to these circumstances, it was not difficult to arrive, as a matter of judgment, at the conclusion that a close and direct relationship of proximity existed

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A between the officers and the owners of the yachts, sufficient to require the former, as a matter of law, to take reasonable care to prevent the boys from interfering with the yachts and damaging them.

The second stage of Lord Wilberforce's test in *Anns v. Merton London Borough Council* [1978] A.C. 728, 752, is one which will rarely have to be applied. It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability. One of the rare cases where that has been held to be so is *Rondel v. Worsley* [1969] 1 A.C. 191, dealing with the liability of a barrister for negligence in the conduct of proceedings in court. Such a policy consideration was invoked in *Hill v. Chief Constable of West Yorkshire* [1987] 2 W.L.R. 1126. In that case the mother of the last victim of a notorious murderer of young women, who was not apprehended until after he had perpetrated 13 murders and eight attempted murders, sued the chief constable of the area on the ground of the negligence of his force in failing to apprehend the murderer before the death of her daughter. The Court of Appeal struck out the statement of claim as disclosing no reasonable cause of action, upon the principal ground that no relationship of proximity had existed between the police and the deceased girl. Glidewell L.J., however, in a judgment concurred in by Sir Roualeyn Cumming-Bruce, said, at p. 1140:

"If the police were liable to be sued for negligence in the investigation of crime which has allowed the criminal to commit further crimes, it must be expected that actions in this field would not be uncommon. Investigative police work is a matter of judgment, often no doubt dictated by experience or instinct. The threat that a decision which, in the end, proved to be wrong might result in an action for damages would be likely to have an inhibiting effect on the exercise of that judgment. The trial of such actions would very often involve the retrial of matters which had already been tried at the Crown Court. While no doubt many such actions would fail, preparing for and taking part in the trial of such an action would inevitably involve considerable work and time for a police force, and thus either reduce the manpower available to detect crime or increase expenditure on police services. In short, the reasons for holding that the police are immune from an action of this kind are similar to those for holding that a barrister may not be sued for negligence in his conduct of proceedings in court: *Rondel v. Worsley* [1969] 1 A.C. 191."

In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752, is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.

H The primary and all-important matter for consideration, then, is whether in all the circumstances of this case there existed between the commissioner and would-be depositors with the company such close and direct relations as to place the commissioner, in the exercise of his functions under the Ordinance, under a duty of care towards would-be depositors. Among the circumstances of the case to be taken into account is that one of the purposes of the Ordinance (though not the only one) was to make provision for the protection of persons who deposit money. The restrictions

and obligations placed on registered deposit taking companies, fenced by criminal sanctions, in themselves went a long way to secure that object. But the discretion given to the commissioner to register or deregister such companies, so as effectively to confer or remove the right to do business, was also an important part of the protection afforded. No doubt it was reasonably foreseeable by the commissioner that if an uncreditworthy company were placed on or allowed to remain on the register, persons who might in the future deposit money with it would be at risk of losing that money. But mere foreseeability of harm does not create a duty, and future would-be depositors cannot be regarded as the only persons whom the commissioner should properly have in contemplation. In considering the question of removal from the register, the immediate and probably disastrous effect on existing depositors would be a very relevant factor. It might be a very delicate choice whether the best course was to deregister a company forthwith or to allow it to continue in business with some hope that, after appropriate measures by the management, its financial position would improve. It must not be overlooked that the power to refuse registration, and to revoke or suspend it, is quasi judicial in character, as is demonstrated by the right of appeal to the Governor in Council conferred upon companies by section 34 of the Ordinance, and the right to be heard by the commissioner conferred by section 47. The commissioner did not have any power to control the day to day management of any company, and such a task would require immense resources. His power was limited to putting it out of business or allowing it to continue. No doubt recognition by the company that the commissioner had power to put it out of business would be a powerful incentive unpelling the company to carry on its affairs in a responsible manner, but if those in charge were determined upon fraud it is doubtful if any supervision could be close enough to prevent it in time to forestall loss to depositors. In these circumstances their Lordships are unable to discern any intention on the part of the legislature that in considering whether to register or deregister a company the commissioner should owe any statutory duty to potential depositors. It would be strange that a common law duty of care should be superimposed upon such a statutory framework.

On the plaintiffs' case as pleaded the immediate cause of the loss suffered by the plaintiffs in this case was the conduct of the managers of the company in carrying on its business fraudulently, improvidently and in breach of many of the provisions of the Ordinance. Another cause was the action of the plaintiffs in depositing their money with a company which in the event turned out to be uncreditworthy. Considerable information about the company was available from the documents required by the Ordinance to be open to public inspection, and no doubt advice could have been readily obtained from investment advisers in Hong Kong. Before the plaintiffs deposited their money with the company there was no relationship of any kind between them and the commissioner. They were simply a few among the many inhabitants of Hong Kong who might choose to deposit their money with that or any other deposit taking company. The class to whom the commissioner's duty is alleged to have been owed must include all such inhabitants. It is true, however, that according to the plaintiffs' averments there had been available to him information about the company's affairs which was not available to the public and which raised serious doubts, to say the least of it, about the company's stability. That raises the question whether there existed between the commissioner and the company and its managers a special relationship of the nature described by Dixon J.

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A in *Smith v. Leurs*, 70 C.L.R. 256, 261–262, and such as was held to exist between the prison officers and the Borstal boys in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, so as to give rise to a duty on the commissioner to take reasonable care to prevent the company and its managers from causing financial loss to persons who might subsequently deposit money with it.

B In contradistinction to the position in the *Dorset Yacht* case, the commissioner had no power to control the day-to-day activities of those who caused the loss and damage. As has been mentioned, the commissioner had power only to stop the company carrying on business, and the decision whether or not to do so was clearly well within the discretionary sphere of his functions. In their Lordships' opinion the circumstance that the commissioner had, on the plaintiffs' averments, cogent reason to suspect
C that the company's business was being carried on fraudulently and improvidently did not create a special relationship between the commissioner and the company of the nature described in the authorities. They are also of opinion that no special relationship existed between the commissioner and those unascertained members of the public who might in future become exposed to the risk of financial loss through depositing money with the company. Accordingly their Lordships do not consider that the
D commissioner owed to the plaintiffs any duty of care on the principle which formed the ratio of the *Dorset Yacht* case. To hark back to Lord Atkin's words in *Donoghue v. Stevenson* [1932] A.C. 562, 581, there were not such close and direct relations between the commissioner and the plaintiffs as to give rise to the duty of care desiderated.

E The plaintiffs, however, advanced an argument based upon their averment of having relied upon the registration of the company when they deposited their money with it. It was said that registration amounted to a seal of approval of the company, and that by registering the company and allowing the registration to stand, the commissioner made a continuing representation that the company was creditworthy. In the light of the information in the commissioner's possession that representation was made negligently and led to the plaintiffs' loss.

F In *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 the House of Lords held that a negligent misrepresentation about a customer's creditworthiness, given in answer to an inquiry, might give rise to a claim for damages at the instance of the party making the inquiry who had foreseeably relied on the representation and suffered financial loss thereby. Likewise in *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520 it was held that a nominated specialist sub-contractor might be liable
G for economic loss caused to the building owner by negligent performance of the sub-contracted work, in circumstances where the building owner had, to the sub-contractor's knowledge, relied on his skill and experience. These decisions turned on the voluntary assumption of responsibility towards a particular party, giving rise to a special relationship. Lord Devlin in the *Hedley Byrne* case [1964] A.C. 465, 530, proceeded upon the
H proposition that wherever there is a relationship equivalent to a contract, there is a duty of care. In the present case there was clearly no voluntary assumption by the commissioner of any responsibility towards the plaintiffs, in relation to the affairs of the company. It was argued, however, that the effect of the Ordinance was to place such a responsibility upon him. Their Lordships consider that the Ordinance placed a duty on the commissioner to supervise deposit-taking companies in the general public interest, but no special responsibility towards individual members of the public. His position

is analogous to that of a police force, which in *Hill v. Chief Constable of West Yorkshire* [1987] 2 W.L.R. 1126 was held to owe no duty towards individual potential victims of crime. The Ordinance was designed to give added protection to the public against unscrupulous or improvident managers of deposit-taking companies, but it cannot reasonably be regarded, nor should it have been by any investor, as having instituted such a far-reaching and stringent system of supervision as to warrant an assumption that all deposit-taking companies were sound and fully creditworthy. While the investing public might reasonably feel some confidence that the provisions of the Ordinance as a whole went a long way to protect their interests, reliance on the fact of registration as a guarantee of the soundness of a particular company would be neither reasonable nor justifiable, nor should the commissioner reasonably be expected to know of such reliance, if it existed. Accordingly their Lordships are unable to accept the plaintiffs' arguments about reliance as apt, in all the circumstances, to establish a special relationship between them and the commissioner such as to give rise to a duty of care.

Consideration is due to two cases in different jurisdiction which were founded on by the plaintiffs. The earlier in date is *States of Guernsey v. Firth* (unreported), 14 May 1981, Court of Appeal of Guernsey (Civil Division) (Appeal No. 10 Civil), a decision of the Court of Appeal of Guernsey upon the defendants' application to strike out the plaintiff's statement of claim as not disclosing any cause of action. The Protection of Depositors (Bailiwick of Guernsey) Ordinance 1971 made it an offence to carry on the business of accepting money on deposit unless the person carrying on such business was registered by the States Advisory and Finance Committee. Section 13 of the Ordinance required the committee from time to time to publish the names and addresses of all registered persons. According to the statement of claim a certain company was registered in 1972 and continued to be so until 31 December 1976. The committee did not renew the company's registration for 1977, but did not at any time between 1 January 1977 and 31 December 1978 publish a list of registered persons. In the meantime the company continued to carry on business illegally and the plaintiff deposited money with it, which she lost when the company went into liquidation in December 1978. She sued the committee for damages in respect of the loss on the ground of the latter's breach of their duty under section 13 of the Ordinance in failing to publish any list of registered persons during the two years in question. The Court of Appeal (Sir Godfray Le Quesne Q.C. (President), J. J. Clyde Q.C. and L. H. Hoffmann Q.C.) decided that on a proper construction of section 13 the Committee was under a mandatory duty to publish lists of registered persons as often as might be necessary to keep the public reasonably informed, and further, applying *Cutler v. Wandsworth Stadium* [1949] A.C. 398, that the section gave a right of action to any depositor who might suffer loss through its breach. Accordingly the plaintiff had a cause of action against the committee. The decision was concerned with the construction of an enactment imposing a specific statutory duty which was alleged to have been breached. Their Lordships therefore do not consider it to be in point for the purposes of the present appeal, which is concerned with the existence of a common law duty of care, and do not think it appropriate to express any opinion as to its correctness.

The second case is *Baird v. The Queen* (1983) 148 D.L.R. (3d) 1, a decision of the Federal Court of Appeal in Canada. That case too was concerned with the question whether the plaintiffs' pleadings should be

A duty of care, and do not think it appropriate to express any opinion as to its correctness.

The second case is *Baird v. The Queen* (1983) 148 D.L.R. (3d) 1, a decision of the Federal Court of Appeal in Canada. That case too was concerned with the question whether the plaintiffs' pleadings should be struck out as not disclosing a reasonable cause of action. The question was answered in the negative, on the ground that it was not "plain and obvious beyond doubt" that the plaintiffs could not succeed. In that case also the plaintiffs had lost money which they had deposited with a company subject to licensing, inspection and regulation under statute, the Trust Companies Act 1970. That Act placed various duties and conferred certain functions in relation to companies within its scope upon the Minister of Finance and the Superintendent of Insurance. It was alleged that both these functionaries had failed to perform or negligently performed their statutory duties in a number of respects as regards the company in question. A number of issues of principle were discussed in the judgment of Le Dain J., but he preferred to leave the final decision upon them until after trial on the merits. In these circumstances, and considering that the relevant legislation there was different in important respects from the Hong Kong Ordinance, their Lordships have not derived material assistance from the case.

The final matter for consideration is the argument for the Attorney-General of Hong Kong that it would be contrary to public policy to admit the plaintiffs' claim, upon grounds similar to those indicated in relation to police forces by Glidewell L.J. in *Hill v. Chief Constable of West Yorkshire* [1987] 2 W.L.R. 1126, 1140. It was maintained that if the Commissioner were to be held to owe actual or potential depositors a duty of care in negligence, there would be reason to apprehend that the prospect of claims would have a seriously inhibiting effect on the work of his department. A sound judgment would be less likely to be exercised if the commissioner were to be constantly looking over his shoulder at the prospect of claims against him, and his activities would be likely to be conducted in a detrimentally defensive frame of mind. In the result, the effectiveness of his functions would be at risk of diminution. Consciousness of potential liability could lead to distortions of judgment. In addition, the principles leading to his liability would surely be equally applicable to a wide range of regulatory agencies, not only in the financial field, but also, for example, to the factory inspectorate and social workers, to name only a few. If such liability were to be desirable upon any policy grounds, it would be much better that the liability were to be introduced by the legislature, which is better suited than the judiciary to weigh up competing policy considerations.

Their Lordships are of opinion that there is much force in these arguments, but as they are satisfied that the plaintiffs' statement of claim does not disclose a cause of action against the commissioner in negligence they prefer to rest their decision upon that rather than upon the public policy argument.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Solicitors: Philip Conway Thomas & Co.; Macfarlanes.

S. S.

[COURT OF APPEAL]

A

WILLIAMS v. WILLIAMS

TUCKER AND OTHERS v. WILLIAMS AND ANOTHER

1987 July 1; 10

Sir John Donaldson M.R., Parker L.J.
and Sir George Waller

B

Evidence—Documentary—Bankers' books—Right to inspect and take copies as evidence—Cheques and credit slips—Whether "other records"—Whether order of inspection to be made—Bankers' Books Evidence Act 1879 (42 & 43 Vict. c. 11), s. 9(2) (as amended by Banking Act 1979 (c. 37), s. 51(1), Sch. 6, para. 1(1))¹

C

The wife sought ancillary financial relief in matrimonial proceedings against her husband and was also a defendant in proceedings for possession of the matrimonial home brought by the trustees of an unregistered charity of which the husband was chairman. The actions were consolidated. In the course of the action the wife sought an ex parte order under the Bankers' Books Evidence Act 1879 for inspection of, inter alia, paid cheques and credit slips relating to specified accounts with a named bank. It was the bank's practice for cheques to be returned to the paying branch where they were either returned to customers, if they so requested, or collected together in unsorted bundles, according to the day of receipt. Credit slips were retained in similar bundles. The county court registrar granted the order. On appeal by the bank the judge varied the order by substituting an order which did not include cheques and credit slips.

D

E

On appeal by the wife:—

Held, dismissing the appeal, that adding a cheque or credit slip to the bundles of such documents retained by a bank could not be regarded as making an entry in the records of the bank within the meaning of the Bankers' Books Evidence Act 1879; that on the true construction of section 9, as amended, "other records" had to be construed ejusdem generis with "ledgers, day books, cash books and account books"; and that, accordingly, cheques and credit slips were not "other records" within the meaning of the Act (post, pp. 795D–F, 796E–F).

F

The following cases are referred to in the judgment of Sir John Donaldson M.R.:

Barker v. Wilson [1980] 1 W.L.R. 884; [1980] 2 All E.R. 81, D.C.
Reg. v. Jones (Benjamin) [1978] 1 W.L.R. 195; [1978] 2 All E.R. 718, C.A.

The following additional cases were cited in argument:

Bentel v. Barclays Bank International Ltd. (unreported), 6 February 1985; Court of Appeal (Civil Division) Transcript No. 950 of 1985, C.A.
Reg. v. Dadson (1983) 77 Cr.App.R. 91, C.A.
Waterhouse v. Barker [1924] 2 K.B. 759, C.A.

APPEAL from Judge Holt sitting at Blackpool County Court.

In the first of two consolidated actions the applicant wife, Pamela Ruth Williams, sought ancillary financial relief in judicial separation proceedings. In the second action Edward Henry Tucker, Jacqueline

H

¹ Bankers' Books Evidence Act 1879, as amended, s. 9(2): see post, p. 794E–F.

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Williams v. Williams (C.A.)

A Louise Hamilton and Kathleen Palmer, the trustees of an unregistered charity known as the Hospital Aids Donation Society, sought possession of the matrimonial home at 102, St. Andrews Road, St. Annes-on-Sea, against the applicant and her husband, Sidney Richard Williams. On 24 February 1987 in the Blackpool County Court the applicant obtained an ex parte order pursuant to section 7 of the Bankers' Books Evidence Act 1879, as amended, that her solicitors be at liberty to inspect and copy entries in the books of Barclays Bank Plc., Orpington, relating to specified accounts. On 10 March the applicant obtained a further ex parte order that her solicitors be at liberty to inspect and copy, inter alia, all paid cheques and credit slips relating to the accounts. The bank appealed against the order of 10 March, and on 3 April Judge Holt allowed the appeal and varied the order by substituting an order which did not, in terms, include credit slips or cheques.

B The applicant appealed on the grounds that (1) the judge erred in law in holding that cheques and credit slips issued upon or relating to accounts held at branches of Barclays Bank Plc. and thereafter retained at such branches did not constitute bankers' books for the purpose of an order for inspection thereof pursuant to section 7 of the Bankers' Books Evidence Act 1879; (2) the judge erred in law in holding that the cheques retained by the bank constituted in themselves transactions conducted by the bank and accordingly were not or could not constitute records of such transactions; (3) there was no sufficient evidence on which the judge could find that, by reason of being kept in daily bundles in random order, cheques and credit slips retained by the bank were not records, that is, were not kept for reference or remembrance.

D The facts are stated in the judgment of Sir John Donaldson M.R.

E *Timothy Ryder* for the applicant.

John Jarvis for the bank.

Cur. adv. vult.

F 10 July. The following judgments were handed down.

G SIR JOHN DONALDSON M.R. This appeal raises a short, but important, point under the Bankers' Books Evidence Act 1879 as amended by the Banking Act 1979, section 51(1) and Schedule 6, paragraph 1. The point is whether the Act extends to paying-in slips and paid cheques retained by banks after the conclusion of the transactions to which they relate.

H The applicant has sought disclosure by the bank of copies of those documents for use as evidence in two different proceedings. In the first, in which she petitions for judicial separation from her husband, she also seeks ancillary financial orders. This involves ascertaining the income and capital resources of her husband, who is loath to assist and has ignored all orders for discovery. The applicant's case is that her husband has secret bank and building society accounts and, in addition, has used his position as chairman or director of an unincorporated and unregistered "charitable" organisation to conceal the extent of his own wealth by mixing his own moneys with those of the "charity" in its accounts with the Orpington branch of Barclays Bank. In the second, the trustees of the "charity" are seeking an order against both Mr. and Mrs. Williams for possession of the matrimonial home at St. Anne's-on-Sea alleging

that it is owned by the "charity." The applicant's defence is that although it was bought with money drawn from the account of that organisation, the money used was that of her husband and that he is the beneficial owner of the house.

Clearly if justice is to be done, the applicant must be able to find out what payments have been made into and out of these charitable accounts and her husband's accounts and by and to whom such payments were made. The question is how this is to be achieved. As the bank concedes, she could obtain a subpoena duces tecum addressed to the appropriate officer of the bank requiring him to attend at the hearing with all documentation in the hands of the bank relating to the accounts of the "charity" and of her husband. However, this would probably, if not inevitably, lead to adjournments in both proceedings in order that the documents could be studied and further inquiries made. If, on the other hand, the applicant and her advisers could have this information in advance of the hearings, the financial and other costs of an adjournment would be avoided and indeed the chances of getting at the truth would be improved.

With these considerations in mind, on 24 February 1987 the applicant applied ex parte in the Blackpool County Court and obtained an order from Mr. Deputy Registrar Pickup requiring the bank to allow her and her solicitors

"to inspect and take copies of all entries in the books of Barclays Bank Plc., Orpington, Kent relating to [Mr. Williams's] account therewith and also the accounts of [the 'charity']."

On 10 March 1987 upon a further ex parte application the applicant obtained an extended order by Mr. Registrar Jeffreys in the following terms:

"1. further to the provisions of the order of Mr. Deputy Registrar Pickup, the solicitors for [the applicant] be at liberty to inspect and take copies of all entries in all of the records used and kept in the ordinary course of their business by Barclays Bank Plc., Orpington concerning and relating to the banking account or accounts of [Mr. Williams] and also of [the 'charity'] between 1 January 1978 and the date hereof (whether such records be written, or as microfilm, magnetic tape or any other form of mechanical or electronic data retrieval system) and in particular that they be at liberty to inspect and take copies of: (1) all paid cheques issued on any of the said accounts and all such other documentary or other records used by the said bank and identifying the recipient of any cheque paid on the said accounts; (2) all documentary or other records of payment into the said accounts, including credit slips, paying-in slips or counterfoils; (3) all documents of transfer recording or authorising payments from one of the said accounts to another thereof; (4) all standing orders or direct debit instructions as ordered in relation to the said accounts."

Upon being served with this later order, the bank appealed and Judge Holt varied it by substituting an order in the following terms:

"It is ordered that further to the provisions of the order of Mr. Deputy Registrar Pickup dated 24 day of February 1987 the solicitors for [the applicant] be at liberty to inspect and take copies of all entries in all of the records used and kept in the ordinary

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- A course of their business by Barclays Bank Plc., Orpington concerning and relating to the banking account or accounts of [Mr. Williams] and also of [the 'charity'] between 1 January 1978 and the date hereof (whether such records be written, or as microfilm, magnetic tape or any other form of mechanical or electronic data retrieval system) and in particular that they be at liberty to inspect and take copies of all documents of transfer recording or authorising payments from one of the said accounts to another thereof."
- B

The applicant appeals seeking the restoration of the registrar's order of 10 March 1987.

- C We are told that the parties will have no difficulty in agreeing upon a schedule indicating the types of documents which fall to be disclosed under the registrar's or, as the case may be, the judge's orders and, for the purposes of the argument, it was assumed that the difference lay in the fact that under the registrar's order cheques drawn upon and paid out of the accounts of the named charity and of Mr. Williams together with paying-in slips relating to payments to the credit of those accounts would be disclosable, whereas under the judge's order they would not.

- D The first Bankers' Books Evidence Act was enacted in 1876 (39 & 40 Vict. c. 48). Its purpose was set out in the long title:

- E "Whereas serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings: And whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books: Be it therefore enacted . . ."

The way this was achieved was by providing that entries in the bank's books should be admissible as prima facie evidence of the "matters, transactions and accounts recorded therein," subject to verification by the bank's officers and that copies of all such entries should be admissible in evidence without production of the originals.

- F The current Act, that of 1879, was described as, and was, an amending Act, but it took the form of repealing the Bankers' Books Evidence Act 1876 and re-enacting it in a simpler and clearer form. Would that the legislature would adopt the same methods today.

The relevant provisions of the Act of 1879, as originally enacted, were:

- G "3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded.

- H "4. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits. . . .

"6. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved

under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.

"7. On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs. . . .

"9. . . . Expressions in this Act relating to 'bankers' books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank."

The Act in this form clearly contemplated that the banks had a series of books of various kinds which, in the course of the ordinary business of the bank, were in everyday use in that clerks made entries, that is to say wrote, in them. The transfer of any of these books to the court, with a consequent inability to make such entries, and indeed to consult the books, would have been a very considerable inconvenience. Hence the power to provide certified copies, not of the books, but of the relevant entries in the books. However there was no need for this power to extend, and it did not extend, to papers (including cheques and paying-in slips) which were retained in the bank's possession, but did not constitute an "entry in a banker's book."

In 1979 Parliament recognised that banks had replaced "books" with more sophisticated forms of "entry" recording "matters, transactions and accounts" and, by section 51(1) of, and paragraph 1 of Schedule 6 to, the Banking Act 1979, it amended the Act of 1879 by substituting a new definition of "bankers' books" in the following terms:

"9 (2) Expressions in this Act relating to 'bankers' books' include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism."

However, and this is highly significant, Parliament did not amend sections 3, 4 and 5 of the Act of 1879 which continued to refer to "a copy of an entry in a banker's book." The Parliamentary intention was, therefore, that section 3, incorporating the new definition, should read: ". . . a copy of any entry in a ledger, day book, cash book, account book or other record used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded."

Sections 4 and 5 fall to be construed similarly.

For the purposes of this appeal it is not, I think, necessary to refer in detail to the evidence of how Barclays' cheques are collected, presented and paid. Suffice it to say that it is done by inter-bank and inter-branch credits and debits, which identify the cheques and the accounts upon which they are drawn by their numbers, but do not identify the payee by name. That information is only obtainable by looking at the cheque

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Williams v. Williams (C.A.)

Sir John
Donaldson M.R.

A itself. This is returned to the paying branch and, unless the customer
asks for it to be returned to him, is retained by that branch. Furthermore,
surprising though it may seem, if it is returned to the customer, no copy
is made of the cheque. The only exception to this general statement of
the position is that if an electronic reader-sorter is unable to read the
magnetic numbers on a cheque, that cheque is rejected and is then
B microfilmed and dealt with manually. The bank were minded to concede
on the authority of *Barker v. Wilson* [1980] 1 W.L.R. 884 that the reel
or sheet of microfilm might be regarded as a “banker’s book” within the
new definition and that each photograph of a cheque might be regarded
as an “entry.” Even if this is right, it would not help the applicant
because only 3·5 to 4 per cent. of cheques are rejected by the bank’s
reader-sorter and are photographed. Furthermore, the selection of which
C cheques are dealt with in this way is entirely fortuitous, at least if the
magnetic print has not been erased deliberately.

Cheques and paying-in slips retained by branches are not sorted in
any way, all those received on a particular day being bundled up
together in any order. A day’s bundle can contain 2,000 to 2,500
individual items. They are only referred to if a query arises and in that
event, assuming that the relevant day can be identified, someone has to
D sort through the whole of that day’s bundle.

In this situation Mr. Ryder, appearing for the applicant, has to
submit, and does submit, that the bundles of cheques and paying-in slips
constitute bankers’ books within the modern definition and that adding
each cheque or paying-in slip to the bundle constitutes making an entry
in those books. Whilst I would be prepared to accept that the cheques
constitute part of the bank’s records used in the ordinary business of the
E bank (*Reg. v. Jones (Benjamin)* [1978] 1 W.L.R. 195, a case concerned
with a bill of lading put in evidence under the Criminal Evidence Act
1965), I am quite unable to accept that adding an individual cheque or
paying-in slip can be regarded as making an “entry” in those records.
Putting the matter in another way, “other records” in the new definition
has, I think, to be construed ejusdem generis with “ledgers, day books,
F cash books and account books” and unsorted bundles of cheques and
paying-in slips are not “other records” within the meaning of the Act.

For these reasons, which are substantially the same as those of Judge
Holt, I would hold that the applicant is not entitled to the extended
order which she sought. I do so with considerable regret, because in a
proper case, of which this seems to be one, it should be possible to
obtain disclosure of cheques and paying-in slips before the hearing. This
G is something which I hope can be looked at by the relevant Rule
Committees.

The bank have resisted this appeal for two reasons. First they say
that they must preserve the confidentiality of the banker–customer
relationship, unless this is over-ridden by an order of the court and they
were not satisfied that, on the true construction of the Bankers’ Books
Evidence Act 1879, the court had power to do so. These sentiments are
H unexceptionable. Their second reason is less attractive. They point out
that identifying particular paid cheques and paying-in slips is a very
time-consuming, and therefore expensive, process bearing in mind their
system of retaining such documents in an unsorted state. Understandably
they are reluctant to undertake it even if they are reimbursed the cost
involved. They are not therefore averse to a situation in which the only
means by which such documents can be the subject of a court order for

production is by subpoena duces tecum, since their experience is that few litigants will go to this length. Of course they put it more attractively, saying that in practice discovery of records, such as statements of account, under the Act normally provides the litigant with all that he needs and that if the Act were to extend to cheques and paying-in slips, courts would be liable to order their production automatically and without a proper regard for whether this was necessary in the interests of justice. All that may be correct, but I am not attracted by reliance upon procedural difficulties as a means of restricting orders for discovery, regardless of whether such discovery is necessary in the interests of justice.

On the facts of this case, it is not clear to me why, if this has not already been done, the court should not make a specific order requiring Mr. Williams to obtain the cheques and paying in slips relating to his account or accounts with the bank and to disclose them to the applicant and her solicitor. If, as seems likely, Mr. Williams failed to comply with this order, he could be committed for disobedience of the court order and the bank, as his agent holding these documents on his behalf, could then be required to disclose them. That does not, however, solve the problem of the cheques and paying in slips relating to the "charity" accounts. Mr. Williams would deny that they were in his possession, power or control. However I do not understand why the trustees of the "charity" should not be ordered to give discovery of them in the possession action. If, however, they are only discoverable by means of a subpoena duces tecum calling upon the appropriate officer of the bank to attend the hearing, I see no reason why the court should not order that the hearing should begin on a specified day and, so far as that day is concerned, be confined to receiving the documents, the remainder of the hearing standing adjourned to a date to be fixed.

I would dismiss the appeal.

PARKER L.J. I agree.

SIR GEORGE WALLER. I also agree.

Appeal dismissed.

Legal aid taxation of applicant's costs.

Solicitors: Wren Hilton Aptel & Ascroft Whiteside, Lytham St. Annes; Durham Press

R. C. W.

3 W.L.R.

A

[PRIVY COUNCIL]

LOPINOT LIMESTONE LTD. APPELLANT

AND

ATTORNEY-GENERAL OF TRINIDAD AND
TOBAGO RESPONDENT

B

[APPEAL FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO]

1987 July 6; 29

Lord Bridge of Harwich, Lord Templeman,
Lord Mackay of Clashfern, Lord Ackner and
Sir Duncan McMullin

C

*Trinidad and Tobago—Town planning—Development—Refusal of
planning permission for development of land as limestone
quarry—Landowner claiming compensation in respect of refusal
of permission—Whether proposed development material change
in “use” of land—Whether compensation payable—Town and
Country Planning Act (Laws of Trinidad and Tobago, 1980 ed.,
vol. 7, c. 35:01), ss. 2, 8(2), 26(1), 27(1)(a)*

D

Section 2 of the Town and Country Planning Act provides:
“‘use’ in relation to land, does not include the use of land by
the carrying out of any building or other operations thereon.”
Section 8 provides:

E

“(1) . . . permission shall be required . . . for any
development of land . . . (2) In this Act . . . ‘development’
means the carrying out of building, engineering, mining or
other operations in, on, over or under any land, the making
of any material change in the use of any buildings or other
land . . .”

F

Section 26 makes provision for the payment of compensation if
planning permission is refused but by section 27(1):

“Compensation . . . shall not be payable—(a) in respect of
the refusal of permission for any development that consists
of or includes the making of any material change in the use
of any buildings or other land; . . .”

G

The plaintiff applied for permission to develop part of its
land as a limestone quarry, but the Minister of Finance refused
permission. Having unsuccessfully sought compensation in
respect of that refusal from the minister under section 26(1) of
the Town and Country Planning Act, the plaintiff commenced
proceedings in the High Court of Trinidad and Tobago against
the Attorney-General claiming, inter alia, a declaration that the
refusal of permission was a nullity or that the plaintiff was
entitled to compensation under the Act. The judge granted a
declaration that compensation was payable, but he also held,
although no declaration to that effect was made, that the
minister’s decision was a nullity having been made in breach of
the rules of natural justice. The Court of Appeal of Trinidad
and Tobago allowed the Attorney-General’s appeal and set
aside the declaration that the plaintiff was entitled to
compensation on the ground that since the minister’s decision
was a nullity there was no refusal of permission with regard to
which a claim for compensation could be made. The court
remitted the plaintiff’s application to the minister for due
consideration according to law.

H

On the plaintiff’s appeal to the Judicial Committee:—

Held, allowing the appeal, that the application related to
development of the land by carrying out mining operations for

Lopinot Ltd. v. Attorney-General (P.C.)**[1987]**

the winning and working of limestone; that by section 2 such mining operations were outside the statutory definition of "use" in relation to land, and so the proposed development would cause no material change in the use of the land, and that accordingly the exemption from payment of compensation afforded by section 27(1)(a) would be inapplicable to the refusal of permission for that development; that compensation would be payable to the plaintiff in respect of refusal of permission under section 26(1), being an amount equivalent to the difference between the value of the land with permission for quarrying limestone granted subject to the conditions which might reasonably and properly have been imposed, and its value without permission; and that, therefore, the Court of Appeal's order would be varied by the addition of a declaration that, if the application was refused, the plaintiff would be entitled to compensation under and subject to the provisions of Part IV of the Act (post, pp. 801G, 802A, B, F—G, H—803A).

Order of the Court of Appeal of Trinidad and Tobago varied.

The following case is referred to in the judgment of their Lordships:

Viscount Securities Ltd., In re Claim of (unreported), 21 December 1976, High Court of the Republic of Eire, Transcript No. 1976/229 S.S.

The following additional cases were cited in argument:

Hartley v. Minister of Housing and Local Government [1970] 1 Q.B. 413; [1970] 2 W.L.R. 1; [1969] 3 All E.R. 1658, C.A.

Overland v. Minister of Housing and Local Government (1957) 8 P. & C.R. 389

APPEAL (No. 1 of 1985) with leave of the Court of Appeal of Trinidad and Tobago by the plaintiff, Lopinot Limestone Ltd., from the judgment of the Court of Appeal of Trinidad and Tobago (Kelsick C.J., Hassanali and Bernard JJ.A.) given on 12 April 1984 allowing an appeal by the Attorney-General of Trinidad and Tobago from the judgment of Lennox Deyalsingh J. delivered on 26 July 1982 in the High Court, whereby he granted a declaration that the plaintiff was entitled to compensation under Part IV of the Town and Country Planning Act.

The facts are stated in the judgment of their Lordships.

Fenton Ramsahoye S.C. (of the Trinidad and Tobago Bar) and *E. Huw Davies* for the plaintiff.

Anthony Lester Q.C., *Lionel Jones S.-G.*, Trinidad and Tobago, and *Jeffrey Jowell* for the Attorney-General.

Cur. adv. vult.

29 July. The judgment of their Lordships was delivered by LORD BRIDGE OF HARWICH.

The appellant plaintiff owns some 200 acres of land in the Lopinot Valley of the Northern Range in the island of Trinidad. This litigation is concerned with a parcel of 22 acres now disused, but formerly a cocoa plantation ("the site"). The relevant law to which it will be necessary to refer in this judgment is found in the Town and Country Planning Act

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Lopinot Ltd. v. Attorney-General (P.C.)

A ("the Act") and the Town and Country Planning (General Development) Order ("the Order") of Trinidad and Tobago.

On 14 December 1978 the plaintiff applied to the minister pursuant to section 11 of the Act and clause 6 of the Order for permission to develop the site as a limestone quarry. Under section 11(1) of the Act, which in many respects mirrors the parallel United Kingdom legislation, the minister is empowered to grant permission either unconditionally or subject to such conditions as he thinks fit, or to refuse permission. By clause 6(6)(b) of the Order he was required to give notice to the plaintiff of the determination of the application within two months or such extended time as might be agreed in writing between them. No such agreement was made. By letter dated 28 May 1980 the minister notified the plaintiff that the permission sought was refused.

C The plaintiff wrote to the minister on 12 June 1980 claiming compensation under Part IV of the Act in respect of the refusal of permission, but, getting no satisfaction, instituted the present proceedings in the High Court of Justice of Trinidad and Tobago on 10 July 1980. The remedies sought included a number of declarations in the alternative. For present purposes it is sufficient to note that the plaintiff claimed: D (1) a declaration that the purported refusal of the application for planning permission was a nullity; (2) alternatively a declaration that the plaintiff was entitled to compensation in respect of the refusal under Part IV of the Act.

Logically the issues raised by these two alternative claims fell for determination in the order indicated, i.e. first the nullity issue, second the compensation issue. But at the trial before Lennox Deyalsingh J. the judge was invited and agreed to determine the compensation issue first. He held that the refusal attracted compensation and so declared. But counsel for the plaintiff was understandably anxious, lest the case should go further on the compensation issue, to have the benefit of the judge's findings of fact bearing on the nullity issue. The judge proceeded to make findings of fact leading to the conclusion that the decision to refuse planning permission was made in breach of the rules of natural justice and was a nullity. But at the request of counsel for the plaintiff he refrained from making any declaration to that effect.

The Attorney-General appealed to the Court of Appeal of Trinidad and Tobago on a wide variety of grounds. He failed on all of them save one. The Court of Appeal allowed the appeal on the narrow ground, put shortly, that, as the judge had rightly held the minister's decision to be a nullity, there was no refusal of planning permission and therefore no basis for a claim for compensation. They expressed no opinion as to whether or not a valid refusal of the plaintiff's application for planning permission in this case would, on the true construction of the Act, attract compensation under Part IV. They set aside the judge's order and ordered that the plaintiff's application for planning permission be remitted to the minister for due consideration according to law. The plaintiff appeals to the Board by leave of the Court of Appeal of Trinidad and Tobago.

H It appeared to their Lordships at the outset that it would be most unfortunate that this lengthy, tortuous and no doubt expensive litigation should terminate without a decision of the question whether, in the event of a refusal of planning permission by the minister when he

reconsiders the plaintiff's application, the plaintiff will be entitled to compensation. They put this view to counsel. Dr. Ramsahoye, for the plaintiff, was content to accept that, if this question could be resolved by an appropriate declaration, he need not challenge the Court of Appeal's order remitting the plaintiff's planning application to the minister. Mr. Anthony Lester, for the Attorney-General, realistically and helpfully accepted that it would be appropriate for the Board in this way to determine the compensation issue which, though presently still hypothetical, is certainly not academic. The issue was accordingly fully argued and now falls for decision.

Permission is required by section 8(1) of the Act for any development of land and "development", as defined by section 8(2), includes "the carrying out of building, engineering, mining or other operations in, on, over or under any land" and "the making of any material change in the use of any buildings or other land." By definition in section 2 "'use' in relation to land, does not include the use of land by the carrying out of any building or other operations thereon." Section 26(1) of the Act provides:

"If on a claim made to the minister in the manner prescribed by regulations made under this Act, it is shown that, as a result of a planning decision involving a refusal of permission or a grant thereof subject to conditions, the value of the interest of any person in the land to which the planning decision relates is less than it would have been if the permission had been granted or had been granted unconditionally, then the minister shall, subject to the provisions of this Part, pay to that person compensation (to be assessed in accordance with the provisions of the Land Acquisition Act), of an amount equal to the difference."

Their Lordships were informed that no regulations for the purposes of this subsection have been made. Section 27(1) of the Act, so far as material, provides:

"Compensation under this Part shall not be payable—(a) in respect of the refusal of permission for any development that consists of or includes the making of any material change in the use of any buildings or other land; . . . (d) in respect of the imposition, on the granting of permission to develop land, of any condition relating to—(i) the number or disposition of buildings on any land; (ii) the dimensions, design, structure or external appearance of any building, or the materials to be used in its construction; (iii) the manner in which any land is to be laid out for the purposes of the development, including the provision of facilities for the parking, loading, unloading or fuelling of vehicles on the land; (iv) the use of any buildings or other land; or (v) the location or design of any means of access to a highway, or the materials to be used in the construction thereof; (e) in respect of any condition subject to which permission is granted for the winning and working of minerals; . . ."

The submission for the Attorney-General is that compensation is excluded in respect of a refusal of planning permission for development consisting in the quarrying of limestone by section 27(1)(a) in that such

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Lopinot Ltd. v. Attorney-General (P.C.)

A development consists of or includes the making of a material change in the use of land. In *In re Claim of Viscount Securities Ltd.* (unreported), 21 December 1976, High Court of the Republic of Eire, Transcript No. 1976/229 S.S., Finlay P. had to consider a similar submission in relation to parallel provisions of Irish planning legislation. There, as here, a general entitlement to compensation for refusal of planning permission (section 55 of the Irish Local Government (Planning and Development) Act 1963) was qualified by an exclusion of compensation in the case of refusal of planning permission for development consisting of or including the making of a material change in the use of land (section 56(1)(a) of the Irish Act) and "use" in relation to land was defined in terms to the like effect as those used in the Act under consideration. It was argued for the planning authority that no compensation was payable in respect of a refusal of permission to build dwelling houses on agricultural land because such development included the making of a material change in the use of the land. Finlay P. rejected the argument. He pointed out that to accept it would attenuate the general right to compensation almost to vanishing point. The definition of "use" in relation to land, by giving the word an artificial meaning narrower than its meaning in ordinary parlance, had the effect of dividing development into two broad categories. In terms of section 8(2) of the Act which their Lordships have to consider, the broad categories are on the one hand "the carrying out of building, engineering, mining or other operations in, on, over or under any land" and on the other hand "the making of any material change in the use of any buildings or other land." Finlay P. concluded:

E "If one accepts these two broad divisions of development not necessarily always exclusive and sometimes inevitably overlapping it is reasonable and consistent with the general provisions of the Act to construe section 56(1)(a) as excluding from the right to compensation an owner of land whose development has been refused permission in respect of the second category namely in the artificial sense the material change of user in the land or structures. The practical effect of such a construction would be that the general right to compensation contained in section 55 would not be nullified or attenuated to a minimal extent as would arise if the narrower construction of section 56(1)(a) were made. . . . I am, accordingly, satisfied that it is the proper construction to apply to this subsection and that the true meaning of it is that it excludes only from compensation a development consisting of or including a material change in the use of a structure or land other than the carrying out of works on this land."

H Their Lordships find this reasoning convincing and applicable to the Act which they have to construe. Mr. Lester did not seriously challenge this view, but sought to distinguish building operations on the one hand and mining operations on the other, at all events where the latter consist of working a quarry. Erecting a building, he submitted, is a once and for all operation. Working a quarry, on the other hand, although involving a series of mining operations, is a continuing activity involving a use of land in ordinary language which the definition of "use" in section 2 of the Act is not effective to exclude. Their Lordships cannot accept the

validity of this distinction. The winning and working of minerals from a quarry is no more than a series of mining operations, as the minerals are progressively excavated, to which the activities carried on for the purpose of working the quarry are merely incidental. For present purposes there can be no distinction in principle, based on the difference in time scale, between such mining operations and building operations, to which the activities of builders carrying out the operations are likewise incidental. Like building operations, mining operations are "other operations" excluded by the definition from the statutory meaning of "use" in relation to land.

But, independently of all these considerations, the issue, in their Lordships' judgment, is put beyond doubt by section 27(1)(e) of the Act. It is inconceivable that the legislature should have relied on the generality of the language of section 27(1)(a) to express an intention to exclude compensation in respect of the outright refusal of planning permission for the winning and working of minerals when they thought it necessary, by section 27(1)(e), to provide clearly and specifically for the much less draconian exclusion of compensation in the case of a grant of such a permission subject to conditions.

That is sufficient to resolve the compensation issue, but it may be of assistance to the parties and reduce the scope for disputes in this matter in the future if their Lordships add some supplementary observations.

Reading the documents which constitute the application for planning permission dated 14 December 1978, which include a quarry survey report, as a whole, it appears that the permission sought is to win and work the limestone on the site by blasting, crushing, screening and washing; outline permission is sought for the erection of certain ancillary buildings such as an office, storeroom and rest room. It is proposed to work the quarry in stages, taking three acres at a time, and then, as each three acre portion is exhausted, to reclaim the land for agricultural use. If, on reconsideration, the minister decides to grant permission, all these matters will no doubt require to be regulated by carefully defined conditions, which can properly be imposed without attracting liability to pay compensation by virtue of section 27(1)(e) of the Act. The conditions which may be imposed must not, of course, be so restrictive as to frustrate the working of the quarry. That would amount in effect to a refusal of permission disguised as a conditional grant.

If, on the other hand, the remission of the application for reconsideration by the minister leads to a refusal, the resulting claim for compensation under section 26(1) will fall to be quantified, in the light of section 27(1)(e), by comparing the value of the site without permission for quarrying with its value if permission had been granted subject to such conditions as might reasonably and properly have been imposed.

It is common ground that the planning application must now be determined with all reasonable expedition and to that end the plaintiff has undertaken to submit to the minister any such further evidence and representations as it wishes the minister to consider within three months of the Board's order and the Attorney-General has undertaken on behalf of the minister that he will (whether or not any further evidence or representations are submitted to him) give notice to the plaintiff of the determination of the application within six months of the Board's order. Upon those undertakings their Lordships affirm the order of the

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Lopinot Ltd. v. Attorney-General (P.C.)

A Court of Appeal that the plaintiff's application for planning permission be remitted to the minister for due consideration according to law. But their Lordships vary the order of the Court of Appeal by the addition of a declaration that, if the application is refused, the plaintiff will be entitled to compensation under and subject to the provisions of Part IV of the Act. To that extent the appeal is allowed.

B In the light of this outcome, it is very properly conceded on behalf of the Attorney-General that he should pay the plaintiff's costs of the proceedings before the judge of first instance and of the appeal from the Court of Appeal to the Board and their Lordships so order. As regards the costs of the proceedings before the Court of Appeal their Lordships can find no sufficient reason to depart from the view of the Court of Appeal that each party should be left to bear its own costs. Accordingly

C there will be no order in respect of the costs incurred in the Court of Appeal.

Solicitors: Ingledew, Brown, Bennison & Garrett; Charles Russell & Co.

S. S.

D

E

[COURT OF APPEAL]

REGINA v. GOLD

REGINA v. SCHIFFREEN

1987 June 29;
July 17, 20; 31

Lord Lane C.J., Leonard and Rose JJ.

F

Crime—Forgery—False instrument—Computer—Unauthorised access into Prestel computer network—Entry of number and password causing electronic impulses to affect computer's user segment momentarily—Whether electronic impulses "device"—Whether user segment "false instrument"—Forgery and Counterfeiting Act 1981 (c. 45), ss. 1, 8(1)

G

The appellants, by means of a dishonest trick, gained unauthorised access into and used a computer network, by entering a number and password on a keyboard, thus causing electronic impulses to affect a part of the computer known as the user segment, which cleared itself on the number and password being checked automatically by the computer, the overall time involved being momentary. The appellants were indicted on specimen counts of forgery, contrary to section 1 of the Forgery and Counterfeiting Act 1981.¹ At the close of the case for the prosecution the appellants submitted that there was no case to answer. The submission was rejected and the appellants were convicted.

H

¹ Forgery and Counterfeiting Act 1981, s. 1: see post, p. 806F–G. S. 8(1): see post, p. 806G–H.

On appeal against conviction, on the questions whether the electronic impulses were a "device" within section 8(1)(d) and whether the user segment was a "false instrument" within section 1:—

Held, allowing the appeal, (1) that, since the electronic impulses were not ejusdem generis with disc, tape or sound track and were not the device on which information was recorded or stored, they could not be a device within section 8(1)(d) (post, p. 808E-F).

(2) That, since forgery involved both a message about the document itself and a message in its words that was to be accepted and acted upon and since the user segment did not carry such messages, the user segment was not brought within the ambit of forgery; and that, therefore, the submission of no case to answer should have been upheld and the convictions would be quashed (post, pp. 809B-C, E, H, 810B).

Per curiam. The Act of 1981 does not seek to deal with information that is held for a moment while automatic checking takes place and is then expunged. The process is not one to which the words "recorded or stored" can properly be applied, suggesting as they do a degree of continuance (post, p. 809E-F).

No cases are referred to in the judgment or were cited in argument.

APPEALS against conviction.

The appellants, Stephen William Gold and Robert Jonathan Schifreen, were tried in the Crown Court at Southwark (Judge Butler Q.C.) on an indictment containing nine counts charging forgery against section 1 of the Forgery and Counterfeiting Act 1981 in that (except for details comprising the date of commission and a particular computer within the network of the Prestel computer) the particulars were that the named appellant

"made a false instrument, namely, a device on or in which information is recorded or stored by electronic means with the intention of using it to induce the Prestel computer to accept it as genuine and by reason of so accepting it to do an act to the prejudice of British Telecommunications Plc."

At the close of evidence for the prosecution, counsel for the appellants submitted that there was no case to answer, on the basis that the prosecution had failed to prove that the appellants had made a false instrument within the meaning of the Act of 1981. The submission was rejected, the appellants called but did not give evidence and on 24 April 1986, after a trial lasting nine days, the appellant Gold was convicted of four counts and the appellant Schifreen of five counts. The appellant Gold was fined £150 on each count, with 14 days' imprisonment consecutive on each in default and was ordered to pay £1,000 towards the costs of prosecution. The appellant Schifreen, who was convicted on five counts, was similarly fined with similar orders respecting default and costs. They appealed against conviction on the grounds, inter alia, that the judge erred in not acceding to the submission of no case to answer, in that the prosecution had failed to establish that the appellants had made a device or an instrument by transmitting electronic impulses.

The facts are stated in the judgment.

3 W.L.R.

Reg. v. Gold (C.A.)

A *Colin Nicholls Q.C.* and *Alistair Kelman*, assigned by the Registrar of Criminal Appeals, for the appellant Gold.

Stephen Mitchell Q.C. and *Andrew Hochhauser*, assigned by the Registrar of Criminal Appeals, for the appellant Schifreen.

Michael Kalisher Q.C. and *Austen Issard-Davies* for the Crown.

B *Cur. adv. vult.*

17 July. LORD LANE C.J. read the following judgment of the court. On 24 April 1986 in the Crown Court at Southwark, the appellants were convicted of contravening the provisions of the Forgery and Counterfeiting Act 1981. They were sentenced as follows: Gold, who was convicted on four counts, was fined £150 on each with 14 days' imprisonment on each in default, and ordered to pay £1,000 towards the prosecution costs; C Schifreen, who was convicted on five counts, was fined £150 on each with the same term in default, and the same order with regard to costs. They now appeal against both conviction and sentence.

The case involved the unauthorised access gained into the British Telecom Prestel Computer Network between October 1974 and January 1985 by the appellants who were what is known as computer "hackers." D This is said to be the first occasion on which this kind of activity has been made the subject of charges under the Act.

The nine counts in the indictment were specimens. Save for the date and the particular computer involved, each count was similar, alleging, as it did, that the appellant in question:

E "made a false instrument, namely, a device on or in which information is recorded or stored by electronic means with the intention of using it to induce the Prestel Computer to accept it as genuine and by reason of so accepting it to do an act to the prejudice of British Telecommunications Plc."

F There is little, if any, dispute about the factual background to the case. Some description of it is necessary in order to understand the way in which the appellants went about their activities.

Prestel is an information system which allows people who have the necessary micro-computers to call up a computer database and to receive information therefrom. Access to the Prestel computer is by way of the British Telecom telephone system. When the computer's number is G dialled, the telephone system connects the dialler to the appropriate Prestel Centre.

In order legitimately to obtain information from the Prestel database, it is necessary to register as a user by filling in an application form and paying a rental charge. Once that is done, the user is allocated an identity number consisting of ten numerals and also a password.

H The user has, as part of his equipment, a television screen and a keyboard. After he has become connected to the particular Prestel computer which he has dialled, a picture will appear on his television screen inviting him to "log on." He then types in his customer identification number ("C.I.N."). That is verified by the computer. Next the user types out his password, which is also verified by the computer. If the computer has been able to match up the C.I.N. and the password with the user information which it has in its memory, the user is then admitted to those parts of Prestel database which he has been authorised

to use. He can then type out his request for information on his keyboard.

In order to understand the nature of the charges, it is necessary to examine in a little more detail the procedure whereby the computer verifies the C.I.N. and the password. When the user telephones the computer, the call is answered by a device called a "port." A port is analogous to a doorway into the system. There is one port for each telephone line. The port tells the computer that a new call has been made and that the user needs to be shown the logging frame. The logging frame is then shown to the user on his television screen. The user then types out his C.I.N. This passes down the telephone line as a series of electronic impulses. There is a part of each computer which is reserved for dealing with the input and output and the control of each port.

The C.I.N. is received in a particular area reserved for that port alone. That area is called a user segment. Each user segment has three areas: (1) the input buffer, (2) the control area and (3) the output buffer. The word "buffer" in this context is used to describe an area in a computer which is used to receive information from or to transmit information to the outside world. When the user keys in his C.I.N., that is received in the input buffer and is then immediately moved in the control area and retained there for the duration of the logging procedure. This may be a very brief time indeed.

In order to verify the customer's identity and the password, the user's details must be accessed from the data base to determine whether he is a valid user or not. It is the function of the logging procedure to compare the C.I.N. with the information already contained in the user file. If there is no C.I.N. on the user file which matches that which has been typed in by the user, then the user is given up to three attempts to repeat his C.I.N. The same procedure is then adopted with the password. If those two checks are completed successfully, the user is then allowed into the Prestel computer.

After these operations are over, the areas in the user segment that were used for the C.I.N. and the password are cleared. Thereafter the input buffer is used to receive the instructions being keyed in by the user and the output buffer is used to show the information which has been requested upon the user's terminal.

The relevant provisions in the Act are as follows. Section 1:

"A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, by reason of so accepting it to do or not to do some act to his own or any other person's prejudice."

Section 8(1):

"in this Part of this Act 'instrument' means— . . . (d) any disc, tape sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means . . ."

Section 9:

"(1) An instrument is false for the purposes of this Part of this Act—(a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or (b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in

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A that form . . . (2) A person is to be treated for the purposes of this Part of this Act as making a false instrument if he alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration)."

Section 10:

B "(1) Subject to subsections (2) and (4) below, for the purposes of this Part of this Act an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs— . . . (c) will be the result of his having accepted a false instrument as genuine . . . in connection with his performance of any duty . . . (3) In this Part of this Act references to inducing somebody to accept a false instrument as genuine . . . include references to inducing a machine to respond to the instrument . . . as if it were a genuine instrument . . .

C (4) Where subsection (3) above applies, the act or omission intended to be induced by the machine responding to the instrument . . . shall be treated as an act or omission to a person's prejudice."

D On any view this, if it was forgery at all, was a very unusual form of it. The appellants did not dispute that they had gained access to the relevant Prestel data bank by means of a dishonest trick. Their object was not so much to gain any profit for themselves as to demonstrate their skill as "hackers." Although they no doubt appreciated that they were in a "grey area of the law," as one of them said to the police, there is no evidence or likelihood that they suspected that they might be contravening the provisions of the Act.

E At the root of the whole case was the question: what was the false instrument which the appellants had made? Or (to expand the question by importing the definition in section 8(1)), what was the device (ejusdem generis with disc, tape and sound track) on or in which information was recorded or stored by electronic means?

F Surprisingly, no firm answer to that question appeared until much of the trial was over. No particulars were requested. The first positive inquiry came from the judge, who asked prosecuting counsel during submissions at the close of the prosecution case: "If I were to say to you, 'what is the instrument?', what would you reply?" Counsel: "The answer I would have to give would be the user segment." That is an answer which does not exude great confidence. In his ruling on the submissions, the judge had this to say:

G "the defendant here made a series of electrical impulses which arrive at, affect and operate on what is called a user segment. These impulses are . . . recorded or stored, albeit for a limited period only. No doubt nothing can be touched, but that is always inherent in the recording process, and, quite apart from that, by section 9(2) an alteration to an instrument is sufficient and here there was, as I see it, an alteration to a user segment."

H So there the judge is saying that the appellants made a false instrument by altering the user segment by means of the impulses which they keyed into the system.

In his direction to the jury the judge put the matter in this way:

"If you are a member and you put in your own details, of course there is no problem, but, say the prosecution, if you input somebody else's number and password, you have made . . . a false instrument.

They liken it to making . . . a false visiting card . . . Now during the log-on process these electronic impulses have to be held albeit for a very short time indeed in . . . the input buffer which is in the user segment and checked for veracity . . . by the computer with the information it is already holding . . . No doubt it all takes a fraction of second. So there is made by the caller, say the prosecution, an instrument. By this process, they say, there has been created a device on or in which information is stored by electronic means. Now it is argued on behalf of the defendants such a construction is wholly artificial and unwarranted. Electronic impulses, they say, cannot be a device on or in which information is stored."

Our sympathies are with the judge, faced as he was with the formidable, if not almost impossible, task of putting before the jury fairly, accurately and intelligibly a concept which comes near to defying description. It is scarcely surprising if some confusion is detectable in the passages we have cited between the user segment itself and the electronic impulses which are put into it by the caller, legitimate or otherwise.

What we have to decide is whether the words of the Act are apt to cover what the appellants admittedly did.

The first and all-important matter which the prosecution had to prove was that the appellants made a false instrument. As already indicated, there were two possible candidates for that role, the electronic impulses and the user segment. Mr. Kalisher for the prosecution concedes that the judge, albeit understandably, did not make this aspect of the case altogether clear, but submits that since the facts were scarcely in dispute, no harm was done thereby.

If the device was the electronic impulses then, say the appellants, that cannot found a charge of forgery. First, they are not of the same genus as disc, tape or sound track. Secondly, they are no more than electronic translations of the C.I.N. and password and are part of the process of transmission; they are the information which may be recorded or stored; they are not the device on which information is recorded or stored. With those submissions we agree. Mr. Kalisher does not, as we understand it, dissent.

The other possibility is the user segment. Before us the prosecution based their case upon this as being the device which was falsified. Their argument runs as follows. The user segment of the relevant Prestel computer receives the information keyed into it by the caller, and, having received it (i.e., the C.I.N. and password), it retains or stores that information on semi-conductor chips or magnetic cords for the moment of time which is required to verify it against the user files which the computer has in its memory. The falsity, goes the argument, is that specified in section 9(1)(a) or 9(1)(b) in that the instrument purports to have been made in that form by someone who did not make it or authorise its making. Once the check is successfully completed, the user segment is cleared. For that brief moment during which the user segment records or stores the false information it becomes a false instrument or device. It was made by the appellant who keyed in the CIN and password. Thus the first and vital ingredient in the offence is, on the prosecution's argument, established.

The fact that the false instrument only exists for a moment is immaterial, submits Mr. Kalisher. It makes no difference whether its life

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A is a second or ten years, it has come into existence and that is all that the Act requires.

Although the simplicity of that submission is attractive, it requires closer examination before being accepted.

B Mr. Nicholls for the appellant Gold drew our attention to The Law Commission (Law. Com. No. 55) Criminal Law Report on Forgery and Counterfeit Currency of 1973 in order to demonstrate the mischief which the Act sought to remedy, and in particular what the words in section 1 as interpreted in section 8 were intended to cure.

C The report, in paragraph 22, points out that in the straightforward case of forgery, a document contains messages of two distinct kinds, first a message about the document itself (e.g., that it is a cheque), and secondly, a message to be found in the words of the document that is to be accepted and acted upon (e.g., that a banker is to pay £x). It is only documents which contain both types of message that require protection by the law of forgery.

D In paragraph 24 the report turns to the desirability of extending this protection to electronic devices. No difficulty arose over computerised printing of, e.g., false dividend warrants which would have been forgery without any necessity of amendment to the law. "The problem is related to the production of false recordings or information or instructions, whether on tape or other material which are stored for further use." The report then goes on to suggest words to bring such material within the Act, and they are almost identical with the words now found in section 8.

E The mischief sought to be remedied was the possibility of forgery by electronic means rather than by the hand-held pen. The basic concept of forgery did not require alteration. It only required adapting to electronic methods of creating false information or instructions which are recorded or stored for further use.

F In our judgment the user segment in the instant case does not carry the necessary two types of message to bring it within the ambit of forgery at all. Moreover, neither the report nor the Act, so it seems to us, seeks to deal with information that is held for a moment whilst automatic checking takes place and is then expunged. That process is not one to which the words "recorded or stored" can properly be applied, suggesting as they do a degree of continuance.

G There is a further difficulty. The prosecution had to prove that the appellants intended that someone should accept as genuine the false instrument which they had made. The suggestion here is that it was a machine (under section 10(3)) which the appellants intended to induce to respond to the false instrument. But the machine (i.e., the user segment) which was intended, so it was said, to be induced seems to be the very thing which was said to be the false instrument (i.e., the user segment) which was inducing the belief. If that is a correct analysis, the prosecution case is reduced to an absurdity.

H We have accordingly come to the conclusion that the language of the Act was not intended to apply to the situation which was shown to exist in this case. The submissions at the close of the prosecution case should have succeeded.

It is a conclusion which we reach without regret. The Procrustean attempt to force these facts into the language of an Act not designed to fit them produced grave difficulties for both judge and jury which we would not wish to see repeated.

The appellants' conduct amounted in essence, as already stated, to dishonestly gaining access to the relevant Prestel data bank by a trick. That is not a criminal offence. If it is thought desirable to make it so, that is a matter for the legislature rather than the courts. We express no view on the matter.

Our decision on this aspect of the case makes it unnecessary to determine the other issues raised by the appellants, in particular the submission that they should be found guilty of forgery when there was no evidence that either of them had any inkling that what they were doing might amount to a contravention of the Act.

*Appeals allowed.
Convictions quashed.*

20 July. The following order was made: (1) under section 16(4) of the Prosecution of Offences Act 1985 payment out of central funds of appellants' taxed costs in Court of Appeal, Crown Court and magistrates' court excepting costs incurred on 17 and 20 July; (2) under section 8(5) of the Legal Aid Act 1982 repayment of legal aid contributions of (a) appellant Gold of £208, and (b) of appellant Schifreen of £4,332; (3) taxation of £100 costs incurred by appellant Gold before legal aid; (4) under section 17(1)(a) of the Prosecution of Offences Act 1985 payment out of central funds of Crown's costs of appeal except for costs incurred on 17 and 20 July. An application for a certificate under section 33(2) of the Criminal Appeal Act 1968 was adjourned.

31 July. The court certified that a point of law of general public importance was involved in the decision, namely, "(1) Whether, on a true construction of sections 1, 8, 9 and 10 of the Forgery and Counterfeiting Act 1981, a false instrument is made in the following circumstances—(a) a person keys into a part of a computer (the user segment), a customer identification number and password of another, without the authority of that other, (b) with the intention of causing the same computer, to allow unauthorised access to its database, and (c) the user segment, upon receiving such information (in the form of electronic impulses), stores or records it for a very brief period whilst it checks it against similar information held in the user file of the database of the same computer. (2) Whether, in order to constitute a false instrument within the meaning of the said Act, an instrument must contain—(a) a message about the instrument itself, and (b) a message to be found in the words of the instrument that is to be accepted and acted upon. (3) Whether, in order for a person to be found guilty of forgery within the meaning of the said Act, he must be proved to have been aware of the relevant facts which constitute the making of the false instrument. (4) Whether the offence is made out if the 'somebody' whom the appellants allegedly intended should accept the false instrument as genuine (in this case—under section 10(3)—a machine) is the same machine as that which was said to be the false instrument, namely the user segment?"

Leave to appeal refused.

Solicitor: Philip G. Ashcroft.

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[COURT OF APPEAL]

PICKSTONE AND OTHERS v. FREEMANS PLC.

1987 Jan. 26, 27;
March 25Purchas and Nicholls L.JJ and
Sir Roualeyn Cumming-Bruce

B

Discrimination, Sex—Equal pay—Work of equal value—Applicants claiming work of equal value with male comparator—Other male employees doing like work with applicants—Whether applicants entitled to rely on equal value provisions—Equal Pay Act 1970 (c. 41), s. 1(2)(a)(c) (as amended by Sex Discrimination Act 1975 (c. 65), s. 8 and Equal Pay (Amendment) Regulations 1983 (S.I. 1983 No. 1794), reg. 2)—E.E.C. Treaty (Cmd. 5179-II), art. 119—Council Directive (75/117/E.E.C.), art. 1

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The employers employed both men and women as warehouse operatives and as checker warehouse operatives. The applicants, female warehouse operatives, claimed that they were entitled to equal pay with a male checker warehouse operative on the basis that they were doing work of equal value within the meaning of section 1(2)(c) of the Equal Pay Act 1970,¹ as amended. The employers resisted the claim on the ground that the applicants were employed on like work with other male employees in the company within the meaning of section 1(2)(a) of the Act, and were not entitled to rely on the equal value provisions. An industrial tribunal upheld the employers' submission and dismissed the claims. The appeal tribunal dismissed the applicants' appeal holding that the express requirement in section 1(2)(c) that the work alleged to be of equal value was not work to which paragraph (a) or (b) applied excluded the applicants from relying on its provisions, and that, since section 1(2)(c) was unambiguous article 119 of the E.E.C. Treaty² was not applicable.

On the applicants' appeal:—

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Held, allowing the appeal, that the words "not being work in relation to which paragraph (a) or (b) above applies" in section 1(2)(c) of the Act of 1970 were clear and unambiguous and, therefore, since the applicants were employed on like work as men within the meaning of paragraph (a), their claim based on work of equal value under paragraph (c) was excluded under the provisions of the Act; that, however, article 119 of the E.E.C. Treaty created personal rights directly enforceable in national courts notwithstanding any restriction on such rights imposed by national legislation; and that, since the provisions of that article, as restated in article 1 of Council Directive (75/117/E.E.C.), did not exclude a claim based on work of equal value where women were employed on like work with men, the applicants were not debarred from claiming that they were employed on work of equal value with the male comparator; and that, accordingly, the matter would be remitted to the industrial tribunal for determination whether their work was of equal value to that of the comparator and whether any difference in pay was due to factors unconnected with discrimination on the ground of sex (post, pp. 817G—818A, 820B—C, 821E—F, 822H—823B, 826F—G, 829A—B, 833D—834A, F, G—H, 835B—E).

Defrenne v. Sabena (Case 43/75) [1976] I.C.R. 547, E.C.J.; *Macarthy's Ltd. v. Smith* (Case 129/79) [1981] Q.B. 180, E.C.J.

¹ Equal Pay Act 1970, s. 1(2) as amended: see post, p. 814B—D.

² E.E.C. Treaty, art. 119: see post, p. 815E—F.

Pickstone v. Freemans Plc. (C.A.)**[1987]**

and C.A. and *Worringham v. Lloyds Bank Ltd.* (Case 69/80) [1981] 1 W.L.R. 950, E.C.J. applied.

Decision of the Employment Appeal Tribunal [1986] I.C.R. 886 reversed.

The following cases are referred to in the judgments:

Ainsworth v. Glass Tubes & Components Ltd. [1977] I.C.R. 347, E.A.T.

Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland (Case 61/81) [1982] I.C.R. 578, E.C.J.

Bulmer (H.P.) Ltd. v. J. Bollinger S.A. [1974] Ch. 401; [1974] 3 W.L.R. 202; [1974] 2 All E.R. 1226, C.A.

Defrenne v. Sabena (Case 43/75) [1976] I.C.R. 547; [1981] 1 All E.R. 122n, E.C.J.

Garland v. British Rail Engineering Ltd. [1983] 2 A.C. 751; [1982] 2 W.L.R. 918; [1982] I.C.R. 420; [1982] 2 All E.R. 402, E.C.J. and H.L.(E.)

Jenkins v. Kingsgate (Clothing Productions) Ltd. (Case 96/80) [1981] 1 W.L.R. 972; [1981] I.C.R. 592, E.C.J.; [1981] 1 W.L.R. 1485; [1981] I.C.R. 715, E.A.T.

Macarthy's Ltd. v. Smith (Case 129/79) [1981] Q.B. 180; [1980] 3 W.L.R. 929; [1980] I.C.R. 672; [1981] 1 All E.R. 111, E.C.J. and C.A.

O'Brien v. Sim-Chem Ltd. [1980] 1 W.L.R. 734; [1980] I.C.R. 429; [1980] 2 All E.R. 307, C.A.

Worringham v. Lloyds Bank Ltd. (Case 69/80) [1981] 1 W.L.R. 950; [1981] I.C.R. 558; [1981] 2 All E.R. 434, E.C.J.

The following additional cases were cited in argument:

Commission of European Communities v. Denmark [1986] C.M.L.R. 44

Johnston v. Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] Q.B. 129; [1986] 3 W.L.R. 1038; [1987] I.C.R. 83; [1986] 3 All E.R. 135, E.C.J.

Rainey v. Greater Glasgow Health Board [1987] A.C. 224; [1986] 3 W.L.R. 1071; [1987] I.C.R. 129; [1987] 1 All E.R. 65, H.L.(Sc.)

Shields v. E. Coomes (Holdings) Ltd. [1978] 1 W.L.R. 1048; [1978] I.C.R. 1159; [1979] 1 All E.R. 456, C.A.

Sorbie v. Trust Houses Forte Hotels Ltd. [1977] Q.B. 931; [1976] 3 W.L.R. 918; [1977] I.C.R. 55; [1977] 2 All E.R. 155, E.A.T.

APPEAL from the Employment Appeal Tribunal.

The applicants, I. Pickstone, A. Hepburn, P. J. Woolner, C. E. Fyffe and R. Roberts, five warehouse operatives, claimed against their employers, Freemans Plc., that they were entitled to equal pay to that of Mr. Phillips, who was employed as a checker warehouse operative, as their work as warehouse operatives was of equal value to his work within the meaning of section 1(2)(c) of the Equal Pay Act 1970. The industrial tribunal sitting at Cambridge dismissed their claim on the ground that a claim under paragraph (c) relying on work of "equal value" could only be made if the applicant was unable to rely on the "like work" provision in section 1(2)(a). On the applicants' appeal, the appeal tribunal [1986] I.C.R. 886 dismissed the appeal on the ground that as they were employed on like work with men they could not claim that they were employed on work of equal value to that of another man under section 1(2)(c).

The applicants appealed on the grounds that (1) the appeal tribunal erred in law in deciding that, on its true construction, section 1(2)(c) of the Equal Pay Act 1970, as amended, prohibited a woman from claiming equal pay for work of equal value by reference to named comparators

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- A when she did like work to another man in the same employment; (2) the appeal tribunal erred in law in failing to find that section 1(2)(c), on its true construction, prohibited a woman from claiming that she did work of equal value to a man in the same employment when she did like work to a man. It did not prevent a woman from claiming under the equal value provisions by reference to the work of one man merely because she did like work to another man; (3) the appeal tribunal erred in law in
- B failing to find that article 119 of the E.E.C. Treaty and Council Directive (75/117/E.E.C.) (a) entitled the applicants to claim equal pay to men doing work of equal value in the same employment irrespective of whether there was another man doing like work to that of the applicants and (b) either assisted in the interpretation of section 1(2)(c), to the extent that it was ambiguous, so as to support the grounds advanced in
- C (1) and (2) above or gave rights to the applicants upon which they might directly rely and against the employers in national courts and tribunals.

The facts are stated in the judgment of Nicholls L.J.

David Pannick for the applicants.

Christopher Carr Q.C. and *Patrick Elias* for the employers.

Cur. adv. vult.

D 25 March. The following judgments were handed down.

NICHOLLS L.J. This appeal concerns equal pay in cases of work of "equal value." Shortly stated, the question raised is whether a woman employed on work which is the same as that of one man but which is also of equal value with the work of another man, can claim equal pay with that other man where she is already being paid as much as the man engaged on the same work as herself. Both the industrial tribunal and the appeal tribunal have said no in answer to that question. We were told that there are many other claims before industrial tribunals awaiting the outcome of this appeal.

The five applicants, Mrs. Pickstone and four of her female colleagues, are employed by Freemans Plc., a mail order company, as "warehouse operatives." They contend that their work is of equal value to that of a Mr. Phillips, who is employed by the employers as a "checker warehouse operative." They are not paid as much as he is. So they made a complaint to the industrial tribunal, sitting at Cambridge. Before that tribunal the employers contended that men as well as women were employed as warehouse operatives, and paid equally, and that men and women were also employed as checker warehouse operatives. The employers submitted that in those circumstances it was not open to the applicants as warehouse operatives, paid equally with their male colleagues, to claim equality of pay with Mr. Phillips, a checker warehouse operative. Issue was joined before the industrial tribunal on that submission of law, without the facts being investigated and without any formal admission by the applicants that there are male employees doing like work to them. Thus, in effect, the industrial tribunal heard and decided a preliminary question of law on assumed facts.

The applicants base their claims on section 1(2)(c) of the Equal Pay Act 1970 and also on article 119 of the E.E.C. Treaty.

Equal Pay Act 1970

Section 1(1) of the Equal Pay Act 1970 implies an equality clause into every contract of employment of a woman which does not already

include such a clause. The nature and effect of an equality clause are set out in section 1(2). An equality clause has a similar effect in each of the three circumstances specified in paragraphs (a), (b) and (c) of section 1(2). Accordingly, for convenience I will omit sub-paragraphs (i) and (ii) from paragraphs (b) and (c) when setting out the material parts of section 1(2), as follows:

“(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the ‘woman’s contract’), and has the effect that—(a) where the woman is employed on like work with a man in the same employment—(i) if (apart from the equality clause) any term of the woman’s contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman’s contract shall be treated as so modified as not to be less favourable, and (ii) if (apart from the equality clause) at any time the woman’s contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman’s contract shall be treated as including such a term; (b) where the woman is employed on work rated as equivalent with that of a man in the same employment—(i) . . . and (ii) . . . (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—(i) . . . and (ii) . . .”

Like work under paragraph (a) means work of the same or of a broadly similar nature where any differences between what the woman does and what the man does are not of practical importance in relation to terms and conditions of employment. Work is only rated as equivalent under paragraph (b) if the woman’s and the man’s jobs have been rated as equivalent on a job evaluation study.

The employers’ argument, which was accepted by the industrial tribunal and the appeal tribunal, is straightforward. Paragraph (c), expressly and unambiguously, does not apply where the woman is employed on work to which either paragraph (a) or paragraph (b) applies. Paragraph (c) applies only where the woman is employed on work “not being work in relation to which paragraph (a) or (b) above applies.” Hence, it was submitted, if the woman is in fact employed on like work with a man (meaning any man) in the same employment, paragraph (a) applies to her case whether she likes it or not, and she is thereby excluded from the scope of paragraph (c). Likewise with paragraph (b).

The applicants’ argument is that the exclusionary words in paragraph (c) “not being” are ambiguous, and that one of the possible meanings of the word “applies” is applies in the sense that the woman is not employed on like work with, or on work rated as equivalent with that of, a man in the same employment *with whom the woman is comparing herself*. It is for the applicant to choose the man with whose work she wishes to compare hers: *Ainsworth v. Glass Tubes & Components Ltd.* [1977] I.C.R. 347, and Parliament, when adding paragraph (c) to section 1(2) in 1983, cannot have intended to go against that principle and compel a woman to compare herself with a man under paragraph (a). In

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Nicholls L.J.

A the present case the applicants are doing what traditionally has been “women’s work” and they should be free to have recourse for comparison to other work of equal value to theirs.

B In reply Mr. Carr submitted that this construction is untenable. The scheme of the section is to imply an equality clause into the woman’s contract, with immediate effect, viz., with effect from the inception of the woman’s contract. Where a woman is employed on like work with a man, paragraph (a) applies automatically, with the consequential, immediate deemed modification of the relevant term in the woman’s contract. Paragraph (a) applies in this way irrespective of whether any complaint is made to the industrial tribunal. Hence, if a complaint is made and is successful, the woman has a claim not merely for the future: she can claim arrears of remuneration or damages: section 2(1).
C But, continued Mr. Carr’s submission, Mr. Pannick’s construction is inconsistent with this, because on Mr. Pannick’s construction paragraph (a) would not apply (and, indeed, none of the paragraphs would apply) unless and until the woman selects a male comparable.

D Argument was also addressed to us on the mischief which section 1(2)(c) was intended to cure. This requires a consideration of Community law, because it was in response to a decision of the European Court of Justice that section 1(2)(c) was added to the Equal Pay Act 1970.

Community law: article 119

E The United Kingdom became a member of the European Economic Community on 1 January 1973, and the E.E.C. Treaty was introduced into English law by section 2 of the European Communities Act 1972. Article 119 is in these terms:

F “Each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment for his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job.”

G This article had two objects. First, in the economic field, to avoid the situation in which undertakings established in states which had implemented the principle of equal pay would suffer a disadvantage in competition within the Community with undertakings established in states which had not then eliminated pay discrimination against women workers. Secondly, in the social field, “by common action, to ensure
H social progress and seek the constant improvement of the living and working conditions of [the member states] peoples:” see *Defrenne v. Sabena* [1976] I.C.R. 547, 565.

In 1975, concerned at the uneven progress being made by member states in implementation of article 119, the council of the European Communities adopted Council Directive (75/117/E.E.C.), which it will be convenient to call “the equal pay directive.” The material parts of that Directive read:

"The Council of the European Communities . . . Whereas implementation of the principle that men and women should receive equal pay contained in article 119 of the Treaty is an integral part of the establishment and functioning of the common market; Whereas it is primarily the responsibility of the member states to ensure the application of this principle by means of appropriate laws, regulations and administrative provisions; . . . Whereas differences continue to exist in the various member states despite the efforts made to apply the resolution of the conference of the member states of 30 December 1961 on equal pay for men and women and whereas, therefore, the national provisions should be approximated as regards application of the principle of equal pay has adopted this Directive;

"Article 1.

"The principle of equal pay for men and women outlined in article 119 of the Treaty, hereafter called 'principle of equal pay,' means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

"Article 2.

"Member states shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities . . .

"Article 4.

"Member states shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended."

As authoritatively decided by the European Court of Justice, the first sentence of article 1 of the equal pay directive re-states the principle of equal pay set out in article 119 of the Treaty, but article 1 "in no way alters the content or scope of that principle as defined in the Treaty." The main purpose of article 1 of the Directive was to facilitate the practical application of that principle: see *Jenkins v. Kingsgate (Clothing Productions) Ltd.* (Case 96/80) [1981] 1 W.L.R. 972, 984.

Thus, as re-stated in article 1 of the equal pay directive, the principle embodied in article 119 of the Treaty is that men and women should receive equal pay for equal work, viz., for the same work or for work to which equal value is attributed. What, so far, the European Court has not considered (indeed, we were referred to no decision of any court where the point has been considered) is the application of that principle in the case posed by the question stated at the beginning of this judgment. In the present proceedings the appeal tribunal decided, for a

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A different reason to which I shall come, that Community law was not applicable, and did not express a view on what the position would be under Community law if it were applicable. The industrial tribunal were bolder: in their view the equal pay directive envisages that the first matter to be considered is "the same work": "it is only if there is no same work that one goes to the alternative 'work to which equal value is attributed'."

B In this court Mr. Pannick submitted that the principle of equal pay for equal work enunciated in article 119, as re-stated or clarified in article 1 of the equal pay directive, entitles men and women to equal pay for the same work and (likewise) to equal pay for work to which equal value is attributed. They are entitled to equal pay in both those instances, and their entitlement to equal pay for work of equal value is not dependent upon there being no person of the other sex currently engaged in the same work as the person making the claim. If there is a man, or if there are men, doing the same work but being paid no more than the woman, that will be evidence, whose weight will depend upon all the circumstances, that the payment of a higher wage to other men who are doing work which is different but of no greater value is due to a material factor other than the difference in sex.

D The argument in favour of the narrower construction of article 119 is that it makes sense for recourse not to be had to the less precise and much more difficult yardstick of work of "equal value" when there is to hand the more precise and less controversial one of "same work." The second limb of article 1 of the equal pay directive (work to which equal value is to be attributed), preceded as it is by the disjunctive "or," is applicable only when the first limb (same work) is not in point. If the first limb is applicable, so that there is a man doing the same work as the woman, but the woman is entitled nonetheless to compare herself to another man and his work she would, as the industrial tribunal said in this case, "have wandered into the territory of job evaluation." The principle of equal pay for men and women doing equal work is intended to avoid discrimination on the ground of sex, not to have effect on disputed differentials unrelated to sex. Moreover, the basis of the decision of the European Court in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (Case 61/81) [1982] I.C.R. 578, 599, was that the United Kingdom had failed to take steps to provide a remedy in cases other than like work and work covered by voluntary job classification schemes: "equal value" was only needed as a supplement, a fall-back alternative.

G In my view Mr. Pannick's submission, in support of the first of these two interpretations of article 119, is correct. Article 119 enshrines a broad, general principle: equal pay for equal work. The equal pay directive makes clear that in this context equal work embraces work of equal value as well as work which is the same. I can see no justification for implying into this general principle, whereunder equal work includes both these categories, a rigid and inflexible limitation, to the effect that, although a woman is entitled to compare herself with a man doing work of equal value, she is only so entitled if and so long as no man is doing the same work as herself, and that whenever and for so long as there is a man doing the same work the woman cannot make that comparison, even if the difference in pay is attributable solely to grounds of sex. It makes the presence per se of one man doing the same work, which in some cases might be wholly fortuitous or even, possibly, a situation

contrived by an unscrupulous employer, a decisive factor, regardless of all the other circumstances of the case.

Although this precise point has not been considered by the European Court, support for the broad approach I have adopted to the interpretation of article 119 can be obtained from the decision of the European Court in *Macarthy's Ltd. v. Smith* (Case 129/79) [1981] Q.B. 180. In that case a woman took up a post, after an interval of four months, which had been held by a man. She was paid a lower salary than he had been paid. She claimed to be entitled to the same salary as her predecessor. The European Court held, at p. 198, that the crucial question was whether there was a difference in treatment between a man and a woman performing "equal work" within article 119:

"... The scope of that concept, which is entirely qualitative in character in that it is exclusively concerned with the nature of the services in question, may not be restricted by the introduction of a requirement of contemporaneity. 12. It must be acknowledged, however, that, as the Employment Appeal Tribunal properly recognised, it cannot be ruled out that a difference in pay between two workers occupying the same post but at different periods in time may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex. That is a question of fact which it is for the court or tribunal to decide."

Thus "equal work" involves a comparison between the work (the nature of the services) performed by the woman and the work done by the man, and in making that comparison it is not essential that the man is still doing that work or that he was ever doing it at the same time as the woman. Absence of contemporaneity does not prevent the comparison being made, although such absence is material when considering, as a question of fact, whether the reason for the difference in pay is discrimination on grounds of sex. I do not see how this interpretation of article 119 permits of the conclusion that nonetheless contemporaneity is of the essence in relation to work of equal value, in that a woman is entitled to equality of pay with a man whose work is of equal value but only so long as contemporaneously there is no man doing the same work as herself.

Community law: direct applicability

Before us, although he was not prepared to accept Mr. Pannick's interpretation of article 119 as correct, Mr. Carr concentrated most of his fire in a different direction. He submitted that, even if the applicants' interpretation of article 119 were correct, the applicants could still not succeed with their alternative claim under article 119, because in equal value cases article 119 is not directly applicable and enforceable in this country. In adopting this approach Mr. Carr was following the same course as the appeal tribunal in the present proceedings, who applied the decision of this court in *O'Brien v. Sim-Chem Ltd.* [1980] 1 W.L.R. 734. So I turn next to the question of direct applicability.

It is now well established that, where article 119 of the Treaty applies directly to the facts of a case, without the need for more detailed implementing measures on the part of member states or of the Community, the law enacted in that article is binding on the English court, and the individual has the right to apply to the English court for

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A relief: see, for example, *O'Brien's* case, *per* Cumming-Bruce L.J. at p. 745.

Thus the question is: what are the circumstances in which article 119 does, or does not, apply directly? In *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547, 566–568, paragraphs 21–24, and 40, the European Court held that article 119 was directly applicable in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private. That was in 1976.

B Subsequently, in *O'Brien's* case this court held, in short, that equivalent work (in contrast to like work) was only brought within the scope of the equal pay principle in article 119 by article 1 of the equal pay directive, and that, accordingly, article 119 itself had no direct effect in respect of equivalent work. Nor did article 1 of the equal pay directive have direct effect, for it was addressed to the national legislatures for them to implement the equal pay provisions where the work was “equivalent” but not “like.”

C *O'Brien's* case came before the Court of Appeal in 1979. Since then Community jurisprudence has moved on. The European Court has authoritatively clarified the effect of article 1 of the equal pay directive, and also the position regarding direct enforceability of rights under article 119, and I conceive that on these points of Community law it is the duty of this court to give effect to those later decisions of the European Court. In March 1981, as already mentioned, the European Court held that article 1 of the equal pay directive did not alter the content or scope of the principle of equal pay outlined in article 119: *Jenkins v. Kingsgate Ltd. (Clothing Productions) Ltd.* (Case 96/80) [1981] 1 W.L.R. 972. Earlier in the same month, in *Worringham v. Lloyds Bank Ltd.* (Case 69/80) [1981] 1 W.L.R. 950, the European Court had to consider whether article 119 of the Treaty or article 1 of the equal pay directive conferred enforceable Community rights upon individuals where contributions were made by an employer bank to two staff retirement benefit schemes, there being one scheme for men and another for women. The court held that the contributions paid by the employer in the name of the employee were “pay” within the meaning of article 119. Accordingly, no question arose regarding article 1 of the equal pay directive. On direct applicability the court said, at p. 969:

“23. As the court has stated in previous decisions (judgment of 8 April 1976, in *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547 and judgment of 27 March 1980, in *Macarthys Ltd. v. Smith* (Case 129/79) [1981] Q.B. 180, article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private. In such a situation the court is in a position to establish all the facts enabling it to decide whether a woman receives less pay than a man *engaged in the same work or work of equal value.*” (Emphasis added.)

The court concluded, at p. 970:

"27. In this case the fact that contributions are paid by the employer solely in the name of men and not in the name of women *engaged in the same work or work of equal value* leads to unequal pay for men and women which the national court may directly establish with the aid of the pay components in question and the criteria laid down in article 119 of the Treaty. 28. For those reasons, the reply to the third question should be that article 119 of the Treaty may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals . . ." (emphasis added).

In my view that decision covers the present case. The five applicants and Mr. Phillips work in the same establishment, and I can see no relevant distinction between the banking employees in *Worringham's* case and the applicants in the present case with regard to the ability of the court to determine, without further national or Community measures, whether a woman was or was not engaged in work of equal value.

Mr. Carr relied strongly on the decision of the European Court in July 1982 in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (Case 61/81) [1982] I.C.R. 578. In deciding that the United Kingdom had failed to introduce into its legal system in implementation of the equal pay directive such measures as were necessary to enable employees to pursue a claim in respect of work of equal value where no job classification scheme existed, the court said, at p. 598:

"there is at present no means whereby a worker who considers that his post is of equal value to another may pursue his claims if the employer refuses to introduce a job classification system."

Mr. Carr submitted that that is inconsistent with equal value claims being directly enforceable by individuals. I agree that, read literally, this passage supports Mr. Carr's submission, but I am not persuaded that the court's conclusion regarding the United Kingdom's breach of article 1 of the equal pay directive is inconsistent with the same court's decision in *Worringham's* case [1981] 1 W.L.R. 950 regarding the direct application of article 119. Even where the national legislation does no more than reproduce the Community right, explicit national legislation, with appropriate procedural rules and regulations, can have a practical usefulness for claimants and their advisers not possessed by a directly enforceable Community right which lacks that convenient clothing.

Conclusion on section 1(2)(c) of the Equal Pay Act 1970

I broke off from considering the construction of the exclusionary words in section 1(2)(c) "not being work" to look at Community law in order to identify the mischief which the introduction of paragraph (c) into section 1(2) of the Equal Pay Act 1970 was intended to cure. The mischief was the omission, save for the cases covered by paragraph (b), of any provision in the Act for equal pay in cases of work of equal value. The European Court expressed its conclusion in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1982] I.C.R. 578, 599:

"14. Accordingly, by failing to introduce into its national legal system in implementation of the provisions of [the equal pay directive] such measures as are necessary to enable all employees

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A who consider themselves wronged by failure to apply the principle of equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists to obtain recognition of such equivalence, the United Kingdom has failed to fulfil its obligation under the Treaty."

B Paragraph (c) was added to section 1(2) as Parliament's legislative response to that decision. Moreover, the amendment to section 1(2) was made by means of a statutory instrument, Equal Pay (Amendment) Regulations 1983 (S.I. 1983 No. 1794), under a statutory power enabling provision to be made for the purpose of implementing any Community obligation of the United Kingdom: section 2(2) of the European Communities Act 1972. Thus the link between section 1(2)(c) and article 119 is indeed a close one.

C If the view expressed above on the interpretation of article 119 is correct, and if the employers' argument on the construction of section 1(2)(c) is correct, two consequences would seem to follow inescapably. The first is that section 1(2)(c) of the Equal Pay Act 1970 would, in part, have failed to remedy the mischief which it must be taken to have been intended to cure, in that the Act still would not provide a remedy in those cases where currently no man is engaged on the same work. The second consequence, having regard to the reasoning of the European Court in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1982] I.C.R. 578, would be that in this respect the United Kingdom would, apparently, have still not wholly fulfilled its obligations under the Treaty and the equal pay directive.

E Needless to say, I am extremely reluctant to construe section 1(2)(c) in a way that would have these consequences. Nonetheless I have found the employers' arguments on the meaning of the exclusionary words in section 1(2)(c) cogent to the extent that, indeed, I have found myself driven to the conclusion that those words are not ambiguous and are not fairly capable of the meaning submitted by Mr. Pannick. It would be incompatible with the scheme of an equality clause introduced by section 1 for the exclusionary words in paragraph (c) to have the meaning or effect submitted by Mr. Pannick. In my judgment, on the assumed facts, the applicants do not fall within section 1(2)(c).

F There is one further point I should add here. It concerns section 2(4) of the European Communities Act 1972, the material part of which provides that "any enactment passed or to be passed . . . shall be construed and have effect subject to the foregoing provisions of this section." The foregoing provisions of section 2 include a provision, in section 2(1), that all such rights and obligations created or arising by or under the Treaties, and all such remedies provided for by or under the Treaties, as in accordance with the Treaties, are without further enactment to be given legal effect in the United Kingdom shall be recognised and available in law, and be enforced accordingly.

H *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751, 771, Lord Diplock mentioned, and left open, the possibility that,

"having regard to the express direction as to the construction of enactments 'to be passed' which is contained in section 2(4), anything short of an express positive statement in an Act of Parliament passed after 1 January 1973, that a particular provision

is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty, would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation of the United Kingdom, however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve consistency.”

In the present case no argument was addressed to us on this point, it being common ground in counsel's submissions that Community law was material on the construction of section 1(2)(c) only if what I have called the exclusionary words in section 1(2)(c) are ambiguous.

Had this section 2(4) point been likely to affect the outcome of the present appeal, I apprehend that it would have been necessary, before delivering judgment, to have invited the parties to consider whether they wished to return to the court to make submissions on this point. However, as at present advised, I do not think this point would assist either party. To construe the exclusionary words in section 1(2)(c) as having the meaning I have stated above does not encroach upon any directly enforceable rights which women (or men) have under article 119. There is nothing in the Equal Pay Act 1970 which expressly or impliedly negatives, or purports to negative, any such Community rights. Those rights remain enforceable in the English court. In that respect this construction of section 1(2)(c) is not in conflict with article 119.

Where, on this construction of section 1(2)(c) of the Equal Pay Act 1970, there is a conflict is that the effect of the exclusionary words is to limit the ambit of section 1(2)(c) in such a way that the section does not cover all the cases which, in accordance with article 119, it should cover. Section 1(2)(c) fails to confer a statutory right on all employees endowed with equal pay rights under article 119. But, given that the exclusionary words are unambiguous and are not reasonably capable of the meaning which would carry out the United Kingdom's treaty obligations in this field, for my part, as at present advised, I have great difficulty in seeing how the effect of section 2(4) of the European Communities Act 1972 in such a case can be to require the English court, nevertheless, to ascribe some other, artificial meaning to those words.

Overall conclusion

It remains for me to note that Mr. Pannick submitted that if he was wrong on the construction of the Equal Pay Act 1970, so that the appeal falls to be determined according to the meaning and effect of article 119, this court should seek rulings from the European Court on the relevant questions. In my view, in the exercise of its discretion this court should not accede to that submission. The position under Community law on both the material points is sufficiently clear for it to be appropriate for this court to deal with both these points (as it happens, in favour of Mr. Pannick's clients) without any reference to the European Court.

Accordingly, for the reasons given, for my part I would allow the appeal and direct that these applications proceed in front of the industrial tribunal on the footing that under article 119, although not under section 1(2)(c) of the Equal Pay Act 1970, a woman employed on work which is the same as that of one man but which is also of equal value with the work of another man is not debarred from claiming equal pay with that other man by reason of the fact that she is already being

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A paid as much as the man engaged on the same work as herself. In determining whether the work of these applicants is of equal value to that of the checker warehouse operatives, and in determining whether (to adopt and adapt the language of the European Court in *Macarthys'* case [1981] Q.B. 180, 198) the difference in pay between the warehouse operatives and the checker warehouse operatives is explicable by the operation of factors which are unconnected with any discrimination on grounds of sex, the industrial tribunal should give such weight to the factor that there is a man, or there are men, doing the same work as the applicants and being paid no more, as is appropriate having regard to all the circumstances. These are determinations of fact.

B

C PURCHAS L.J.: The history of events against which this matter comes before the court and the relevant United Kingdom statutory provisions have been described in the judgment of Nicholls L.J. and need not be repeated in this judgment except where necessary for ease of reference. The Equal Pay Act 1970 received the Royal Assent on 29 May 1970 but did not come into force until 29 December 1975, thus allowing a period of time for employers to bring their contractual arrangements into line. Section 1 was passed:

D “with a view to securing that employers give equal treatment as regards terms and conditions of employment to men and to women . . . (a) for men and women employed on like work the terms and conditions of one sex are not in any respect less favourable than those of the other; and (b) for men and women employed on work rated as equivalent . . . the terms and conditions of one sex are not less favourable than those of the other in any respect in which the terms and conditions of both are determined by the rating of their work.”

E

These provisions, as enacted, never came into force. The Act of 1970 was amended and re-enacted in Schedule 1 to the Sex Discrimination Act 1975; the terms of the amended Act have already been set out in the judgment of Nicholls L.J. The Act from the outset envisaged two criteria: “like work” and “equivalent work.”

F

There is no clue as to whether the rights in respect of “like work” and “equivalent work” were to be mutually exclusive or accumulative. This may have been because Parliament did not advert to the somewhat sophisticated mischief adumbrated by Mr. Pannick. I am not aware of any evidence of a compliant male actually having been put to “low paid woman’s work” to avoid a claim for “equal pay” for “equivalent work.” However, the possibility cannot be ignored. The simple approach might well have been that the presence of a male doing the same or like work would provide the best means of comparison without the necessity of resorting to a more remote comparison with someone doing equivalent work. Nor is any further light thrown on this problem by the amendments to section 1 of the Act of 1970 introduced by the Act of 1975. It was not until an amendment to section 1 of the Act of 1970 effected by the Equal Pay (Amendment) Regulations 1983 added a further paragraph that the concept of mutual exclusivity appeared. I must return to this later.

G

H

To complete the statutory history the European Communities Act 1972 received the Royal Assent on 17 October 1972. Section 2, in its relevant parts, provided:

"(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties . . . are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law . . .

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated minister or department may by regulations, make provision—(a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid. . . . (4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, *and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; . . .*" (emphasis provided).

Schedule 2 restricted the powers to make orders conferred by section 2(2) in respects which might well be thought to justify full legislative treatment such as imposing or increasing taxation, making orders with retrospective effect or creating by order new criminal offences. The power, therefore, to make statutory orders under section 2(2) was clearly defined and limited.

The Equal Pay Act 1970 as originally amended by the Sex Discrimination Act 1975 contained only provisions in relation to section 1(2) "(a) where the woman is employed on like work with a man in the same employment" and (b) where the woman is employed on work rated as equivalent with that of a man in the same employment." Each paragraph contained sub-paragraphs in precisely equivalent terms providing for the modification of the appropriate term in the woman's contract or the inclusion of a term otherwise omitted in that contract. It is significant, however, that section 1(2)(b) did not include, and still does not include, any express restriction upon resorting to this paragraph if section 1(2)(a) is also available (contrast section 1(2)(c) below).

It is convenient at this stage to set out again the material parts of article 119 of the E.E.C. Treaty:

"Each member state shall . . . maintain the application of the principle that men and women should receive *equal pay for equal work*. For the purposes of this article, 'pay' means the ordinary basic or minimum wage . . . *and any other consideration, whether in cash or in kind . . . directly or indirectly . . .*" (emphasis provided).

and Council Directive (75/117/E.E.C.) which was adopted in 1975 by the Council of European Communities, who were anxious about the inertia being shown by some member countries in implementing article 119:

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A “Whereas implementation of the principle that men and women should receive equal pay contained in article 119 is an integral part of the establishment and functioning of the common market; . . .

“Article 1

B “The principle of equal pay for men and women outlined in article 119 of the Treaty, hereafter called ‘principle of equal pay,’ means, for the same work or for work to which equal value is attributed, the elimination of all discrimination . . .”

It is now established that the Directive merely explains and defines article 119 and does not have any legislative force of its own: *Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] 1 W.L.R. 972.

C In view of the failure (referred to below) of Mr. Pannick to demonstrate a viable alternative construction to the words “not being work . . . applies” in section 1(2)(c) of the Act of 1970 to support a submission of ambiguity, it is not necessary to consider article 119 as an aid to construction of the Act of 1970. The matter cannot, however, be concluded without recourse to Community law. It is necessary to consider the question of the direct enforceability of article 119 in the domestic courts of the U.K. in the following respects: (1) What is the statutory status of the amendment effected by the Regulations of 1983? (2) Does article 119 recognise any distinction between equal pay for equal work as defined by the Directive as meaning “the same work” or “work to which equal value is attributed” in the sense that the two concepts are mutually exclusive or are to be given an optional or accumulative effect? (3) Whether and to what extent article 119 is considered to give rise to personal rights enforceable in the courts of the United Kingdom?

Statutory status of section 1(2)(c) of Equal Pay Act 1970

F As a result of the reference by the Commission of the European Communities to the European Court in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1982] I.C.R. 578, it was held by the court that the Act of 1970, with section 1(2)(a) and (b) as amended by the Act of 1975, did not comply with article 119 in the sense that it did not enable all employees who considered themselves wronged by failure to apply the principle of “equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists” to have recourse to the courts: see p. 599. The decision established: (1) that under article 119 the words “equal pay for equal work” meant equal pay “for like work or for work to which equal value is attributed”; and (2) that section 1(2)(b) of the Act of 1970 did not satisfy article 119 because a job valuation scheme could only be put into effect if the employer chose to organise one. This did not comply with article 2 of the equal pay directive which provides:

H “Member states shall introduce into their national legal system such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities . . .”

In the submissions, questions and advice of the Advocate General, no consideration was given to the relationship between the two branches of

the definition of equal pay for equal work identified in article 1 of the Directive. Of course, section 1(2)(b) was not said to be mutually exclusive with section 1(2)(a) of the Act of 1970. To comply with the decision of the European Court the Equal Pay (Amendment) Regulations 1983 were made under the powers granted by section 2(2) of the European Communities Act 1972. In order to remedy the defect identified in section 1(2) of the Act of 1970 a further paragraph (c) was added:

“where a woman is employed on work which, *not being work in relation to which paragraph (a) or (b) above applies*, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment” (emphasis provided).

Paragraph (c) was clearly modelled on paragraphs (a) and (b), with the additional words specifically providing that the relief under the new paragraph—and the relief afforded by paragraphs (a) and (b)—should be mutually exclusive. These words have, of course, been central to this appeal. The fact that Parliament saw fit to include them in section 1(2)(c) but did not amend the existing section 1(2)(b) by adding similar words of exclusion in line with the new paragraph, must, I would have thought, raise a question to say the least. Moreover, one might be forgiven for wondering what would have been the attitude of the European Court if the words of exclusion had appeared in section 1(2)(b) at the time of their decision in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* in July 1982.

Mr. Pannick, who appears for the applicants, has submitted that, notwithstanding the inclusion of section 1(2)(c) under the statutory order, the United Kingdom legislation does not yet comply with article 119 and the Directive. The critical words are: “not being work in relation to which paragraph (a) or (b) above applies.” I agree with Nicholls L.J. that Mr. Pannick’s primary submission, namely, that there is an ambiguity in the application and effect of these words, cannot succeed. I am firmly of the view that paragraph (c), read in its ordinary sense, is plain and contains no ambiguity. The qualification “not being work in relation to which paragraphs (a) and (b) above applies” relates to the work on which the woman is employed and its relationship with work falling within (a) or (b) and cannot relate, as Mr. Pannick submits, to the man with whom the woman at her election chooses to be compared. There is nothing which I would wish to add to what has fallen from Nicholls L.J. on this aspect of the case. However, as has already been stated, the matter does not end there.

If the expression “equal work” in article 119, as elucidated by article 1 of the Directive, is shown to embrace two separate comparisons, namely, “same work” and “work of equivalent value,” there are difficulties in the construction of section 1(2)(c) otherwise demanded by the plain language of the statute. The words excluding paragraphs (a) and (b) included in paragraph (c) would appear to go beyond the delegated powers under which the Regulations of 1983 were made. The powers are restricted generally to “the implementation” of the Treaty as set out in section 2(2) of the European Communities Act 1972 already cited. Moreover, on a strict interpretation, the question may well be asked—Why “work of equivalent value” should not be available for the

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A identification of discrimination merely because there exists the same or similar work available for comparison, when no such restriction applies to “work rated as equivalent” under subsection (b).

B To date, so far as I know, consideration of section 1(2) of the Act of 1970 by the European Court has been without any argument that the provisions relating to “like work” and “work rated as equivalent” are mutually exclusive rather than optional or cumulative. By the introduction of the limiting words now included in paragraph (c) and the possibility, however remote, of their incorporation by necessary inference in paragraph (b), the minister in making the Regulations of 1983 may have failed to achieve compliance with article 119 as Mr. Pannick suggests. This submission has, in my judgment, considerable force and is supported by the further possibility that the new paragraph (c) is without the statutory powers granted by section 1(2) of the Act of 1972. However, as the latter point was not argued before us, I approach it with considerable reservation.

Article 119

D In considering the true construction of this article in the light of the judgments of the European Court, I bear in mind, on the one hand, the judgment of Lord Denning M.R. in *H. P. Bulmer Ltd. v. J. Bollinger S.A.* [1974] Ch. 401 to which Mr. Pannick drew our attention and, on the other hand, the discretionary power we have, where necessary, to resolve questions of doubt, to refer the matter to the European Court under article 177 and R.S.C., Ord. 114. Lord Denning M.R. emphasised the importance of avoiding overloading the European Court and gave guidelines to construction for the English courts. As I read the position, it is this. If it is possible to detect a clear general approach to a particular question of construction from the judgments of the European Court, then a domestic court, not being “a final court” within article 177, should not exercise its discretion to refer to the European Court, but should attempt to construe the article in question, within the guidelines in *Bulmer’s* case.

F Article 119 has been considered in a number of cases by the European Court. A convenient starting point is *Defrenne v. Sabena* [1976] I.C.R. 547. The distinction between “like work” and “work of equivalent value” did not arise. The terms of service for the steward and stewardess were the same. The question of direct enforceability did arise, however, and it is convenient to refer to this at this stage. It was part of the United Kingdom Government’s case that article 119 was not directly enforceable, at p. 553:

H “(c) The need for legislative action on the part of the member states appears from the formulation of the obligation imposed on them by article 119 in the form of a general statement of principle. Directive (75/117/E.E.C.) acknowledged this need; in article 8 it requires member states to put into force the legislation necessary to comply with the Directive within one year of its notification and thus to ensure the application of the general principle contained in article 119. In the absence of such national implementing legislation an obligation of the kind contained in article 119 is incomplete and cannot properly be completed by interpretative judicial decisions.”

In answer to questions posed by the court, at p. 562, there is no suggestion of mutual exclusivity:

"In the private sector the Equal Pay Act 1970 provided for the abolition of all discrimination in collective agreements by the end of 1975. It gives the right to equal pay to women employed on work of the same or a broadly similar nature as men, as well as to women employed on work which, although different from that carried out by men, has been given an 'equal value' under a system of classification of duties ('job evaluation')."

In the judgment of the court the following paragraphs are relevant, at pp. 566-567, 568:

"18. For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of article 119 between, *first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a community or national character*" (emphasis provided). 19. It is impossible not to recognise that the complete implementation of the aim pursued by article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at community and national level. . . . 21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by article 119 must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation. 22. This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private. 23. As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks. . . . 40. The reply to the first question must therefore be that the principle of equal pay contained in article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public."

I have set out *Defrenne v. Sabena* [1976] I.C.R. 547 at some length because the European Court referred back to this judgment in a number of subsequent judgments and because it is the fons et origo of the expression "direct and overt discrimination" which formed a main plank of Mr. Carr's submissions to which I shall return subsequently.

For my part I do not see that the reference to what has been compendiously referred to as "indirect discrimination" in *Defrenne v.*

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A *Sabena* is a mandate for distinguishing cases in which it can clearly be established that "unequal pay" is received for "like work" from those cases in which "unequal pay" is received for "work of equivalent value," provided that the "equivalence" of the work can be identified without reference to "more explicit implementing provisions of a community or national character." Applying the decision in *Defrenne v. Sabena* in the light of the submissions and answers given by the United Kingdom, I would be prepared to construe article 119, as explained by the Directive, as affording a relief to a person who is receiving "unequal pay," either for the same work or for work of equivalent value, and that the two concepts are not mutually exclusive but are integral parts of the same concept.

C *Direct enforceability*

In general, therefore, I agree with Mr. Pannick when he submits that article 119 is directly enforceable. Mr. Pannick further submits, however, that any distinction which had been based upon the contention that article 1 of the Directive of 1975 was not so enforceable, was misconceived because article 119 was not extended by the Directive which merely explained it. On this basis Mr. Pannick submitted that discrimination described as indirect or hidden was no less within article 119 and, therefore, directly enforceable.

Mr. Carr submitted, on the other hand, that, if article 119 embraced claims based upon work of equal value, as well as like work, then by enacting section 2(1) of the Act of 1972 the United Kingdom would have complied with the article and that, therefore, the decision in *Commission of the European Community v. United Kingdom of Great Britain and Northern Ireland* [1982] I.C.R. 578 should not have gone against the United Kingdom. The force of this argument is somewhat diluted because this was not the case proposed on behalf of the United Kingdom at that time. Mr. Pannick said that the decision of the European Court on this aspect must be taken as per incuriam if there is any force in Mr. Carr's submissions.

It was Mr. Carr's main submission that, in order to succeed on the direct enforceability point, Mr. Pannick had to allege that his claim fell within what has been described in some of the cases as the "direct discrimination category." He relied on paragraphs 9 and 10 of the decision in *Macarthy's Ltd. v. Smith* [1981] Q.B. 180, 198:

"9. According to the first paragraph of article 119 the member states are obliged to ensure and maintain 'the application of the principle that men and women should receive equal pay for equal work.' 10. As the court indicated in *Defrenne v. Sabena* [1976] I.C.R. 547, that provision applies directly, and without the need for more detailed implementing measures on the part of the Community or the member states, to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service."

Mr. Carr also relied upon *Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] 1 W.L.R. 972, the judgment delivered by the European Court, at pp. 977, 983:

"Finally, as to the question of the direct effect of article 119 and article 1 of the Council Directive (75/117/E.E.C.), it may be recalled that, as the court held in its decision of 8 April 1976, in *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547, these provisions are directly applicable to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay, including unequal pay for equal work carried out in the same establishment or service. . . . Although 'adverse impact' is defined in the legislation of the United Kingdom as 'indirect discrimination,' it should not be confused with the 'indirect and disguised discrimination' which has been described by the court as falling outside the scope of the direct application of article 119. Here, 'indirect discrimination' is used in such a manner as to exclude any practice which, although not founded on any discriminatory motives, nevertheless has a discriminatory effect, and not as meaning discrimination which can only be suppressed by national or Community legislative measures more detailed than the provisions referred to above. . . .

"Fourth question

"16. In the fourth and last question, the national court asks whether the provisions of article 119 of the Treaty are directly applicable in the circumstances of this case. 17. As the court has stated in previous decisions (judgment 8 April 1976, in *Defrenne v. Sabena* [1976] I.C.R. 547; judgment of 27 March 1980, in *Macarthys Ltd. v. Smith* [1981] Q.B. 180 and judgment of 11 March 1981, in *Worringham v. Lloyds Bank Ltd.* [1981] 1 W.L.R. 950), article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private."

In particular Mr. Carr relied upon the decision of this court in *O'Brien v. Sim-Chem Ltd.* [1980] 1 W.L.R. 734. Here the court distinguished between equal work and equivalent work: see the judgment of Cumming-Bruce L.J., at pp. 747-748:

"I am satisfied that the Directive is what it professes to be, i.e. a directive to governments to take national measures to approximate their laws in order to give effect to the new criteria expressed in article 1 of the Directive. The discrimination identified by the application of the criterion in that article is not directly applicable in national courts until it is implemented in national legislation. Paragraph 68 of the judgment in the *Defrenne* case [1976] I.C.R. 547, 571, makes it necessary to make one qualification of that

A conclusion: 'Even in the areas in which article 119 has no direct
effect, that provision cannot be interpreted as reserving to the
national legislature exclusive power to implement the principle of
equal pay since, to the extent to which such implementation is
B necessary, it may be relieved by a combination of Community and
national measures.' In my view this paragraph contemplates the
combination of Community and national measures and affirms the
jurisdiction to decide whether national measures comply with the
Treaty and with relevant Directives, even if such Directives are not
directly applicable."

C The judgments in *O'Brien v. Sim-Chem Ltd.* were, of course,
delivered before the ruling of the European Court in *Jenkins v. Kingsgate*
(*Clothing Production Ltd.* [1981] 1 W.L.R. 972. In so far as the court's
attention in *O'Brien's* case was paid to the direct enforceability of article
1 of the Directive, the judgments have been overtaken by the subsequent
D decisions of the European Court in 1981: *Jenkin's* case and *Worringham*
v. Lloyds Bank Ltd. [1981] 1 W.L.R. 950. In the latter case the
applicants contended, inter alia, (a) that the exclusion of retirement
benefit schemes from the Acts of 1970 and 1975 was incompatible with
Community law; (b) that the deficiencies in the treatment by the bank of
men and women in the bank's retirement benefit scheme was "a form of
direct and overt discrimination which may be identified solely with the
aid of the criteria of equal work and equal pay referred to in article
119:" see p. 956B. The bank's reply emphasised that the benefits were
not considerations paid directly or indirectly by the employer, but were
received from the trustees of the pension fund and that the assessment
E of terms in such a scheme to achieve fairness between men and women
was an extremely complex one. On this basis it was submitted that, if
there was discrimination, it could not be described as "direct or overt."
This argument was repeated by the United Kingdom at p. 963A-B. The
judgment of the court, at p. 969 included the following:

F "21. Moreover, Directive (75/117/E.E.C.), whose objective is, as
follows from the first recital of the preamble thereto, to lay down
the conditions necessary for the implementation of the principle that
men and women should receive equal pay, is based on the concept
of 'pay' as defined in the second paragraph of article 119 of the
Treaty. Although article 1 of the Directive explains that the concept
G of 'same work' contained in the first paragraph of article 119 of the
Treaty includes cases of 'work to which equal value is attributed,' it
in no way affects the concept of 'pay' contained in the second
paragraph of article 119 but refers by implication to that concept.

"The third question

H "22. The national court asks further in its third question whether,
if the answer to question 1 is in the affirmative, 'article 119 of the
E.E.C. Treaty . . . [has] direct effect in the member states so as to
confer enforceable Community rights upon individuals in the
circumstances of the present case.' 23. As the court has stated in
previous decisions (judgment of 8 April 1976, in *Defrenne v. Sabena*
(Case 43/75) [1976] I.C.R. 547 and judgment of 27 March 1980, in
Macarthys Ltd. v. Smith (Case 129/79) [1981] Q.B. 180), article 119
of the Treaty applies directly to all forms of discrimination which
may be identified solely with the aid of the criteria of equal work

and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private. In such a situation the court is in a position to establish all the facts enabling it to decide whether a woman receives less pay than a man engaged in the same work or work of equal value."

Finally, I wish to refer to *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751. This case involved post-retirement travel concessions which were non-contractual given to railway employees. The concession given to men included their spouses and children. Those given to the women were personal to them only. The following questions were asked of the European Court, at pp. 755-756. Was the discrimination:

"1 . . . contrary to (a) article 119 of the E.E.C. Treaty? (b) article 1 of the Council Directive (75/117/E.E.C.)? . . . 2. If the answer . . . is affirmative, is article 119 or either of the said Directives directly applicable . . . so as to confer enforceable . . . rights . . . ?"

The United Kingdom denied that article 119 would be directly enforceable asserting that national or Community measures would be required to achieve precision and relied upon paragraph 17 of the judgment in *Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] 1 W.L.R. 972. This contention was not supported by the Advocate General. Paragraphs 13, 14 and 15 of the decision read, at pp. 767-768:

"Question 2

"13. Since question 1(a) has been answered in the affirmative the question arises of the direct applicability of article 119 in the member states and of the rights which individuals may invoke on that basis before national courts.

"14. In paragraph 17 of its judgment of 31 March 1981, in *Jenkins v. Kingsgate (Clothing Productions) Ltd.* (Case 96/80) [1981] 1 W.L.R. 972, 983 the court stated that article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application.

"15. Where a national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the grant of special transport facilities solely to retired male employees represents discrimination based on difference of sex, the provisions of article 119 of the Treaty apply directly to such a situation."

Some assistance in deciding the approach to be adopted by the domestic court in the presence of an apparent conflict between domestic and Community law is to be found in the speech of Lord Diplock in *Garland's* case after it had returned from the European Court, at p. 771:

"The instant appeal does not present an appropriate occasion to consider whether, having regard to the express direction as to the

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A construction of enactments 'to be passed' which is contained in section 2(4), anything short of an express positive statement in an Act of Parliament passed after 1 January 1973, that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty, would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation of the United Kingdom, however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve consistency. For, in the instant case the words of section 6(4) of the Sex Discrimination Act 1975 that fall to be construed, 'provision in relation to . . . retirement,' without any undue straining of the ordinary meaning of the language used, are capable of bearing either the narrow meaning accepted by the Employment Appeal Tribunal or the wider meaning preferred by the Court of Appeal but acknowledged by that court to be largely a matter of first impression. Had the attention of the court been drawn to article 119 of the E.E.C. Treaty and the judgment of the European Court of Justice in *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547, I have no doubt that, consistently with statements made by Lord Denning M.R. in previous cases, they would have construed section 6(4) so as not to make it inconsistent with article 119."

In my judgment the decisions of the European Court demonstrate a clear pattern of development as regards the direct enforceability of article 119 as follows. (1) The expression "equal pay for equal work" is to receive a broad interpretation. "Pay" is given a very wide definition in article 119 itself. It would be inconsistent if work were not treated similarly. (2) Article 1 of Council Directive (75/117/E.E.C.) merely confirms that the expression "equal work" shall have an equally wide interpretation that is not only "same work" but also "work to which equal value is attributed." (3) The sense of (1) and (2) cannot be said to support the contention that "same work" must always exclude "work to which equal value is attributed" in choosing the most appropriate route by which to arrive at "equal work." (4) The expression in *Defrenne v. Sabena* [1976] I.C.R. 547, 566D, "direct and overt discrimination which may be identified solely with the aid of criteria based on equal work and equal pay" has been followed through the cases and remains the touchstone of direct enforceability. Attempts to limit its range by equating "equal work and equal pay" to "same work and equal pay" have invariably been rejected and in any event ignore the effect of article 1 of the directive in defining "equal work and equal pay." (5) That the words used to describe the second type of discrimination "indirect and disguised" mean what they say, namely, that without reference to more explicit implementing provisions the discrimination cannot be identified. Paragraph 19 of the judgment in *Defrenne v. Sabena* instances the sort of situation envisaged. (6) That a discrimination which appears on the face of a direct comparison demonstrates unequal pay for one type of work and another type of work to which equal value is attributed at the same place of employment must fall within the first rather than the second type of discrimination and would, therefore be directly enforceable.

Conclusion

Regrettably, in my judgment Mr. Pannick's submission that section 1(2)(c), whilst it contains unqualified words excluding section 1(2)(a) and (b), is inconsistent with rights that are directly enforceable in the United Kingdom courts under Community law is made out. There is clear authority that in a case of conflict Community law must prevail. Two courses are open to the court: (1) to refer two questions to the European Court asking (a) Does section 1(2)(c) comply with article 119? (b) Is article 119 directly enforceable in the United Kingdom courts in cases where the discrimination arises in cases of unequal pay for work to which an equivalent value is attributed? (2) To construe section 1(2) of the Act of 1970 so as to conform with the principles of article 119 by inserting the words necessary to achieve a result that is not inconsistent with Community law as I understand it. This involves an otherwise unjustifiable qualification of what are in fact clear words. As I understand the effect of Community law, it embraces the requirement that, in order to identify discrimination, the domestic court must be able to call upon the best method of arriving at a standard of "equal work" whether by comparing the work under review with "the same work" or "work to which equal value is attributed." This must be at the election of the domestic court, in this case the industrial tribunal. The choice method of determining "equal work" within the meaning of article 119 cannot, in my judgment, be either at the hands of the employer or the employee since that would encourage "comparison shopping" by either or both. This cannot have been the intention of the article. Although this course has obvious advantages, both from a social and also an industrial point of view, it is more difficult to find a satisfactory statutory justification. There is a possible approach. This is to assume: (a) that the draftsman of the Regulations of 1983 did not exceed the powers under which the regulations were drawn under section 2(2)(a) of the Act of 1972; and (b) to construe and give effect to the regulations in accordance with section 2(4) of that Act and article 119. This could be achieved by amending the relevant part of section 1(2)(c) to read: "... not being work which can more fairly be compared under paragraphs (a) or (b) above."

Since under article 117 reference to the European Court is discretionary so far as this court is concerned, and in view of the firm conclusion I have reached with regard to the state of Community law, I would favour the second of the two courses. Therefore I agree with the order proposed by Nicholls L.J.

SIR ROUALEYN CUMMING-BRUCE. I have had the advantage of reading in draft the judgments now delivered by Purchas L.J. and Nicholls L.J. and can state my own views very concisely.

As a matter of construction, I reject Mr. Pannick's submission that the words of section 1(2)(c) of the Act of 1970 are ambiguous. On their ordinary meaning the words "not being work in relation to which paragraph (a) or (b) above applies" are plain and unambiguous, even though for the reasons stated by Purchas L.J. they may appear to go beyond the delegated powers under which the Regulations of 1983 were made. So the applicants' case fails on the construction of the English legislation.

Article 119 of the Treaty, as explained by Council Directive (75/117/E.E.C.), gives an applicant the right to claim that he or she is

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A entitled to equal pay when engaged under a contract of employment which imposes on the employee the obligation to do work of equal value to the work of any other employee of the opposite sex in the same establishment. It is for the industrial tribunal to decide the questions of fact relevant to the applicant's claim. Article 119 does not exclude such comparison on the ground that an employee of the opposite sex is engaged on the same or like work on the same remuneration as the applicant. An equal value claim and comparison are not dependent on the situation relevant to persons doing the same or like work, though the facts regarding same work or like work cases may be material evidence for consideration by the industrial tribunal, subject to the usual factors relevant to the weight of such evidence.

B
C The judgments of the European Court, to which Purchas and Nicholls L.JJ. have referred, point clearly enough to the conclusion that the equal pay rights established by article 119 as explained in the directive are directly enforceable in a national court in a case where the national legislation is such as to restrict the rights conferred on employees by article 119. This is sufficiently clear to justify this court so holding even though the particular issue of comparison of section 1(2)(c) of the Act of 1970 with the rights conferred by article 119 has not yet been resolved by the European Court.

D The conclusion, which in my view is likely to involve formidable problems of industrial and commercial convenience, must be that the European remedy is available to the applicant to the industrial tribunal even though there can be no remedy available under national legislation.

E For those reasons the appeal should be allowed, and the case sent back for determination by the industrial tribunal in the light of this judgment.

*Appeal allowed with costs.
Matter remitted to industrial tribunal
for further determination.
Leave to appeal.*

F *Solicitors: W. Douglas Clark, Brookes & Co., West Bromwich; Slaughter & May.*

M. F.

MORRIS v. LONDON IRON AND STEEL CO. LTD.

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May and Croom-Johnson L.JJ. and
Sir Denys Buckley

Industrial Relations—Industrial tribunals—Findings of fact—Industrial tribunal unable to decide whether employee dismissed—Issue determined by reference to burden of proof—Whether duty on tribunal to decide facts on evidence

Fact or Law—Issues of fact—Inability to make findings—Claim for unfair dismissal—Whether industrial tribunal having duty to find facts—Whether entitled to determine issue by reference to burden of proof without finding facts

The employee applied to an industrial tribunal, claiming that he had been unfairly dismissed by the employer. On the preliminary issue, whether the employee had been dismissed, the tribunal, finding the probabilities equally balanced, felt unable to make a finding of fact one way or the other, and dismissed the application on the basis that the employee had not discharged the burden which lay on him of proving that he had been dismissed. He appealed to the Employment Appeal Tribunal, which by a majority held that tribunals of fact were under a duty to make findings on at least the important issues of fact before them and that the industrial tribunal had failed to discharge that duty, and remitted the case for rehearing by another industrial tribunal.

On the employer's appeal:—

Held, allowing the appeal, that although judges and tribunals were under a duty to make findings of fact in relation to matters before them if they could, drawing inferences from the findings of primary fact where appropriate, they were under no absolute obligation to make such findings; that if, in an exceptional case, the judge or tribunal applying the appropriate standard of proof was conscientiously unable to decide where the truth lay on a particular issue, he or it was entitled, in the absence of any relevant presumption of law, to determine that issue by reference to whether the party on whom the onus of proof lay had discharged it, without making findings of primary fact on that issue; that the industrial tribunal, having found itself unable to make a finding of fact as to whether the employee had been dismissed, had therefore been entitled to dismiss the application on the basis that he had not discharged the onus of proof which lay on him; that there was no duty on an industrial tribunal to give detailed reasons for its inability to make such a finding, beyond those which were necessary to enable the parties to know that there had been no error of law; that in the instant case the industrial tribunal had given adequate reasons; and that, accordingly, its decision should be restored (post, pp. 843G–H, 844A–C, D–F, 845F–H, 846A, C–E).

Varndell v. Kearney & Trecker Marwin Ltd. [1983] I.C.R. 683, C.A. applied.

Bray v. Palmer [1953] 1 W.L.R. 1455, C.A. and *Baker v. Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472, C.A. considered. *Khanna v. Ministry of Defence* [1981] I.C.R. 653, E.A.T. doubted.

Per curiam. It should not be thought that a swift reliance on where the onus of proof lies and a failure to decide issues of fact ought in any way to be considered an easy or convenient

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Morris v. London Iron Co. (C.A.)

- A refuge for a judge or tribunal who found it difficult to make up his or its mind in a particular case (post, pp. 843H—844A, 846A—B).

Decision of the Employment Appeal Tribunal [1986] I.C.R. 629 reversed.

The following cases are referred to in the judgments of May and Croom-Johnson L.JJ.:

- B *Alexander Machinery (Dudley) Ltd. v. Crabtree* [1974] I.C.R. 120, N.I.R.C.
Baker v. Market Harborough Industrial Co-operative Society Ltd. [1953] 1 W.L.R. 1472, C.A.
Bray v. Palmer [1953] 1 W.L.R. 1455; [1953] 2 All E.R. 1449, C.A.
Khanna v. Ministry of Defence [1981] I.C.R. 653, E.A.T.
Union of Construction, Allied Trades and Technicians v. Brain [1981] I.C.R. 542, C.A.
- C *Varndell v. Kearney & Trecker Marwin Ltd.* [1983] I.C.R. 683, C.A.

The following additional case was cited in argument:

Rhesa Shipping Co. S.A. v. Edmunds [1985] 1 W.L.R. 948; [1985] 2 All E.R. 712, H.L.(E.)

APPEAL from the Employment Appeal Tribunal.

- D By an originating application dated 4 July 1985, the employee, Michael Charles Morris, applied for a determination by an industrial tribunal of the question whether he had been unfairly dismissed by the employer, London Iron and Steel Co. Ltd., on 19 April 1985 from his employment as a labourer. On 10 October 1985, the industrial tribunal unanimously decided, as a preliminary issue, that the applicant had not
- E been dismissed. The employee appealed and on 17 April 1986 the Employment Appeal Tribunal [1986] I.C.R. 629 by a majority allowed the appeal and remitted the matter to a differently constituted tribunal for a fresh hearing.

- F By a notice of appeal dated 16 May 1986 the employer appealed, pursuant to leave granted by the appeal tribunal on 17 April, on the grounds (1) that the majority of the appeal tribunal were wrong in holding that the industrial tribunal had erred in determining that the employee had not been dismissed within the meaning of section 55 of the Employment Protection (Consolidation) Act 1978; (2) that the majority of the appeal tribunal had erred in law in holding (i) that there had been a duty on the industrial tribunal to decide the issues of fact relating to the question of whether the employee had been so dismissed notwithstanding that it had concluded that it was unable to say which evidence, as between that adduced by the employee and that adduced by the employer, was to be preferred on the balance of probabilities, and (ii) that the industrial tribunal had erred in law in failing so to decide and had further erred in determining that question by relying on the burden of proof and in finding as a fact that the employee had not discharged the burden which lay on him of proving that he had been
- H dismissed; (3) that the majority of the appeal tribunal ought to have held, as the dissenting member had done, that there was no duty in law on an industrial tribunal to decide issues of fact where it was genuinely and conscientiously unable to resolve conflicting evidence, and that it was permissible for a tribunal in such circumstances to determine the issue of dismissal by relying on the burden of proof and finding that the employee had not discharged it; (4) that the majority of the appeal tribunal had erred in law in holding that the industrial tribunal had been

under a duty to consider each issue of fact singly and to make specific findings in relation to each issue; (5) that the majority of the appeal tribunal had erred in law in holding that the principle enunciated in *Bray v. Palmer* [1953] 1 W.L.R. 1455 and *Baker v. Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472, relating to the duty of judges to decide issues of fact in road traffic accident cases, applied equally to industrial tribunals determining whether an employee had been dismissed for the purposes of section 55 of the Act of 1978; that the majority ought to have held, as the dissenting member had done, that the authorities did not impose a duty on tribunals in all civil cases to resolve conflicts of evidence by specifically accepting or rejecting the evidence of one or other witness or set of witnesses, and that they did not prevent such tribunals determining particular issues by relying on the burden of proof when they were genuinely and conscientiously unable to decide issues of fact; (6) that the majority of the appeal tribunal had wrongly construed its dicta in *Khanna v. Ministry of Defence* [1981] I.C.R. 653, 658, 659 as indicating that industrial tribunals had a duty in all cases to decide issues of fact and that it was improper for them to reach decisions by relying on the burden of proof; that the majority ought to have held, as the dissenting member had done, that the appeal tribunal had there recognised that there might be cases in which the ultimate decision would turn on the burden of proof, and that, in any event, *Khanna's* case was distinguishable from the instant case; (7) that the majority of the appeal tribunal had further erred in holding that the industrial tribunal's failure to decide the issues of fact left the whole case undecided; and that they ought to have construed the industrial tribunal's conclusions, as the dissenting member had, as meaning that the employee had not satisfied it that he had been dismissed, and to have held that it had reached a proper and valid decision.

The facts are stated in the judgment of May L.J.

Andrew Thompson for the employer.
Michael McLaren for the employee.

MAY L.J. On 24 September and 10 October 1985 an industrial tribunal had to decide a preliminary issue on an application by an employee alleging unfair dismissal, namely whether or not that employee had been dismissed by his employer. The issue between the parties at that time was whether the employee had been dismissed by his employer, or whether, on the other hand, he had resigned from his employment.

The material facts upon which it fell to the industrial tribunal to decide that preliminary issue occurred in April 1985. In the industrial tribunal's reasons for its decision, it recorded that the pre-April 1985 facts were not contested, but went on: "but the evidence of the [employee] and his witness and that of the [employer's] witnesses as to what happened in April and thereafter is conflicting." Then the industrial tribunal rehearsed the evidence that there had been before it on the issue "Was there a dismissal, or had there been a resignation?" and expressed its conclusions in paragraphs 17 to 19 in this way:

"17. The members of this tribunal have found themselves unable to state which evidence is to be preferred on the balance of probabilities. After considering all the evidence and observing the

A demeanour of the witnesses we find that the probabilities are equally balanced. We do not feel able to make a finding of fact as to which version of events is to be preferred. 18. But the onus of proof of dismissal rests with the [employee]. We find as a fact that he has not discharged that onus. 19. Accordingly we are obliged to find that the [employee] was not dismissed."

B That that was the unanimous decision of the tribunal is apparent from the first page of its written decision, which was ultimately sent to the parties on 4 November 1985, although we are told that some half hour or so after the conclusion of evidence and submissions before the tribunal on 10 October, the parties were orally told of the nature of the industrial tribunal's decision.

C Being dissatisfied with that finding of the industrial tribunal the employee appealed to the Employment Appeal Tribunal. That appeal tribunal by a majority allowed the appeal and remitted the matter to a differently constituted tribunal for a fresh hearing. The appeal tribunal gave leave to appeal to this court. We have now heard an appeal on behalf of the employer against the allowing by the appeal tribunal of the appeal from the industrial tribunal by the employee to which I have referred. The employer on its appeal to us seeks to have the decision of the industrial tribunal reinstated, with the result that it was decided that in so far as this litigation is concerned, the employee was not dismissed.

D The majority of the appeal tribunal, having in their judgment referred to the decision of the industrial tribunal, parts of which I have quoted, came to their conclusion, allowing the appeal, in this way. At one stage they said [1986] I.C.R. 629, 631, 632:

E "the crux of the argument which has been advanced to us is that there is a duty not only in industrial tribunals but in any tribunal of fact to make findings of fact and that a tribunal of fact faced with conflicting evidence, however difficult it may find it to do so, must resolve the conflict, and if conscientiously it finds it cannot do so then it is, albeit conscientiously, failing in its duty as a tribunal of fact. . . . The majority is persuaded that the industrial tribunal was under a duty to make up its collective mind on at least the important issues of fact which arose before them. Its failure to do so in the present case was inevitably, so the majority find, a breach of that duty. . . . The majority consider that without specific findings of the sort which they regard as desirable, a party cannot decide whether he is in a position to challenge findings of fact, for example, on the ground of perversity or on the ground of some other error."

G Finally they said, at p. 633:

H the majority feels that by their failure to come to a conclusion on the issues of fact, the industrial tribunal have 'left the whole case undecided.' And for those reasons the majority would remit the matter for determination by a differently constituted industrial tribunal."

The views of the dissenting member of the appeal tribunal were that no criticism could be made of the way in which the industrial tribunal had reached its decision. He or she said in the course of the decision that "there must be cases (rare cases) when any tribunal of fact (using the word 'tribunal' in its broadest sense) cannot conscientiously decide

between two sets of witnesses.” He or she then recorded paragraph 17 of the industrial tribunal’s reasons, which I have quoted, and went on to say, at pp. 633–634:

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“Even having displayed their difficulty, indeed their inability, to decide between the two competing sets of evidence and even having chosen to express their views in the words which they did, the dissentient nonetheless feels that all they are saying in substance and effect is ‘the applicant has failed to satisfy us.’ They should not, the dissentient feels, be open to criticism on this account nor should the applicant be in a better position than he would have been had the industrial tribunal adopted some such formula as that suggested.”

B

The matter has been argued before us on much the same lines and with reference to the same authorities as it was before the appeal tribunal. In brief, the argument of the employer is that if the industrial tribunal conscientiously came to the conclusion which it is recorded as having reached, no criticism can be made of it and the result, having regard to the onus of proof, had to be that the employee had failed to make out his case.

C

On behalf of the employee before us, although the arguments have been expanded in a skeleton argument for which we are extremely grateful, effectively the appeal has been argued on the lines to which the majority of the appeal tribunal adverted in the passages from the judgment of the appeal tribunal which again I have quoted. The arguments have been based, first, upon the decisions of this court in two similar “running-down” actions. The first was *Bray v. Palmer* [1953] 1 W.L.R. 1455 and the second *Baker v. Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472. In each of those cases two vehicles were involved. In the second case both drivers were killed, so that it was not easy to adduce evidence as to precisely how the accident happened. In *Bray v. Palmer* [1953] 1 W.L.R. 1455 Oliver J. felt that, on the evidence he had, he was unable to see his way to deciding which of the respective drivers was responsible; he was unable to decide whether the plaintiff’s story or that of the defendant was true, and he accordingly dismissed the action and the counterclaim arising out of that road accident. When the matter came before this court, the essence of the court’s decision was that the explanation that both the plaintiff and the defendant (the respective drivers of the two vehicles) were in some measure each to blame for the accident had not been considered by the trial judge and was at least as likely as the explanation that one or other of the two drivers had been wholly to blame. In the result the decision of the trial judge was set aside. Having regard to the evidence which had been adduced, this court felt that the matter should go back for a rehearing.

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Various dicta from the judgments have been relied on by one side or the other in the argument before us. Sir Raymond Evershed M.R. in his judgment rehearsed an argument which Mr. Fox-Andrews of counsel had put before the court, at p. 1458:

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“... in essence and in substance the judge, having heard and considered the evidence, concluded, as a fact that the occurrence in issue was only explicable upon hypothesis ‘A’ or upon hypothesis ‘B’ and that, if that is right, then there is no duty upon a judge so compelling that he must, whatever the evidence and its nature and

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A however great his experience, conclude the matter in favour either of 'A' or of 'B'. I do not find it necessary to express a conclusion whether the judicial duty in such a circumstance does require a judge to decide one or the other. I am not saying it does not, but it is unnecessary for me to say that he must, in those circumstances, make up his mind."

B Quite clearly, therefore, the Master of the Rolls was expressly reserving the question whether or not there was any judicial duty in the circumstances postulated to reach a conclusion on one side of the line or the other.

C Then in a longer passage from the judgment of Jenkins L.J., the latter, having referred to passages from the trial judge's judgment, said that they seemed to fall short of a decision of the case, and continued, at p. 1459:

D "Having come to the conclusion that the accident happened either in the way asserted on the plaintiffs' side or in the way asserted on the defendant's side, [the trial judge] said, in effect, that he was unable to decide which story was the right one. With the greatest respect to the judge, that seems to me to be a denial of justice. It can only mean that the parties to the case on one side or the other are deprived of relief to which they are entitled. In my view, it behoved the judge to form some conclusion one way or the other in the matter and I think the difficulty in which he found himself was in great measure due to his method of approaching the problem, which appears from his observation to the effect that he did not see his way to find that both were responsible or even that both were to blame and that it seemed to him to be a case of one or the other."

E The last part of that quotation from Jenkins L.J.'s judgment is particularly relied upon by the employee, being (it is said) a statement that it behoved the trial judge in the circumstances of that case to come to a conclusion one way or the other in the matter before him.

F As to that I have two comments to make. First, it seems to me that the statement was clearly made in the context of the failure of the trial judge to take into account, and indeed to appreciate, that there was the third possibility on the facts of the case that both drivers had been to blame. In any event, secondly, it seems to me quite clear that that dictum on the part of Jenkins L.J. was not necessary for the decision to which he came, namely that the approach of the judge below had been wrong and that accordingly the matter should be reheard.

G Morris L.J. in a short judgment said, at p. 1460:

H "The judge thought that the stories both of the plaintiffs and the defendant were wildly improbable. In those circumstances, I find it difficult to see how the case could proceed on the basis that one or other case must substantially be true and that the allegations on one side or the other must be rejected in their entirety. I do not think it was appropriate in this case to reject consideration of the possibility that there may have been some measure of fault on either side."

That, as I think, makes it quite clear that Morris L.J., with the other members of the court, was deciding the matter on the erroneous approach (as they thought) by the trial judge when the matter had been before him.

In *Baker v. Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472 the first judgment was given by Somervell L.J. It is necessary to refer to a brief passage from it where, referring to the trial of that action, he said, at p. 1475:

“Here all available evidence was called, and the question, as it seems to me, is one of probable inference from the facts as established. It seems plain that there must have been negligence. If the natural inference was that the accident was due to negligence on the part of one or other of the drivers but not to both I would have thought that the plaintiff would fail.”

He then went on to consider the judgment of the trial judge trying the first action, who came to the conclusion that the parties had been equally to blame. He agreed with that finding and held that the approach of the other judge (who, trying the second action arising out of the same accident had concluded that it was impossible to reach a conclusion) had been wrong and that the appeal should be allowed to the extent of holding each party equally to blame.

The next passage from the judgments in that case on which reliance is placed in the present appeal is a passage from the judgment of Denning L.J., at p. 1477:

“It is very different from a case where one or other only is to blame, but clearly not both. Then the judge ought to make up his mind between them, as this court said recently in *Bray v. Palmer*. But when both may be to blame, the judge is under no such compulsion and can cast the blame equally on each.”

With respect to Denning L.J., I think, first, that his judgment must be read, understood and its ratio applied in the context of an erroneous approach by the trial judge to the decision of the accident between the two vehicles in that case. Further, as I have already indicated, in my judgment the court did not hold in *Bray v. Palmer* [1953] 1 W.L.R. 1455 that which Denning L.J. there said that they had held; accordingly I do not think that the dictum can be of great assistance.

The position was made patently clear in the judgment of Romer L.J. in *Baker's* case. He expressed sympathy with the view of the trial judge who felt that he could draw no inference of negligence on the part of either of the two drivers, and continued [1953] 1 W.L.R. 1472, 1478:

“[The plaintiff’s] action could not succeed unless she established negligence on the part of the van driver. If the facts which were proved rendered it uncertain how the accident happened, so that it might have been brought about either by the negligence of the lorry driver alone or without negligence on the part of either driver, then [the plaintiff] could not be said to have discharged the onus which lay upon her. In these circumstances I can, as I say, appreciate Ormerod J.’s view that the cause of the accident is so speculative, on the meagre facts available, that either of the alternative elements to which I have referred may have, in fact, existed, and that the plaintiff had therefore failed to prove her case.”

Having there accepted that in certain circumstances, applying the principle of the onus of proof, the plaintiff might have failed, nevertheless Romer L.J. then went on to consider whether that was the proper approach on the facts of that case and, having considered the judgments

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A of both trial judges, came to the conclusion that it was not and that the correct decision of the appeal was to dismiss one and to hold that the other should be allowed to the extent of making both parties equally to blame.

B On that analysis of those two cases (which, be it noted, were decided on facts wholly different from the facts of the instant case) I do not think that they support any of the contentions which the employee raised either before the appeal tribunal or before this court.

C We were then referred to the decision of the appeal tribunal in *Khanna v. Ministry of Defence* [1981] I.C.R. 653, quotations from which both the majority and the dissentient member of the appeal tribunal made in their judgment below. That was a case in which the question was whether the applicant, Mr. Khanna, had been racially discriminated against by his employers, the Ministry of Defence. Speaking for myself, I do not find the case an easy or satisfactory one, particularly because in one respect which it is unnecessary to outline further, I think that a statement by the appeal tribunal that the industrial tribunal had not expressed a view whether they accepted the evidence of certain board members in the Ministry of Defence is irreconcilable with part of the reasons of the industrial tribunal which were quoted by Browne-Wilkinson J. at p. 657. But after referring to the question of the burden of proof, the decision in that case can be seen from a short passage from the judgment, at p. 659:

E “As we see it, on the facts as found by the industrial tribunal, either the tribunal accepts the evidence of the board members that they were not motivated by racial considerations (in which case the claim fails) or it does not (in which case the claim is established by reason of the unavoidable inference the industrial tribunal has found). The failure by the industrial tribunal to decide that issue does not leave the matter decided by the burden of proof: it leaves the whole case undecided.”

F In the instant appeal counsel for the employee seeks to apply that dictum mutatis mutandis to the facts of the instant case and contends that the failure by the industrial tribunal to decide the issue of dismissal, to come down in favour of the evidence called on behalf of the employee or that called on behalf of the employer one way or the other, was not leaving the matter to be decided by the burden of proof, as the industrial tribunal recorded in paragraph 17 of its reasons, but was, as Browne-Wilkinson J. said in *Khanna's* case, leaving the whole case undecided. As I have said, however, I do not find the decision in *Khanna's* case entirely satisfactory.

H I think it unnecessary further to analyse those decisions. In my opinion what they come to is this. Judges and tribunals of fact should make findings of fact in relation to matters before them if they can. In most cases, although in some cases it may be difficult, they can do just that. Having made them, the tribunal is entitled to draw inferences from the findings of primary fact where appropriate. In the exceptional case, however, a judge conscientiously seeking to decide the matter before him may be forced to say “I just do not know:” indeed to say anything else might be in breach of his judicial duty. In this connection, however, I would say this. Speaking from my own experience some people find it easier to make up their minds than others and it should not be thought that a swift reliance upon where the burden of proof lies and a failure to

decide issues of fact in the case, ought in any way to be considered an easy or convenient refuge for anybody who does find it difficult to make up his mind in a particular case. Judges should, so far as is practicable and so far as it is in accordance with their conscientious duty, make findings of fact. But it is in the exceptional case that they may be forced to reach the conclusion that they do not know on which side of the line the decision ought to be. In any event, where the ultimate decision can only be between two alternatives, for instance negligence or not, or, as in the instant appeal, dismissal or resignation, then when all the evidence in the case has been called the judge or the tribunal should ask himself or itself whether, on that totality of the evidence, on the balance of probabilities, drawing whatever inferences may be thought to be appropriate, the alternative which it is necessary for the plaintiff to establish in order to succeed is made out. If it is not, then the operation of the principle of the burden of proof comes into play and the plaintiff fails. But in those cases in which the ultimate decision could be between more than two possibilities, as for instance in the two running-down actions to which I have referred, again the judge should at the end of the day look at the whole of the evidence that has been called before him, drawing inferences where appropriate, and ask himself what has or has not been shown on the balance of probabilities, and then, bearing in mind where the onus of proof lies, decide whether the plaintiff or the defendant succeeds, or both succeed.

In my opinion that is what the industrial tribunal did in the instant case. It was entitled, if it found itself unable to decide which party's evidence it preferred on the balance of probabilities, ultimately to fall back on the onus of proof which lay upon the employee to prove that he had in fact been dismissed. I do not find that the criticisms which the majority of the appeal tribunal made of the industrial tribunal's findings on this particular point can be substantiated. There was, as I have indicated, no absolute obligation upon the industrial tribunal to reach a finding of fact. If at the end of the day it found itself unable to reach a conclusion which was to be preferred, it was entitled so to state and thereafter to decide the application, applying the onus of proof.

So much for the main criticism which the appeal tribunal made of the industrial tribunal's decision and the principal basis upon which this appeal was argued on behalf of the employee before us, an argument for which I am grateful.

The second part of Mr. McLaren's argument on behalf of the employee can be taken compendiously. He submitted that where the decision to which the tribunal has to come can be between two alternatives only, and where the employee's evidence, taken on its own, is sufficient to make out his case, the industrial tribunal must, however difficult it may be, reach a conclusion on the material question of fact. But he then went on to complain that the reason why the industrial tribunal did not do so in the instant case was because it approached the matter before it improperly. It should not (as Mr. McLaren put it, with a certain lack of respect for the industrial tribunal) have given the impression that it had ducked its duty to reach a decision; the industrial tribunal should have set out in much greater detail than it did its findings on other facts, its reasoning, its analysis of those facts, where that analysis had led it, and why in the end it found that it was unable to reach a conclusion one way or the other. That was a basis upon

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A which the majority of the appeal tribunal also criticised the industrial tribunal below.

B In dealing with that submission (which, if I may say with respect, I do not accept) I will briefly refer to passages from the judgment of Eveleigh L.J. in *Varndell v. Kearney & Trecker Marwin Ltd.* [1983] I.C.R. 683 and also to two short quotations by him in the course of that judgment from earlier judgments of Sir John Donaldson in the Court of Appeal and the National Industrial Relations Court. Eveleigh L.J. said in *Varndell's* case, at p. 693:

C "It seems to me that the arguments put forward on behalf of the employees in effect require, not a statement of reasons, but an analysis of the facts and arguments on both sides, with reasons for rejecting the arguments of the employees and reasons for accepting the facts relied upon in support of the tribunal's conclusion. . . . There is no right of appeal on a question of fact, so of what use, generally speaking, is it to have a detailed recitation of the evidence? A conclusion of fact with which this court or the appeal tribunal might disagree, provided it is justifiable on the evidence, gives rise to no ground of appeal."

D The first quotation from Donaldson L.J., which was quoted by Eveleigh L.J. at p. 685 (referring to the reasons of an industrial tribunal for their decision) was from *Union of Construction, Allied Trades and Technicians v. Brain* [1981] I.C.R. 542, 551:

E "their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which reasons are given."

Finally [1983] I.C.R. 683, 694, a quotation from Sir John Donaldson in *Alexander Machinery (Dudley) Ltd. v. Crabtree* [1974] I.C.R. 120, 122:

F "It is impossible for us to lay down any precise guidelines. The overriding test must always be: is the tribunal providing both parties with the materials which will enable them to know that the tribunal has made no error of law in reaching its findings of fact?"

G Applying those principles to the circumstances of the instant case, I can see no reason why, in the simple circumstances of this claim, there was any obligation on the industrial tribunal to enter upon any more detailed analysis of its reasoning and the way in which it reached its ultimate decision than it in fact gave in paragraphs 17 to 19 of its reasons.

H In those circumstances I think the second main basis upon which Mr. McLaren seeks to uphold the appeal tribunal's decision fails. In my judgment the criticisms of the two majority members of the appeal tribunal are not made out. I agree with the approach of the dissentient member of the appeal tribunal, and I would accordingly allow this appeal.

CROOM-JOHNSON L.J. The careful analysis which we have received of the judgments in *Bray v. Palmer* [1953] 1 W.L.R. 1455 and *Baker v. Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R.

1472 shows that there is nothing in those cases to support the proposition that the court must at all costs come to a firm decision on questions of primary fact. The court normally will seek to do so, and it ought to, if it can. But it may clearly rely, where it is unable to make up its mind on that point, on the onus of proof. In those circumstances the result will be that the plaintiff will not have discharged the burden of proof.

In my view there was no misdirection in this case by the industrial tribunal. I agree entirely with the judgment of May L.J. and I would allow this appeal.

SIR DENYS BUCKLEY. I agree. I would like to associate myself with the emphasis by May L.J. in the judgment which he has delivered on the importance in litigation which turns upon matters of fact, of the tribunal of fact making findings of all the facts relevant to their decision which they feel able to make. It is necessary, in order to make clear the grounds of their decision, but the circumstances may in some cases (rare cases, I think) be such that the tribunal feels itself wholly unable to form a view as to what finding is, on the balance of probability, the view most likely to accord with the truth. In such a case, in the absence of any recognised presumptions which arise under the law (for instance, when two people die in a common disaster, that the younger survives the elder) which may provide a means of solving the problem in a case of that nature, where a tribunal is unable to form a conclusion, it has no alternative to falling back upon the burden of proof as the means of resolving the dispute between the parties. It seems to me that we are bound to accept what the industrial tribunal in the present case said at the end of its reasons to the effect that it found itself unable to make a finding of fact as to which version of the events described in the evidence was to be preferred. In those circumstances I think it reached the right conclusion in the matter.

I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: Alton Batchelor; Evans Butler Smith.

[Reported by CLIVE SCOWEN, ESQ., Barrister-at-Law]

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[FAMILY DIVISION]

*In re S. (MINORS) (WARDSHIP: POLICE INVESTIGATION)*1986 Oct. 30;
Dec. 16

Booth J.

B

Minor—Ward of court—Child in care of local authority—Police investigating whether wards subjected to criminal offence—Police seeking disclosure of medical and local authority records—Whether leave of court required for disclosure of records to police and for police to interview wards—Administration of Justice Act 1960 (8 & 9 Eliz. 2, c. 65), s. 12(1)¹

C

In wardship proceedings, evidence was given that the four wards might have been sexually abused by D., who was living with the wards' mother. The wards were committed to the care of the local authority for long term fostering with a view to adoption and the local authority were granted leave to take the wards to a clinic at a children's hospital which dealt in child abuse cases. The clinic considered that some, if not all, the wards had been sexually abused and, as a result, the Metropolitan Police began an investigation into whether criminal proceedings should be brought.

D

On the Commissioner of Police's application for leave of the court to permit disclosure to the police of the records and video recordings made by the clinic, leave to interview the wards and, if necessary, to subject them to a further medical investigation and leave to inspect the case records of the local authority:—

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Held, (1) that notwithstanding the court had committed the care and control of the wards to the local authority, the court retained the duty to protect the interests of the wards until the discharge of the wardship and whether the police should see the medical records and video recordings for the purpose of a criminal investigation was not a matter for those having the day to day care of the wards but a matter for the judge exercising the wardship jurisdiction from whom directions should be sought (post, p. 850C–E).

F

(2) That the court had an unfettered discretion to grant leave for disclosure and in exercising that discretion the court had to balance the interests of the wards against the public interest which required that the police should not be obstructed in pursuing criminal investigations; that in all but the most exceptional circumstances the public interest in protecting not only the wards but other children from the perpetrators of crime by providing evidence for use in criminal proceedings would outweigh the interests of the individual ward; and that in all the circumstances the court would grant leave for the disclosure to the police of the medical records and video recordings made by the hospital and would grant leave to the police to interview the wards and, if necessary, subject the wards to a further medical examination (post, pp. 850G–H, 851C–D, F–H).

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(3) That the case records of the local authority kept under the provisions of the Boarding-Out of Children Regulations 1955 were confidential records of the local authority and were protected from disclosure under the principle of public interest

¹ Administration of Justice Act 1960, s. 12(1): see post, p. 852c.

immunity; that, therefore, the court had no jurisdiction to order the disclosure of those documents unless they had become part of the evidence in the wardship proceedings and thereby subject to the provisions of section 12(1) of the Administration of Justice Act 1960 (post, pp. 852A-B, H-853A, B-C).

(4) That where case records formed the basis of the evidence given on behalf of the local authority in the wardship proceedings, the local authority did not thereby waive the immunity of those documents; but that where extracts from the case records had been exhibited to an affidavit in the wardship proceedings, the local authority had waived their immunity and the provisions of section 12(1) of the Act of 1960 applied so that the leave of the court was required before those extracts could be disclosed to the police; and that, in the exercise of its discretion, the court would grant leave for those extracts to be disclosed (post, p. 853F-H).

In re D. (Infants) [1970] 1 W.L.R. 599 and *In re R. (M. J.) (Publication of Transcript)* [1975] Fam. 89 applied.

The following cases are referred to in the judgment:

D. (Infants), In re [1970] 1 W.L.R. 599; [1970] 1 All E.R. 1088, C.A.

D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171; [1977] 2 W.L.R. 201; [1977] 1 All E.R. 589, H.L.(E.)

G.-U. (A Minor) (Wardship), In re [1984] F.L.R. 811

R. (M. J.) (A Minor) (Publication of Transcript), In re [1975] Fam. 89; [1975] 2 W.L.R. 978; [1975] 2 All E.R. 749

S. and W. (Minors) (Confidential Reports), In re (1983) 4 F.L.R. 290, C.A.

Scott (orse. Morgan) v. Scott [1913] A.C. 417, H.L.(E.)

Y. (A Minor) (Child in Care: Access), In re [1976] Fam. 125; [1975] 3 W.L.R. 342; [1975] 3 All E.R. 348, Arnold J. and C.A.

The following additional cases, supplied by the courtesy of counsel, were cited in argument:

A. B. (Wardship: Jurisdiction), In re [1985] F.L.R. 470

C. (Wardship: Independent Social Worker), In re [1985] F.L.R. 56

F. (orse. A.) (A Minor) (Publication of Information), In re [1977] Fam. 58; [1976] 3 W.L.R. 813; [1977] 1 All E.R. 114, C.A.

H. (A Minor) (Wardship: Applications), In re [1985] 1 W.L.R. 1164; [1985] 3 All E.R. 1, C.A.

J. (A Minor) (Wardship), In re [1984] F.L.R. 535

X v. Commissioner of Police of the Metropolis [1985] 1 W.L.R. 420; [1985] 1 All E.R. 890

SUMMONS

Officers of the Metropolitan Police were undertaking an investigation into whether criminal offences had been committed against four wards of court, who had subsequently been committed to the care of the local authority. The Commissioner of Police of the Metropolis applied to the court seized of the wardship proceedings for an order that the medical records and video recordings made in diagnostic interviews with the four wards at a specialist clinic concerned with sexual abuse of children be disclosed to the police officers; for permission for the officers to interview the wards and, if necessary, for further medical examination of the wards; and for the disclosure of the case records kept by the local authority concerning the wards.

The hearing was in chambers and the reserved judgment was handed down in chambers. The judgment is reported by consent of Booth J.

The facts are stated in the judgment.

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In re S. (Minors) (Fam.D.)

A *Patricia May* for the applicant, Commissioner of Police of the Metropolis.

Barbara Slomnicka for the local authority.

Cur. adv. vult.

B 16 December. BOOTH J. handed down the following judgment. On
 29 October 1985, I made an order dealing with the long-term future of
 four wards of court, two boys aged eight and five, and two girls one of
 whom is nearly four and the other is two. The plaintiff in the proceedings
 is the local authority. The mother is the first defendant and her former
 cohabitee, who is the father of the youngest child, is the second
 C defendant. I will refer to him as Mr. D. By my order I confirmed the
 wardship and committed all the wards to the care of the local authority
 with leave for them to be placed with long-term foster parents with a
 view to adoption. I terminated access by the mother and Mr. D.

During the course of a long hearing some evidence was given by the
 local authority's social workers which strongly suggested that the wards
 had been subjected to sexual abuse by Mr. D. In view of that, at the
 conclusion of the hearing I gave leave to the local authority to take the
 D wards to Great Ormond Street Hospital for Sick Children for interview
 and examination by the specialist team working with sexually abused
 children. The findings of this team have confirmed the likelihood that
 some, if not all, of the wards have indeed been so abused and this
 matter is now the subject of investigation by the Metropolitan Police.

E It is against that background that counsel instructed on behalf of the
 Metropolitan Police Commissioner has sought the leave of the court for
 the disclosure to the police of medical records and video recordings
 made in consequence of my order at diagnostic interviews with the
 children at Great Ormond Street Hospital and for leave for the police to
 interview the children and subject them to medical examinations.
 Counsel also seeks directions with regard to inspection by the police of
 the local authority's case records which are relevant to this issue and
 F which may be of some assistance to their inquiry. The summons also
 asked that all documents in the wardship proceedings be disclosed to the
 police but that request has not been pursued.

The application was first made on behalf of the police by the plaintiff
 local authority without notice to the mother or Mr. D. Quite apart from
 the question whether or not the mother and Mr. D. should be informed,
 I took the view that in the circumstances it was not a proper step for the
 G local authority to take since a conflict might arise between the interests
 of the police and those of the wards for whom, by my order, the local
 authority was responsible. I further indicated that I wished to hear legal
 argument with regard to this application.

Accordingly, I directed that the police should be separately
 represented for this purpose, as is now the case. Their application is,
 H however, supported by the local authority, save in so far as it relates to
 having the wards further medically examined, as to which some concern
 is now expressed as to whether it is in the best interests of the wards.

Notice of this application had not been given either to the mother or
 Mr. D. The police have at all times been anxious that they should not
 be given prior knowledge of the intended investigations as they believe
 that this could be prejudicial to their final outcome. Having regard to
 the nature of the relief sought I consider this to be a proper course to

take. The police do not now ask to see any affidavits or any transcript of the oral evidence before the court, nor do they seek the disclosure of any documents which have at any time been in the possession or control of either the mother or Mr. D.

So far as the wards are concerned the protection of their interests is now primarily a matter for the local authority to whose care they have been committed. So it seemed to me that neither the mother nor Mr. D. was directly concerned with the subject matter of this application and that in view of the possible prejudice to the police investigations, were they to be involved, it was proper to proceed in their absence.

In so far as the police desire to see the medical records and video recordings held by Great Ormond Street Hospital, in my judgment leave of the court is first required, despite the fact that such records and recordings only came into existence after the conclusion of the wardship hearing. When the wardship jurisdiction is invoked and exercised the court retains its duty to protect the interests of the ward for the duration of the wardship and does not divest itself of that duty by committing them to the care and control of one or more of the parties or, as in this case, to the care of the local authority: see *In re Y. (A Minor) (Child in Care: Access)* [1976] Fam. 125 and *In re G.-U. (A Minor) (Wardship)* [1984] F.L.R. 811. So it is still necessary to seek directions from the court whenever it is proposed to take a major step in the lives of the wards.

In my judgment, the disclosure to the police of the medical records and recordings for the purpose of criminal investigations falls into this category of decision and is a matter outside the scope of a party to whose care the ward is committed. The decision is not a matter which arises in the day to day care of the ward and the effect of granting the application could be far reaching. Indeed, the result of it could lead to the direct involvement of the ward in criminal proceedings, a fact which could be regarded as detrimental to his or her interests. It is, therefore, clearly a step of considerable importance in the life of any child. Similarly, if the police are to interview and conduct medical examinations of the wards then leave of the court must first be given. Such medical examinations do not have a therapeutic purpose, but a forensic purpose and, as in the case of the disclosure of the medical records and the video recordings, they may lead to the wards' direct involvement in subsequent proceedings. But if leave is given for the disclosure of those records and video recordings it seems to me that it must follow that leave must also be given to the police to conduct interviews with and, if necessary, examinations of, the wards. Having enabled the police to start upon an inquiry it would not be realistic, save in exceptional and presently unforeseen circumstances, to impose such limits upon them.

A judge dealing with an application such as is now made by the police has an unfettered discretion to grant or to refuse it: *per Rees J. in In re R. (M. J.) (A Minor) (Publication of Transcript)* [1975] Fam. 89, 98. In this case it is a matter of balancing the interests of the four young children who are the wards against the public interest that requires that no obstacle be placed in the way of the police in the course of their criminal investigations. From the wards' point of view, they have already been subjected to disturbed and unsettled lives during the course of which some, if not all, have been sexually abused. The elder children are undoubtedly able to remember a good deal of what has taken place and their memories cannot be healthy or pleasant. The process of

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A healing those wounds, in so far as they can be healed, has only just begun. If the wards are now to be subjected to renewed questioning and examination it seems to me, as a matter of common sense, that it could lead to further distress and unhappiness which would be compounded were they to be called to give evidence in criminal proceedings.

B I accept the assurance of the police that all necessary procedures would be carried out with the least possible inconvenience and distress to the wards and with their welfare in mind. It has been made clear that medical examinations would be conducted only when they were clearly shown to be necessary by reason of the other information in the hands of the police. Nevertheless, I would be failing in my judicial duty to the wards were I not to consider that by granting the leave that is sought the likely outcome for them would be unhappy, if not, in a sense, detrimental.

C The court not only has a duty to protect its wards from potential harm, it also has a duty to uphold the public interest. Mrs. May, on behalf of the commissioner, has argued that public policy dictates that nothing should impede the police in carrying out their statutory duties or impede anyone from giving the police information in furtherance of their lawful inquiries. I am told by Miss Slomnicka, for the local authority, that it is the invariable practice of this local authority, and no doubt of many other local authorities, to invite representatives of the police to attend case conferences relating to the children in their care. This being so, information is available to the police from this source as to whether or not a criminal offence may have been committed. In relation to those children who are not wards of court the police, with the co-operation of the local authority, are free to conduct such investigations as they think fit and they will, where necessary, have access to the case records made by the social workers. The court, therefore, should be slow to interfere in this process in respect of its wards who are in local authority care. The protection afforded to a child by the exercise of the wardship jurisdiction should not be extended to the point where it gives protection to offenders against the law and, indeed, offenders against the wards themselves. In relation to those children who are not wards of court the police, with the co-operation of the local authority, are free to conduct such investigations as they think fit and they will, where necessary, have access to the case records made by the social workers. The court, therefore, should be slow to interfere in this process in respect of its wards who are in local authority care. The protection afforded to a child by the exercise of the wardship jurisdiction should not be extended to the point where it gives protection to offenders against the law and, indeed, offenders against the wards themselves. The court must take into consideration, as a matter of public policy, the need to safeguard not only its wards but other children against the harm they may suffer as the result of recurring crimes by undetected criminals.

F The likely outcome and its effects upon a ward of granting an application such as the police now make must be considered in each and every case. But when balanced against the competing public interest which requires the court to protect society from the perpetration of crime it could only be in exceptional circumstances that the interests of the individual ward should prevail. In this case, although the results may be far-reaching and unpleasant for these young and damaged children, their interests are secondary to that greater public need. I am satisfied that on the facts this application is wholly justified and that the police should have the leave they seek in respect of the medical records and video recordings now in the possession of Great Ormond Street Hospital and that they should have leave to interview and, if necessary, medically examine the wards.

H I turn now to the application which relates to the case records made in respect of the wards by the local authority. The police ask for access to those documents. They do not ask to see the evidence filed by the local authority in the wardship proceedings. Nevertheless, much of that

evidence, particularly that of the social workers, was based upon information contained in the records. In one instance an extract from the case records relating to allegations made by the children to their foster mother and to the social worker, was exhibited to an affidavit which was before the court. As a result, if the police have access to the case records then they will come to know a good deal of the information which was placed by way of evidence before the court. The local authority are willing that this should be so, but in the circumstances they seek directions as to whether or not the leave of the court is first required.

Section 12 of the Administration of Justice Act 1960 precludes the publication of information relating to proceedings in private. The relevant part of that section reads:

“(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—(a) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant . . .”

It is well established that the court has an absolute discretion to give leave in a proper case to publish such information relating to proceedings: see *In re R. (M. J.) (A Minor) (Publication of Transcript)* [1975] Fam. 89. Thus, if it is desired to disclose evidence placed before the court in such proceedings, leave is undoubtedly necessary. In this case the first question I have to determine is whether the words in the section “information relating to proceedings” should be construed to cover documents which do not themselves form part of the evidence but which contain information upon which evidence was based.

The general rule that the court sits in private in wardship proceedings was evolved to guard the interests of the ward: see *per* Viscount Haldane L.C. in *Scott v. Scott* [1913] A.C. 417, 437. Equally, the statutory prohibition against publication of information relating to such proceedings must be deemed to have been enacted for the protection of the child.

I have not heard argument from the Bar as to the construction of this subsection but if the court is to fulfil its duty to protect a child then the words “information relating to such proceedings” must not bear too narrow a meaning. In the context of a case such as this the statute would preclude publication of the evidence presented to the court and in my judgment this would extend to statements prepared by a party or a witness for the purpose of such proceedings. If this were not to be the case the intention of the legislature could be thwarted by the publication of such statements upon the basis that they did not themselves constitute evidence before the court.

The case records of the social services department come within a different category. First, they are not records which are prepared for the purpose of legal proceedings: they are made by local authorities pursuant to a duty imposed upon them by the Boarding-Out of Children Regulations 1955. Secondly, by reason of public interest, the confidentiality of case records is preserved and as a general rule they are privileged from disclosure in court: see *In re D. (Infants)* [1970] 1 W.L.R. 599, applied in *D. v. National Society for the Prevention of Cruelty to Children* [1978]

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A A.C. 171, 191. This is the application of the principle now known as public interest immunity.

In those circumstances, since it cannot compel the disclosure of those records it would not seem appropriate for the court to seek to exercise any control over them and to make them the subject matter of any directions. If this is so, then in this case the local authority must be free to determine whether or not to allow the police access to them.

B Again, this is not a matter upon which I have had full argument from the Bar. But I am satisfied that so far as the case records do not relate to matters which were placed in evidence before the court, there could be no basis upon which the court could, or should, give the local authority any directions as to their use. If, by reason of having had access to such records, the police or any other authorised agency or person then wishes to take steps directly affecting a ward, leave of the court will first be necessary.

C I have been less clear as to the position with regard to those case records upon which evidence placed before the court was based, although they do not of themselves form part of that evidence. Undoubtedly, such records continue to be protected from disclosure by reason of the principle of public interest immunity: see *In re S. and W. (Minors) (Confidential Reports)* (1983) 4 F.L.R. 290. Although the court has the statutory right and duty to protect a child by means of its control over information relating to proceedings heard in private, this must be balanced against the right of the local authority to preserve the confidentiality of its records and thereby to control access to them.

D Since confidentiality in the records could not be considered to have been waived by reason only of the fact that they have been relied upon as the foundation for the social workers' evidence, I have come to the conclusion that those records also do not fall within the ambit of section 12(1) of the Administration of Justice Act 1960. To come to the contrary decision could have the effect of placing an unrealistic fetter upon the local authority in the course of their day-to-day use of their records and it would also serve to draw a distinction between the records of those children in care who are wards and those who are not, which would be difficult to observe.

E In my judgment, a distinction must be made with regard to the verbatim extract from the case records, which in this case was exhibited to an affidavit made by a social worker. This exhibit was disclosed and filed by the local authority as part of its evidence to the court. Confidentiality in respect of this part of the case records has clearly been waived.

F The exhibit undoubtedly contains information relating to the proceedings since it constitutes a part of the evidence. I am satisfied that for this reason the extract of the case records comes within the ambit of section 12(1) of the Administration of Justice Act 1960 and that its publication is precluded without leave of the court. As to whether or not that leave should be given I must adopt the approach I have taken with regard to the medical records and video recordings, so that for the same reasons I give leave for this extract from the local authority's case records to be made available to the police.

H *Directions accordingly.*

Solicitors: Solicitor, Metropolitan Police; Chief Executive of the local authority.

M. B. D.

[1987]

[COURT OF APPEAL]

A

REGINA v. LAMBETH LONDON BOROUGH COUNCIL, *Ex parte*
CLAYHOPE PROPERTIES LTD.

1987 June 8, 9, 10, 11

Kerr and Glidewell L.JJ. and
Sir George Waller

B

Housing—Repairs—Local authority notice—Block of flats—Flats let on long leases at low rent—Statutory notices served on leaseholders to carry out repairs to flats, roof and common parts of block—Local authority's refusal to pay grants for repair work—Whether individual flat "house" to which roof and common parts "appurtenances"—Whether repairs notices valid—Whether mandatory grants payable—Housing Act 1957 (5 & 6 Eliz. 2, c. 56), ss. 9(1A) (as inserted by Housing Act 1969 (c. 33), s. 72), 18, 189—Housing Act 1974 (c. 44), ss. 71, 71A (as inserted by Housing Act 1980 (c. 51), Sch. 12, para. 13)

C

The applicants owned the freehold of a block of flats, 14 of which were let on long leases at low rents and the remaining six were let on periodic protected tenancies. The block was in a state of disrepair, substantial works being needed in particular to the roof and common parts, including passages and staircases. At all material times it was agreed that the local authority could serve repairs notices on leaseholders under the provisions of sections 9(1A) and 18 of the Housing Act 1957¹ in respect of works required to be done in relation to a particular flat. However the local authority had since 1981 been anxious to utilise their powers under Part II of that Act to ensure that repairs were carried out to the fabric of the block. Following the service of a number of repairs notices in respect of the block that had been allowed to lapse, in 1984 the local authority decided to class each flat in the block as a "house" and accordingly they served notices under section 9(1A) on each of the 14 leaseholders and six on the applicants as "the person having control" of the flats subject to protected tenancies. In so serving those notices the local authority having noted that by section 189 of the Act of 1957 "house" included "appurtenances," were of the opinion that the roof and common parts of the block constituted appurtenances of each flat and could thus be subject to each of the notices. Attached to each notice was a schedule divided into two parts specifying first works of internal repair to a particular flat and second external works of repair to the block and internal works to the shared common parts. On receipt of the notices the leaseholders and the applicants applied to the local authority for mandatory repairs grants under sections 71 and 71A of the Housing Act 1974² in respect of the works required to be done. The local authority refused to make payments on the ground that they had come to the conclusion that all the repairs notices were invalid because leaseholders

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¹ Housing Act 1957, s. 9(1A), as amended: see post, p. 858c–d.

S. 18: see post, p. 859d.

S. 189: see post, p. 859b–c.

² Housing Act 1974, s. 71: "(1) A local authority shall pay a repairs grant if—(a) an application for such a grant . . . is approved by them, and (b) the conditions for the payment of the grant are fulfilled . . ."

S. 71A: see post, p. 858a.

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A and tenants could not be required to carry out repairs to the roof and common parts in so far as they were not included in the leases or tenancies of each particular flat. The applicants thereupon sought judicial review to compel the local authority. Hodgson J. dismissed the application upholding the local authority's contention that the notices were not valid, could not be severed so as to allow them to stand in relation to internal repairs of particular flats and that the local authority were not estopped from challenging the validity of the notices.

B On appeal by the applicants:—

C *Held*, dismissing the appeal, (1) that although an individual flat in a block was a "part of a building" within the meaning of section 18 of the Housing Act 1957 and as such could be the subject of a repairs notice under section 9(1A) of the Act, it was not a "house" within the meaning of Part II of the Act so that the extended definition of "house" contained in section 189 of the Act did not apply so as to include "appurtenances belonging thereto"; that accordingly even if the rights relating to the roof and common parts were "appurtenances" of each individual flat the notices could not require works of repair to such parts to be carried out by the leaseholders (post, p. 864B–E).

D (2) That section 18 of the Housing Act 1957 did not of itself enable the local authority to serve valid notices on the leaseholders to do repairs outside each particular demise because section 9(1A) of the Act required the notices to be served on the "person having control" of the house and in relation to the roof and common parts of the block that person was the freehold owner; that it followed that a notice in relation to repairs outside the demise of any individual leaseholder could not validly be served on him (post, pp. 864G–H, 865B–C, 867G–868C).

E *Pollway Nominees Ltd. v. Croydon London Borough Council* [1987] A.C. 79, H.L.(E.) considered.

F (3) That as the leaseholders could not be required to do repairs to the roof and common parts the major object of the notices failed and, in the absence of any challenge by the applicants to the contents of the notices having been made to a county court, no material existed whereby works which the leaseholders could not properly be required to do could be severed so as to leave the remaining parts of the notices relating to the interiors of the flats valid (post, pp. 866H, 867B–C, D).

G *Per* Glidewell L.J. A house in its ordinary sense means a separate building. It may contain one dwelling or more than one. Whether a particular purpose-built block of flats is a "house" for the purposes of Part II is a question of fact (post, p. 864B–C).

Decision of Hodgson J. affirmed.

The following cases are referred to in the judgment of Glidewell L.J.:

Cohen v. West Ham Corporation [1933] Ch. 814, C.A.

Pollway Nominees Ltd. v. Croydon London Borough Council [1987] A.C. 79; [1986] 3 W.L.R. 277; [1986] 2 All E.R. 849, H.L.(E.)

H *Quiltothex Co. Ltd. v. Minister of Housing and Local Government* [1966] 1 Q.B. 704; [1965] 3 W.L.R. 801; [1965] 2 All E.R. 913

The following additional cases were cited in argument:

Attorney-General v. Mutual Tontine Westminster Chambers Association Ltd. (1876) 1 Ex. D. 469, C.A.

Benabo v. Wood Green Corporation [1945] 2 All E.R. 162

Bond v. Nottingham Corporation [1940] Ch. 429, C.A.

- Bradburn v. Lindsay* [1983] 2 All E.R. 408
- Camden Hill Towers Ltd. v. Gardner* [1977] Q.B. 823; [1977] 2 W.L.R. 159; [1977] 1 All E.R. 739, C.A.
- Clymo v. Shell-Mex & B.P. Ltd.* (1963) 10 R.R.C. 85, C.A.
- Crutchell v. Lambeth Borough Council* [1957] 2 Q.B. 535; [1957] 3 W.L.R. 108; [1957] 2 All E.R. 417, C.A.
- Douglas-Scott v. Scorgie* [1984] 1 W.L.R. 716; [1984] 1 All E.R. 1086, C.A.
- Elliott v. Brighton Borough Council* (1980) 79 L.G.R. 506, C.A.
- F.F.F. Estates Ltd. v. Hackney London Borough Council* [1981] Q.B. 503; [1980] 3 W.L.R. 909; [1981] 1 All E.R. 32, C.A.
- Hillingdon London Borough Council v. Cutler* [1968] 1 Q.B. 124; [1967] 3 W.L.R. 246; [1967] 2 All E.R. 361, C.A.
- Jones v. Pritchard* [1908] 1 Ch. 630
- Lister v. Pickford* (1864) 34 L.J.Ch. 582
- Methuen-Campbell v. Walters* [1979] Q.B. 525; [1979] 2 W.L.R. 113; [1979] 1 All E.R. 606, C.A.
- Phipps v. Pears* [1965] 1 Q.B. 76; [1964] 2 W.L.R. 996; [1964] 2 All E.R. 35, C.A.
- Reed v. Hastings Corporation* (1964) 62 L.G.R. 588, C.A.
- Regional Properties Ltd. v. City of London Real Property Co. Ltd.* (1979) 257 E.G. 64
- Trim v. Sturminster Rural District Council* [1938] 2 K.B. 508; [1938] 2 All E.R. 168, C.A.

APPEAL from Hodgson J.

The applicants, Clayhope Properties Ltd., the freeholders of a block of flats known as Dover Mansions, London S.W.9 sought judicial review by way of mandamus directed to Lambeth London Borough Council requiring them to make mandatory repairs pursuant to sections 71 and 71A of the Housing Act 1974. The application was refused by Hodgson J. sitting in the Queen's Bench Division on 8 October 1986.

The applicants by way of a notice dated 30 October 1986 appealed on the grounds that (1) the judge erred in holding that the several notices served under section 9(1A) of the Housing Act 1957 were not valid notices; he ought to have held that the notices were valid; (2) the judge erred in holding that the notices were invalid by reason that a flat within a block is not a "house" for the purposes of section 9(1A) of the Act and ought instead to have held either (a) such a flat was a house for the purposes of the section and the notices were valid accordingly, or (b) that they were valid as directed to part of a building under the provisions of section 18 of the Act; (3) the judge erred in holding that if the notices would otherwise have been valid they were nevertheless invalid because they included a requirement to do repairs to the common parts of the block outside the curtilage of each individual flat and ought instead to have held that (a) the definition of a "house" in section 189 included appurtenances and therefore (b)(i) on the footing that each flat was a "house" works required by a notice might (and in the instant case should) include works outside the curtilage of the flat where such works were in respect of the physical subject matter of rights enjoyed in respect of the flat over other parts of the block, and (ii) the works required by the notices in the instant case were works to the physical subject matter of rights actually enjoyed in respect of each flat, alternatively, (c)(i) on the footing that a flat was not itself a "house" but had to be treated as a "part of a building," that works required by a notice nevertheless might include works outside the curtilage because unless such works were executed the standard required by section 9(1A)

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A of the Act could not be achieved (whether such standard was required to be applied to the whole block as being a "house" or to the demised premises or to some other part of the block as being a "house"); (ii) such works required to be done outside the curtilage of the individual flat might and in the instant case should include works outside the curtilage of the flat in respect of the physical subject matter of rights enjoyed in respect of the flat over other parts of the block, and (iii) the works required by the notices were works to the physical subject matter of rights actually enjoyed in respect of each flat, and were works which the tenant of the relevant flat was entitled to execute; (4) the judge erred in holding that if and in so far as any notice required works to be done to parts of the relevant block which were outside the curtilage of the flat to which such notice referred or that were works which the local authority had no authority to do or to require to be done the notices were not severable and were therefore void and ought instead to have held that as a general proposition such notices were severable; (5) alternatively to (4) the judge erred in holding, in so far as he did hold, that because any individual notice contained some works which ought not to have been required to be done by the person to whom that notice was addressed, the entire notice was void and ought in any event to have decided that since the recipient of a notice had the right to appeal the notices to the county court that court had by virtue of section 11 of the Act power to vary the notices by removing from them works which ought not to have been required to be done, any notice not so varied on appeal ought to be regarded as a valid notice notwithstanding that it required to be done works which ought not to have been required; (6) the judge ought accordingly to have held that the notices were valid and that each one was capable of founding an application for a mandatory grant and his conclusion that no such grant was payable was accordingly wrong.

The facts are stated in the judgment of Glidewell L.J.

John Colyer Q.C. and Roger Cooke for the applicants.

Andrew Arden and Caroline Hunter for the local authority.

GLIDEWELL L.J. delivered the first judgment. This is an appeal against a decision of Hodgson J. given on 8 October 1986 refusing an application for judicial review; that is to say, refusing an order of mandamus requiring the local authority, Lambeth London Borough Council, to make to the applicants, Clayhope Properties Ltd., mandatory repairs grants under section 71A of the Housing Act 1974, amended by the Housing Act 1980.

The applicants are the freehold owners of a mansion block of flats called Dover Mansions, Canterbury Crescent, S.W.9. The block comprises 20 flats, served by two entrances; 14 are held on 99-year leases at low ground rents and six are on protected tenancies. The roof and some common parts, including the passages and staircases, are not included in either the leases or the tenancies.

With that brief introduction I turn to consider the legislation which forms the battleground of this appeal. Part VII of the Housing Act 1974 empowers, and in some cases requires, local authorities to make grants for the improvement or repair of dwellings. Repairs grants are mandatory if the provisions of section 71A of the Act of 1974 are fulfilled, but otherwise they are discretionary. The local authority's finances do not

enable them to make discretionary grants. Section 71A, so far as is material, reads: A

“In so far as an application for a repairs grant relates to the execution of works required by a notice under section 9 of the Housing Act 1957 . . . (b) the authority shall not refuse it if it is duly made and the authority are satisfied that the works are necessary for compliance with the notice.” B

One comes, therefore, to section 9 of the Housing Act 1957, which was in force at all times material to this appeal, though its provisions have now been replaced by similar, though not totally identical, provisions in the Housing Act 1985. Section 9 is concerned, under the general rubric “Unfit premises capable of repair at reasonable cost” with the power of local authorities to require the repair of houses. Section 9(1) gives a local authority power to require the repair of a house which in their opinion is unfit for human habitation, provided it is not incapable of being made habitable at reasonable expense. This case is concerned with subsection (1A), which was added by section 72 of the Housing Act 1969. It provides: C

“Where a local authority . . . are satisfied that a house is in such state of disrepair that, although it is not unfit for human habitation, substantial repairs are required to bring it up to a reasonable standard, having regard to its age, character and locality, they may serve upon the person having control of the house a notice requiring him, within such reasonable time, not being less than 21 days, as may be specified in the notice, to execute the works specified in the notice, not being works of internal decorative repair.” D E

By section 9(2) and (3):

“(2) In addition to serving a notice under this section on the person having control of the house, the local authority may serve a copy of the notice on any other person having an interest in the house, whether as freeholder, mortgagee, lessee or otherwise. (3) In this and the three next following sections references to a house include a reference to a hut, tent, caravan or other temporary or moveable form of shelter which is used for human habitation” F

The phrase “person having the control of a house” is defined in section 39(2) of the Act:

“For the purposes of this Part of this Act”—that is to say Part II—“the person who receives the rack-rent of a house, whether on his own account or as agent or trustee for any other person, or who would so receive it if the house were let at a rack-rent, shall be deemed to be the person having control of the house. In this subsection the expression ‘rack-rent’ means rent which is not less than two-thirds of the full net annual value of the house.” G H

In the present case it is common ground that the 14 flats the subject of long leases, were not, and are not, let at rack-rents but if they were to be let at rents exceeding two-thirds of the full net annual value of the house, the person who would be entitled to receive that rent would in each case be the leaseholder. The person having control of the house is thus, as far as the leasehold flats are concerned, the leaseholder. In respect of the six other flats, the subject of the controlled tenancies, it is

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A the applicants, because they do, or they did at the material time, receive rack-rents from their tenants.

B What is a “house” for the purposes of this Act, or at any rate for the purposes of this Part of this Act? There are two references in the Act to what the word “house” can include. I have already read section 9(3), which does not apply. The other reference is in the interpretation section, section 189(1). That provides: “‘house’ includes—(a) any yard, garden, outhouses, and appurtenances belonging thereto or usually enjoyed therewith . . .” (b) does not apply to Part II of the Act of 1957 but it should perhaps be read because it throws some light on the meaning of the word “house”:

C “(b) for the purposes of any provisions of this Act relating to the provision of housing accommodation, any part of a building which is occupied or intended to be occupied as a separate dwelling.”

D So for the purposes of other provisions of the Act a part of a building intended to be occupied as a separate dwelling is a house, but not for the purposes of this Part of the Act. If the premises are not a “house,” nevertheless the provisions of Part II of the Act may apply, because there is another provision which so far I have not reached, namely section 18, which reads:

“(1) A local authority may under the foregoing provisions of this Part of this Act take the like proceedings in relation to—(a) any part of a building which is used, or is suitable for use, as a dwelling . . . as they are empowered to take in relation to a house . . .”

E The qualification which follows again does not arise in the present case. So if the premises are not a house, but are part of a building which is used, or which is suitable for use, as a dwelling—and for this purpose the building itself may be a building wholly or partly, or the rest of it not at all, in residential occupation—then that part is a part in respect of which the local authority may take the same sort of proceedings as they may take in respect of a house under the earlier parts of that Part of the Act, and thus may serve a section 9(1A) repairs notice. Indeed, as I shall say later, although the question whether each of these flats is a house is a, if not the, major issue in this appeal, if the answer is “no, each flat is not a house,” it is common ground that each flat is certainly a part of a building used as a dwelling, and section 9(1A) repairs notices can properly be served in respect of each flat.

G There are two other provisions of the Act of 1957 to which I should refer before I come briefly to the facts. If a repairs notice is served, under section 11 there is a right of appeal against it. Section 11(1) reads:

“Any person aggrieved by—(a) a notice under the foregoing provisions of this Part of this Act requiring the execution of works . . . may, within 21 days of the service of the notice, demand or order, appeal to the county court . . .”

H By subsection (3), which I can summarise, on an appeal to the county court the judge may either confirm or quash or vary the notice as he thinks fit. So he has, as it seems to me, total discretion to arrive at whatever conclusion he thinks right in all the circumstances; he might quash the notice or he might say that the notice should be varied by deleting some of the works required to be done. Finally, under section 37(1):

"Any notice, demand or order against which an appeal might be brought to a county court under this Part of this Act shall, if no such appeal is brought, become operative on the expiration of 21 days from the date of the service of the notice, demand or order, and shall be final and conclusive as to any matters which could have been raised on such an appeal . . ."

I turn now to the history. In May 1981 the local authority served a notice on the applicants under section 9(1A) in respect of repairs to the whole block. The local authority did so on the basis that Dover Mansions as an entity was a "house" within Part II of the Act. The applicants appealed to the county court. That appeal stands adjourned and has not yet been heard. If the notice had been upheld on the appeal, the local authority accept that they would be liable to pay a mandatory repairs grant to the applicants under section 71A of the Housing Act 1974, and indeed the applicants applied for such a grant. But before anything had happened in respect of that application, there had been two material changes. First, by 1984, the condition of the block had deteriorated further, so that the schedule of repairs appended to the 1981 notice needed amendments and additions; secondly, doubt had arisen whether the whole block could properly be considered to be a "house." The local authority therefore decided to change course. They decided to serve fresh notices, this time the notices with which this appeal is concerned. They are 20 in all, one in respect of each flat, 14 on the leaseholders and six on the applicants as the persons having the control of the flats the subject of the short tenancies. Those notices were served on or about 23 March 1984 and I should refer briefly to their contents. As I have said, 14 were addressed to the individual leaseholders and, apart from the formal parts of the notices, there is attached a sheet which reads:

"The attached schedule is divided into two parts as follows: part A internal works of repair in connection with the specified flat; part B external works of repair to the whole block and internal works to the shared common parts. Each recipient of this notice is responsible for all the works specified in part A and one twentieth of the cost of the works in part B of the schedule."

There then follows some five pages of schedule in part A, and 18 pages in part B. The works to the interior of the flats include such things as replastering, replacing defective window frames and doors. The works to the exterior and to the common parts are not merely in length and description, but in fact, much more extensive. In particular, they include a complete reroofing of the entire property, together with extensive repairs to the brickwork and stonework of the exterior walls.

Following the service of those notices, applications were made for grants under section 71A of the Act of 1974 in respect of each flat by the leaseholders and the tenants, each accompanied by a request that the money should be paid to the receiver appointed to receive the money on behalf of the applicants. Nothing turns on that. The applicants, but not the leaseholders, appealed to the county court in respect of the six tenancy flats against the 1984 repairs notices. Those appeals are still outstanding. It is clear, and I believe it to be common ground, that the Part B repairs are substantially the major part of the repairs required to be carried out in these repairs notices. All are agreed that the block,

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A and the flats within the block, are in bad condition and that major repairs are necessary.

In confirmation of what I have just said, in a letter of 22 March 1984 from solicitors acting, I believe at that stage, on behalf of the leaseholders, Zelim & Zelim, they said:

B “Clearly, therefore, the lessees have ‘control’ only over the *insides* of their flats. As you are aware, the majority of the damage is on the *exterior* and *common parts*, in respect of which the lessees simply cannot have any control.”

C However, on 17 October 1984 the local authority wrote to the solicitors for the applicants, saying in effect that they had changed their minds again, and that current legal opinion is “that we are not able to grant-aid works to common parts and areas of shared responsibility.” By this time they had doubts as to the validity or effect of the 20 notices which they had served earlier in that year, and indeed doubts as to whether they could achieve a situation in which they could be required to make mandatory grants in respect of the roof, the exterior walls and the common parts, and therefore they have made no grants at all. Accordingly, the applicants made the present application for an order D for mandamus in May 1985. In July 1985 the local authority were advised by counsel that notices could not validly be served on the leaseholders, or indeed in respect of individual flats which required repairs to the roof, the exterior walls or common parts, in so far as they were not included in the leases or tenancies of the flats.

E So one has a Gilbertian situation. The local authority, though anxious to have the repairs done, and though happy to pay any grants which they can properly be required to make under section 71A of the Act of 1974—the major proportion of which, I should say, will come from the Department of the Environment—argue that the repairs notices of March 1984 in respect of the individual flats, are misconceived and invalid. The applicants argue that the repairs notices are perfectly sound and valid and that therefore the local authority should be ordered to F make the grants. The form of order sought is

G “an order of mandamus directed to the Lambeth Borough Council requiring them to make according to law mandatory repair grants pursuant to section 71 and 71A of the Housing Act 1974 in respect of each and every flat contained in the mansion block known as Dover Mansions . . . or alternatively flats nos. 2, 5, 8, 12, 14 and 17 contained in Dover Mansions”

those being the subject of the short tenancies.

Mr. Colyer, for the applicants, accepted that grants under section 9(1A) are only payable if the repairs notices are valid and effective. He said that he can reach the conclusion that the repairs notices are valid by either of two alternative routes. I describe route one shortly as follows:

H (i) each flat is a “house” within Part II of the Act of 1957; (ii) under section 189 a house includes its appurtenances; (iii) the leaseholders have rights of support, shelter and way relating to the walls, roof and passages. If the applicants decline to honour their obligations under the leases to keep the roof, main walls and passages under repair, the leaseholders may carry out these repairs themselves. Thus, the easements are “appurtenances” to, and thus part of, each flat within the definition of “house” in section 189, which I have already read. Thus, a notice

requiring repair of the common parts and the roof and walls relates to the "house." As an alternative to (iii), (iv) if the easements are not appurtenances, the leaseholders nevertheless have the right to do the repairs, as I have already said, and under section 9(1A) the repairs the subject of the notice, need not be repairs to the "house" itself, but may be repairs outside the limit of the "house."

Route two is the route to be followed if the flat is not a "house" for the purposes of Part II of the Act. In that case, (i) each flat is part of a building used as a dwelling. Mr. Arden, for the local authority, accepted and asserted that this is the case, that if an application for repairs notices were required only in respect of the interior of the flats, such notices could be served on each leaseholder in respect of the individual flats and in respect of works to the flats, and that mandatory grants would be then payable. (ii) The "appurtenances" way is closed if this route is followed, because the section 189 definition applies only to a house, but (iii) the last point which I sought to describe as Mr. Colyer's alternative termination to route one provides a termination to route two also. In other words, he argued that if each flat is part of a building used as a dwelling, then an order can still be made requiring repairs to be done outside that dwelling. That raises the following issues: first, the major issue, is a flat a "house" within Part II of the Act of 1957? Hodgson J. in his judgment said:

"The local authority contend that these submissions fail in limine because a flat in a block is not a 'house'; it is only part of a building. I agree. I can find nothing in section 18 which would justify me in holding that a flat in a block is a house for the purposes of Part II of the Act. If that had been intended it could have been specifically provided. And, in this connection, it is, in my judgment, importantly indicative of statutory intention that specific provision is made under paragraph (b) relating to 'house' in section 189 that the word includes 'part of a building' for the purposes of provisions in the Act relating to the provision of housing accommodation; these provisions one finds in Part V of the Act: see also *Critchell v. Lambeth Borough Council* [1957] 2 Q.B. 535, 540 *per* Lord Evershed M.R.: 'In any case, in my judgment, [sections 9, 10 and 11 of the Act of 1936]—sections 9, 10 and 16 of the Act of 1957—'use the word "house," in their context as meaning what is commonly called a house—that is, a separate structure'."

That passage in that judgment, being a decision of this court, is of course authoritative.

We were referred to two other authorities which are of assistance: *Quiltotex Co. Ltd. v. Minister of Housing and Local Government* [1966] 1 Q.B. 704, a decision of Salmon L.J. sitting as an additional judge of the Queen's Bench Division. It was a question which arose under Part III of the Housing Act 1957—that is the clearance and compulsory purchase part of the Act, the slum clearance part of the Act in ordinary parlance. The decision is to the effect that a house divided into tenements is nevertheless, or can nevertheless be, a "house" for the purposes of at least that Part of the Act, and for this purpose I apprehend that the same is true of Part II of the Act, because the definition, in so far as there is a definition in Part III, is the same as that in Part II. Salmon L.J. said, at pp. 713–714:

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A "In this connection, it is perhaps worth noting that in another part
of the Act, Part 2, there is section 5 which lends some support to
the conclusion at which I have arrived. Section 5(1) reads:
B 'Notwithstanding anything in any local Act or byelaw in force in any
borough or district, it shall not be lawful to erect any back-to-back
houses intended to be used as dwellings for the working classes, and
any such house shall for the purposes of this Act be deemed to be
unfit for human habitation: Provided that nothing in this section
shall prevent the erection or use of a house containing several
tenements in which the tenements are placed back to back, if the
medical officer of health for the borough or district certifies that the
several tenements are so constructed and arranged as to secure
effective ventilation of all habitable rooms in every tenement.' This
C postulates a house containing several tenements. Each of these eight
houses of the applicants is, in my view, a house containing several
tenements and section 5 at any rate does lend support to the view
that 'house' covers the genus 'tenement house.' No assistance can
be gathered at all from the so-called definition of 'house' in section
189 because it merely extends the ordinary meaning of the word but
does not attempt to define it."

D And so he decided.

Much more recently the House of Lords, in *Pollway Nominees Ltd.*
v. Croydon London Borough Council [1987] A.C. 79, had for
consideration a question relating to a block containing 42 flats which
were let on long leaseholds. One repairs notice was served under section
9(1A) in respect of the whole block on the freeholder. It was held at all
E stages—by which I mean at first instance, by the Court of Appeal and
the House of Lords—that assuming, which was not in dispute, that the
whole block was a "house" for the purposes of Part II of the Act
nevertheless the freeholders were not the persons having control, and
thus the notice could not be served on them. The leaseholders collectively
were the persons having control. If I may interpolate, that means that in
F this case the local authority's first attempt was wrong and that their first
change of heart was well founded. In his speech, Lord Bridge of
Harwich said, at p. 90:

G "The main issue has been argued both in the Court of Appeal and
before your Lordships on the footing that Crown Point can properly
be regarded as a 'house' within the meaning of section 9 of the Act
of 1957. In so far as that may involve an admission of fact by the
respondent, it is, of course, open to a party to make any admission
of fact he chooses. But in so far as the matter proceeds upon a
concession of law that a modern purpose-built block of flats is a
'house' to which the provisions we are considering apply, I am by
no means prepared to accept it as necessarily correct. We have
heard no argument on the point and I refrain from expressing any
H opinion on it one way or the other. I apprehend, however, that a
building originally constructed as a single dwellinghouse does not
cease to be a 'house' under the Act if it is internally converted into
a number of separate residential units which are then sold off on
long leases, as commonly happens as an incident of a familiar form
of contemporary property development. Accordingly, even if we
may be addressing an artificial problem in relation to Crown Point,
the question how the definition applies to a building which is

undoubtedly a house where the separate residential units within the house are all let on long leases at ground rents is one that requires to be answered.”

As I hope I have made clear, the answer which was given was to the effect that the local authority's first attempt to serve the notice in this case was inappropriate, and that had they wanted to treat Dover Mansions as a house the proper course would have been to serve the 14 leaseholders plus the freeholder as together being the person having control of the whole house. It may be, we are told, that that is a course which the local authority will wish to adopt.

In my judgment Hodgson J. was correct in deciding that the individual flats in this building are not each a house. In my view a flat is not a house within Part II of the Act of 1957. A “house” in its ordinary sense means a separate building. It may contain one dwelling or more than one. Whether a particular purpose-built block of flats is a “house” for the purposes of Part II is a question of fact. In relation to this block I express no opinion. It may have to be tested later or it may not. The local authority may decide that it is a “house.” If they do, they may serve a notice accordingly. I assume that if they do, they will serve the notice on the person whom I have already referred to as being collectively the person having control in respect of the roof, exterior walls and common parts, and perhaps a series of individual notices on the leaseholders relating to each flat separately. But it is not for me to advise them. That is for them. Since it is my view that a flat is not a “house” my view is also that route one is barred to Mr. Colyer at its entrance, and it is therefore unnecessary to consider, and I do not propose to consider, the fascinating question whether the easements of shelter, support and way are appurtenances or not.

Mr. Colyer, therefore, can only succeed, if at all, by way of route two. As I have already said, it is accepted that a repairs notice can validly be served on a leaseholder of a flat under section 9(1A) in respect of repairs to that flat. Thus, the issue is: can such a notice also be served which requires repairs to part of the building not within the demise of an individual flat? Mr. Colyer submitted that it can. The works are, it is to be assumed, works which need to be done. He argued that Parliament must have intended that they should be done. The leaseholder has, either by express grant or by implication, the power to do the works of repair to the roof and so on if the freeholder fails to do them. This is enough to enable the notice to require the leaseholder to do such work, to be valid and effective. On the contrary, Mr. Arden argued that the legislation empowers the local authority to serve the notice on the “person having control,” because he is the person who can, and normally will, and should, undertake the repairs to his property. In relation to the roof and the common parts that person is the freeholder, the applicants. The fact that by contract the leaseholder has power to do the work in default does not make any leaseholder the person having control. Put another way, the premises a person can be required to repair are those of which he has control, that is, the premises included in his demise and no more. In this respect Mr. Arden referred us to the provisions of sections 11(3) and 12(1) of the Housing Act 1957. Section 11(3), so far as material, provides:

“On an appeal to the county court under this section the judge may make such order either confirming or quashing or varying the

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A notice, demand or order as he thinks fit and where the judge allows an appeal against a notice requiring the execution of works to a house, he shall . . . ”

The rest does not matter. The passage that matters is that which requires the execution of works to a house. The same phrase is to be found in section 12(1), which begins: “Where a person has appealed against a notice under this Part of this Act requiring the execution of works to a house . . . ” So Mr. Arden drew support from those passages for the proposition that the works must be to the house or, if one is going by the section 18 route, to the part of the building occupied as a dwelling, and to nothing else.

I accept Mr. Arden’s argument in this respect as correct. In my view a notice under section 9(1A) in relation to works on the roof and common parts, which are not within the demise of any individual leaseholder, cannot be served on the leaseholder of the flat as an individual. Mr. Colyer argued that, if this is the case, there is a gap or lacuna in the law which will continue because the relevant provisions of the Housing Act 1985 contain the same definition of the “person having control.” Hodgson J. dealt with this argument in his judgment; he said:

“I do not myself find this lacuna, if it be one, particularly surprising. In *Pollway* Lord Bridge said: ‘I appreciate that this conclusion may cause inconvenience for local authorities. But I imagine that normally the contractual rights of the owners of long leasehold interests in flats to enforce repairing obligations against their lessors will provide an adequate solution to the problem. This may be the explanation of the fact that, though the formula found in the definition has been in common use in statutes since at least 1847, it was not until 1982 that its application to buildings divided into units let on long leases had to be considered by the courts. The truth, I suspect, is that generations of parliamentary draftsmen have been content to use the time-honoured formula without ever contemplating its application to the circumstances presently under consideration. That must surely be true of section 39(2) of the Act of 1957 which simply re-enacts the formula first used in its present context in section 17(1) of the Housing Act 1930. That Act introduced the compulsory procedure which we now see in expanded and amended form in Part II of the Act of 1957 requiring “the person having control of the house” to effect repairs to a house which was unfit for human habitation and which was “occupied or of a type suitable for occupation by persons of the working classes.” The draftsman in 1930 can hardly be blamed if it did not occur to him to make suitable provision for dealing with problems arising from flats let on long leases at low rents.’

“On the facts of this case the contractual rights enjoyed by the tenants are capable of providing, and will no doubt provide, an adequate solution to the problem at which Part II of the Act of 1957 is aimed. The misfortune is that, by limiting the grant legislation to work performed under a section 9 notice, the legislature have failed to provide for the making of grants in respect of the ‘outside’ work. Whether that comes about by oversight or intention matters not. If it is an unintentional lacuna it is for the legislature, if it wishes, to fill it; if it is an intentional restriction of

grant aid (and this cannot be excluded) then, of course, whilst one may or may not think it fair, the court is in no way concerned.” A

If in a particular case a block of flats is a “house” for the purposes of Part II, a notice in respect of the roof and common parts can be served on the freeholder and the leaseholders together, as I have already said, following *Pollway’s* case [1987] A.C. 79. But if not, and there is no person who can be required by the local authority to repair the parts not demised, like *Hodgson J.* I do not find this surprising. Parliament has not yet thought it right to extend this part of the legislation to all flats let out on long leases, and thus must be assumed to think it right to rely upon the contractual provisions as between freeholder and long leaseholder. B

Mr. Colyer further argued that even if we reach, as I have now done, the conclusion set out above, we should not hold that the section 9(1A) notice is invalid. He argued, too, that the part of the works which the leaseholder cannot be required to do can be severed from the rest. In other words disregard part B and leave part A standing. I must confess that it is not totally clear to me that these are separate arguments or part and parcel of the same argument, but I believe it is the latter. Since there is a right of appeal to the county court, Mr. Colyer argued that that is the way in which the notice can be quashed, if it is to be quashed. The High Court should not achieve the same effect by declaring it invalid. This is not, he said, as in *Pollway’s* case, a notice addressed to the wrong person. It is a notice addressed to a person to whom it can be addressed, containing extraneous material, but still valid, and thus, under section 37(1) of the Act of 1957, it cannot properly be challenged save by way of appeal to the county court. Mr. Colyer referred us also to the decision of this court in *Cohen v. West Ham Corporation* [1933] Ch. 814, which is really to the same effect as section 37(1), namely that the notices are valid unless and until an appeal against them to the county court succeeds. As for that argument *Hodgson J.* said trenchantly: C

“In my judgment a notice which required a recipient to do work which is the main part of the requirement and which the local authority have no right in law to require him to do is as invalid and void as is a notice served on the wrong recipient: see *Pollway’s* case.” D E

Mr. Arden argued that it is clear that the purpose of these repair notices was to ensure that all the work was done. The work to the roof and common parts is, as I have already said, by far the major part. Whether the local authority would have served on the leaseholders notices requiring only the works to the interior of their flats, if they were not able to require the works to the roof and common parts to be done, must be in doubt; and he urged us not to hold that the notices remain valid. G

For my part I accept that, having decided that the leaseholders cannot be required to do the work to the roof and common parts, the major object of the repairs notices fails. In my view neither this court nor *Hodgson J.* had the material upon which we could sever the requirement for repairs, one part from another. If the appeals to the county court had been pursued, or if they are pursued, the judge can do exactly that if he thinks right. H

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A Mr. Colyer concluded his submissions by saying that although he is in form asking for mandamus, what he really wants is a declaration as to his rights. In effect, in my judgment there is inherent a declaration that a flat is not a "house" for the purposes of Part II of the Act, and that in respect of the repairs to the roof and common parts, these notices accordingly could not be served on the leaseholders. But if Mr. Colyer meant that what he really wants is a declaration that nevertheless the notices are still valid and if he had sought that initially, I would refuse to grant such a declaration. Whether I would actually say, as did Hodgson J., that the notices were invalid matters not. What I am quite positive is that it would be pointless to grant a declaration that they were valid, when their major point will not be achieved. But a declaration is not what these proceedings are asking for. What the applicants seek is a mandamus to require the local authority to make grants to leaseholders under section 71(A) of the Act of 1974. The decision of Hodgson J. on the main issue, with which I entirely agree, inevitably means that the basis for requiring payment of mandatory grants is not established.

C Accordingly, in my view the judge was right to dismiss the application, and I would therefore dismiss the appeal.

D

SIR GEORGE WALLER. I agree and do not wish to add anything.

KERR L.J. I also agree that this appeal should be dismissed for the reasons given by Glidewell L.J. I only add a few words on what appears to me to be the short central issue among the many peripheral matters which have been argued.

E

This is the question whether the holder of a long lease of a flat in a block of flats can be required to carry out repairs to the common parts of the block pursuant to a notice served on him individually under section 9(1A) of the Housing Act 1957. That provides that the notice must be served on "the person having control." The person having the requisite control is defined in section 39 of the Act as the person who receives, or would be entitled to receive, the rack rent of the premises in question.

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It is of course clear that in relation to repairs required to be done by the long leaseholder to his own flat, a section 9(1A) notice is good. He is the person in control of the flat within the definition of section 39(2). And although section 9(1A) refers to a "house," the proceedings can be served on him, and the same provisions apply mutatis mutandis, by virtue of section 18 which provides that the like proceedings may be taken in relation to "any part of a building." In my view it is only because of section 18, for the reasons explained by Glidewell L.J., that a section 9(1A) notice is effective to require repairs to flats to be carried out by the persons in control of them within the terms of section 39(2). The central issue, however, is whether such a person, by reason of such a notice served on him individually, can also be required to carry out repairs to the common parts of the block. For that purpose I take the roof of the block as an example which is in fact of particular importance here. In what relationship does the tenant of any particular flat stand to the roof of the block? There are, so far as I can see, only two connections between him and the roof; and certainly no others have been mentioned in argument. Both concern rights which he has in relation to the roof. Broadly speaking, he has a right to the protection

of the roof against the ingress of rain and so forth. Secondly, he has the right to repair the roof if the landlord does not do so pursuant to the terms of his lease. He may have those rights expressly by the terms of his lease, by demise as in this case, or he may have them by virtue of the reference to "appurtenances" in section 189 of the Act of 1957, though in my view only in the context of houses and not in the context of parts of a building, or he may have them by virtue of section 62 of the Law of Property Act 1925 which refers to rights, appurtenances and so forth. However, these factors merely involve the possible existence of rights enjoyed by the tenant in relation to the roof. That obviously does not have the effect of making a tenant of a flat a person who is in control of the roof for the purposes of section 9(1A) read together with section 39(2) of the Act of 1957. The Act is not concerned with rights. As shown by the heading to Part II, it is concerned with provisions for securing the repair, maintenance and sanitary conditions of houses. Houses and parts of buildings under the control of persons defined in section 39(2) are the subject matter of Part II, not the power to exercise rights. For those reasons I conclude that part B of these notices could not properly be served on the individual leaseholders of any of these flats.

*Appeal dismissed with costs.
Leave to appeal refused.*

Solicitors: Directorate of Administration and Legal Services, Lambeth London Borough Council; Bernstein & Co.

[Reported by MRS. HARRIET DUTTON, Barrister-at-Law]

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A [QUEEN'S BENCH DIVISION]

INDIAN OIL CORPORATION LTD. v. GREENSTONE SHIPPING
S.A. (PANAMA)

1987 March 4, 5; 18

Staughton J.

B *Shipping—Bill of Lading—Cargo, intermixture of—Crude oil mixed with shipowners' crude oil already on board vessel—Mixture of oils not separable—Shipowners' liability to receivers for short delivery of oil —Whether receivers entitled to entire mixture of oil**Ships' Names—Ypatianna*

C The owners of a vessel which was chartered to transport a quantity of Russian crude oil, the property of the receivers, from a Russian port to India, mixed the Russian oil with crude oil, which was their own property, already on board the vessel. The mixture of oils could not be separated for practical purposes and the owners claimed delivery of all the oil on board when the vessel discharged her cargo at the Indian port. The receivers obtained a quantity of oil less than the figure endorsed on the bill of lading. On the receivers' claims in an arbitration that they were entitled, inter alia, to delivery of the whole of the pumpable oil on board the vessel at the port of discharge and damages, accordingly, in the sum of U.S. \$388,000, the arbitrators awarded them \$46,014.90 only for damages for short delivery.

E On the receivers' appeal from the award on the ground, inter alia, that they were entitled to all the oil on board the vessel:—

F *Held*, dismissing the appeal, that where a party wrongfully mixed the goods of another with his own goods which were substantially of the same nature and quality, and they could not be separated for practical purposes, the mixture was held in common and the innocent party was entitled to receive from it a quantity equal to that of his goods which had gone into the mixture; that, if doubt remained as to either quantity or quality, the matter should be resolved in the innocent party's favour, and he was entitled to claim damages from the wrongdoer for losses suffered, in respect of quality or otherwise, as a result of the admixture; and that, since the quantity of the receivers' crude oil could be ascertained with sufficient precision, the arbitrators were right to award damages for short delivery only (post, p. 887B–C, C–E).G *Armory v. Delamirie* (1722) 1 Str. 505, applied.*Stock v. Stock* (1594) Poph. 37; *Lupton v. White* (1808) 15 Ves. Jun. 432 and dictum of Lord Moulton in *Sandeman & Sons v. Tyzack and Branfoot Steamship Co. Ltd.* [1913] A.C. 680, 694–695, H.L.(Sc.) considered.

H The following cases are referred to in the judgment:

Amoco Oil Co. v. Parpada Shipping Co. Ltd. (unreported), 22 January 1987, Staughton J.*Armory v. Delamirie* (1722) 1 Str. 505*Colwill v. Reeves* (1811) 2 Camp. 575*Cook v. Addison* (1869) L.R. 7 Eq. 466*Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd.* [1963] 1 Q.B. 201; [1962] 3 W.L.R. 512; [1962] 2 All E.R. 53, C.A.*Jones v. De Marchant* (1916) 28 D.L.R. 561

Lupton v. White (1808) 15 Ves. Jun. 432

Oatway, In re [1903] 2 Ch. 356

St. John Shipping Corporation v. Joseph Rank Ltd. [1957] 1 Q.B. 267;
[1956] 3 W.L.R. 870; [1956] 3 All E.R. 683

Sandeman & Sons v. Tyzack and Branfoot Steamship Co. Ltd. [1913]
A.C. 680, H.L.(Sc.)

Spence v. Union Marine Insurance Co. Ltd. (1868) L.R. 3 C.P. 427

Stock v. Stock (1594) Poph. 37

Warde v. Aeyre (1615) 2 Bulst. 323

No additional cases were cited in argument.

ORIGINATING SUMMONS.

By notice of motion dated 31 July 1986, the applicant, Indian Oil Corporation Ltd., who were the receivers of a quantity of crude oil shipped on board the vessel *Ypatianna*, owned by the respondents, Greenstone Shipping S.A. (Panama), appealed against the arbitration award, dated 9 July 1986, of Mr. Donald Davies, Mr. E. J. T. Newcomb and Captain D. Spon, whereby it was found and held that the receivers' claims succeeded only in the sum of U.S. \$46,014.90 together with interest. The receivers applied for an order that so much of the award as dismissed the balance of their counterclaims should be set aside, varied or reversed and/or that the award should be remitted for the reconsideration of the arbitrators together with the court's opinion on the question of law.

The grounds of the appeal were, inter alia, that (1) the arbitrators had held that the mixing of cargo on board the *Ypatianna* took place by reason of the owners' breaches of contract and conversion. (2) In the light of those findings the arbitrators should have held that the property in all the cargo so mixed became vested in the receivers. (3) Accordingly, the arbitrators erred in law and/or in principle and/or misdirected themselves in failing so to hold and/or to award damages for 1,300 tons of crude oil remaining on board the vessel which the owners refused to discharge. (4) Further or alternatively, the arbitrators held that the cargo remaining on board the vessel, which was not discharged, included Russian crude oil, which was the property of the receivers. (5) In the light of those findings, the arbitrators erred in law and/or in principle and/or misdirected themselves in failing to hold that such Russian crude oil should have been delivered to the receivers and they were entitled to damages for failing to deliver it.

The facts are stated in the judgment.

Kenneth Rokison Q.C. and *Peter Gross* for the receivers.

Gordon Pollock Q.C. and *Peregrine Simon* for the owners.

Cur. adv. vult.

18 March. STAUGHTON J. read the following judgment. Confusio is the Latin word for the mixing of goods belonging to two different owners, so that they cannot be separated. Where they can be separated it is commixtio: see *Buckland, Text-Book of Roman Law*, 3rd ed. (1963), pp. 208–209. The effect in English law was decided as long ago as 1594 in *Stock v. Stock* (1594) Poph. 37 (sometimes called

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A *Anon*). There, the decision of Popham C.J. and the Court of King's Bench was this, at p. 38:

B "the plaintiff pretending title to certain hay which the defendant had standing in certain land, to be more sure to have the action pass for him, took other hay of his own, (to wit, the plaintiff) and mixed it with the defendant's hay, after which the defendant took and carried away both the one and the other that was intermixed, upon which the action was brought, and by all the court clearly the defendant shall not be guilty for any part of the hay, for by the intermixture (which was his own act) the defendant shall not be prejudiced as the case is, in taking the hay. And now the plaintiff cannot say which part of the hay is his, because the one cannot be known from the other, and therefore the whole shall go to him who hath the property in it with which it is intermixed."

D In the present case the owners mixed crude oil loaded on their vessel at Novorossisk in the Soviet Union with crude oil which was their own property. At least for practical purposes the mixture could not be separated, so it was a case of *confusio*. When the vessel came to discharge at Madras the owners claimed delivery of the whole. Hence this dispute. Although the transfer of title to moveable things is in general governed by the laws of the place where they are at the time (*Dicey & Morris, The Conflict of Laws*, 10th ed. (1980), p. 555), which in this case would be the Soviet Union, or a Greek ship on the high seas, or the Union of India, it is agreed that I must decide this case in accordance with English law, having regard to the decisions of Popham C.J. and of other judges since 1594.

E On 29 November 1980 the owners chartered their vessel *Ypatianna* to the Shipping Corporation of India Ltd. for the carriage of a part cargo of 75,000 long tons of crude oil from Russia to India. The reason for the restriction to 75,000 tons appears to have been the vessel's draft in the Suez Canal. A bill of lading dated 26 December 1980 recorded that 69,276 metric tons of Soviet export blend had been shipped by V/O Sojuzneftexport at Novorossisk for carriage to one or more Indian ports. The applicants, Indian Oil Corporation Ltd., were as the award finds the receivers of the oil at Madras. Presumably the bill of lading was endorsed to them and (subject to the issues in this case) the title to the crude oil shipped then passed to them, if it was not their property already (as may have been the case). I shall call them the "receivers."

G On any view there was short delivery at Madras, compared with the bill of lading quantity. For that the arbitrators have awarded the receivers damages in the sum of U.S. \$46,014.90. But the receivers' contention is that they are entitled to a much greater sum as damages, that is to say U.S. \$388,000 or thereabouts, on the basis that all the pumpable oil on board the vessel at Madras was their property and should have been delivered to them. They also complain that the arbitrators applied a conventional tolerance in calculating the amount of the shortage which was not supported by the facts found.

H In point of form it was the owners who were claimants in the arbitration. The remedy which they sought was U.S. \$38,000 in respect of over-delivery of crude oil. Even if that claim had been supported by the facts, it is not clear to me how it would have been justified in law; but the point has not been argued, for the owners'

claim failed and there has been no appeal by them. This appeal is from the decision of the arbitrators upon the receivers' counterclaims, pursuant to leave granted by Leggatt J. A

The figures

The quantity loaded, as found in the award, was about 508,000 barrels. The bill of lading quantity is found to have been the equivalent of 507,977 barrels. Crude oil on board before loading: (i) in the cargo tanks no more than 13,262 barrels. This may have included some ballast water. Otherwise it comprised about 5,528 barrels of Iranian crude oil from the immediately preceding voyage and the remainder was in part at any rate Indonesian crude oil from the third previous voyage. (ii) In the deep tanks 2,371 barrels. B C

The total quantity on board before loading was thus 15,633 barrels, and the total after loading 523,610 barrels; each figure may have included some water.

Crude oil discharged was 503,896 barrels. Water discharged from the cargo tanks was 6,229 barrels. Pumpable oil remaining on board after discharge was 9,545 barrels. (There are two different figures in the award for the quantity of crude oil remaining on board in terms of weight but somewhat surprisingly they are both said to equal this volume.) D

The last three figures add up to 519,670. That is somewhat less than the total quantity on board after loading. So far as I can tell the difference can be explained only by evaporation, or because some residues were unpumpable, or more probably in part by one of those causes and in part by the other. E

The receivers' smaller claim was for the shortage revealed by comparing the bill of lading quantity (507,977 barrels) with the quantity of crude oil discharged (503,896 barrels). The arbitrators allowed that claim in principle, but deducted a tolerance of 0.55 per cent. from the bill of lading figure, or 2,793.87 barrels. Accordingly, they awarded damages for a shortage of 1,287.13 barrels only. That deduction forms the basis of one of the receivers' grounds of appeal. F

The larger claim made by the receivers was based on the proposition that all the pumpable oil remaining on board the vessel, 9,545 barrels, had become their property and should have been delivered to them. I assume, although the point was not discussed, that if this larger claim succeeded the smaller claim would merge into it. However, the arbitrators held that the larger claim failed; and that gives rise to the receivers' other grounds of appeal. G

Further facts

The bill of lading incorporated all the terms of the charterparty, including the arbitration clause. The carriage was accordingly subject to the Hague Rules for the carriage of goods by sea. H

Four topics need further consideration. The first is the nature and quality of the crude oil on board before loading. To the extent that it comprised Iranian or Indonesian or other crude oils, I would infer that its specification was not exactly the same as that of Soviet export blend. But there is no finding that it was either better or worse. The furthest that the award goes is this finding:

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A "There were no complaints at the time, neither have there been since, in respect of the quality of the crude oil discharged from the vessel at Madras; therefore it has been assumed that the owners discharged their primary obligation to deliver the bill of lading cargo subject to a conventional shortage of 1,287.13 barrels."

B Later it is said that there was no contamination of the receivers' crude oil. It does not necessarily follow that the quantity on board before loading was, in point of quality, as good as or better than, Soviet export blend. It would have comprised on average no more than 3 per cent. of the cargo discharged, so that a quality claim might well have been difficult to prove or trivial in amount. But there remains a possibility that the owners may have wished to improve the quality of the oil which they already had on board, and for that reason deliberately mixed it with the cargo loaded at Novorossisk.

C In passing I should mention that the crude oil on board before loading was the property of the owners, either because they had paid for it by way of penalties to previous consignees, or because it had been abandoned to them by the true owners. The award describes the quantity on board before delivery as "slops." I am not confident as to the precise meaning of that term—whether it can comprise simply crude oil residues, or necessarily means crude oil mixed with water. The arbitrators say that the slops "could have included some ballast water." In the end, I do not think that the water content of the slops matters, for this reason: it is recorded that a quantity of water was discharged—6,229 barrels. That is not directly credited to the owners in the calculation of the shortage claim: the claim starts by comparing the bill of lading quantity with the quantity of crude oil discharged. But the arbitrators make an allowance of 0.3 per cent. for water and sediment, as part of their total allowance of 0.55 per cent. So far as water is concerned, the notion is that it was entrained in the crude oil loaded but settled out of it during the voyage. That would account for 1,524 barrels. The balance of the water discharged must have come from the slops. There is no reason to believe that they must have contained any greater quantity of water. So I conclude that although the owners may possibly have wished to improve the quality of their crude oil by mixing it with the cargo loaded, there is no evidence that in fact they had that objective or that they achieved it. The inference which I think it fair to draw is that the crude oil loaded, and that already on board, were substantially of the same nature and quality.

E The second topic is the conduct of the owners. The award finds that there was interconnection between the vessel's cargo, ballast and fuel oil systems which was a breach of the International Maritime Organisation and Classification Societies rules. I am aware that a number of cases have recently occurred where there has been the transfer of cargo to a vessel's fuel tanks for use on the voyage, thus constituting theft as well as giving rise to danger of fire on board. So there is a hint here that these owners were going equipped for theft; but it is no more than a hint.

H The awards finds that "during the voyage from Novorossisk to Madras there were many deliberate inter-tank transfers and there were also inter-tank leakages." That too is a hint, but no more than a hint, of wrong-doing on the part of the owners. It is sometimes

appropriate and necessary to make inter-tank transfers during a voyage, for example to correct the trim of a vessel as bunker fuel is consumed. I decline to infer that deliberate wrong-doing on the part of the owners in that respect is proved. As to events before loading, there is this passage in the award:

“The owners wanted to segregate out the crude oil remaining on board the vessel before she arrived at Novorossisk and were quite open in respect of this. There did not appear to be anything furtive in their approach. They were commercially sensible or so one would think. They wanted to separate the relatively large quantity of crude oil for which some payment had been made, so that it did not become mixed with the other cargo. Their failure to segregate the crude oil does not to our mind affect the issues in this case albeit that the matter would be much different if contamination of cargo had taken place.”

In the light of that finding, I should be slow to conclude that the owners by their master deliberately mixed the cargo with their own oil for some commercial motive.

Thirdly, I must say something about a procedure called load on top. This has been devised in order to avoid pollution from tank washing and ballast water. After successively washing some tanks and ballasting others, the vessel ends up with all oil residues in one tank, no doubt intermingled in some degree with water. New cargo is then loaded on top in the slop tank, as well as in the other cargo spaces which are empty. The effect is described by the arbitrators:

“The load on top procedure is widely used in the tanker business and had been for many years prior to the voyage in question. It is common usage or commonly understood in the bulk oil trade that charterers/receivers are entitled to all pumpable oil remaining in the vessel's cargo tanks after discharge when the conventional load on top procedure has been adopted. This may result in there being a delivery from the vessel of more oil than the bill of lading quantity loaded into the vessel although experience suggests that over delivery is not common. There is no common usage or common understanding as far as we are aware in respect of what is the practice in circumstances such as those now before us which were of an unusual nature.”

The usual load on top procedure was not employed in this case. The existing residues were distributed among all or some of the vessel's cargo tanks as well as in the deep tanks, rather than in one cargo tank only. Although this point featured in the owners' skeleton argument, at the hearing it was not contended that the usage found in relation to the load on top procedure is directly applicable here. However, Mr. Rokison for the receivers seeks to derive some support from that usage. If receivers are entitled to all pumpable oil when that procedure is adopted, he argues that a fortiori they should be entitled to pumpable residues when it is not. But the arbitrators's finding does not, in my judgment, form a sufficient foundation for any binding custom or practice when the pumpable oil exceeds the quantity loaded by a substantial amount. It seems that the arbitrators recognised this, for they said later in their award: “We also shrink from deciding that the conventional ‘load on top’ procedure gives title to pumpable oil in

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A the vessel in all circumstances. I agree with the arbitrators that their finding does not establish any custom or practice which would be binding in this case.

Fourthly, there is the question whether the cargo interests consented to the mixing of the crude oil loaded with that already on board. The award finds:

B "There was no question of the receivers expressly assenting to the mixing of the crude oils at the time of loading and/or during the voyage to Madras. . . . there was no consent between the parties, expressed or implied, to the mixing of the crude oil at the loading port."

C Those findings are conclusive that the receivers themselves did not consent. But may there have been consent on the part of the shippers, or of whoever owned the cargo as it went into the vessel?

D At first sight it seems to me surprising that anyone loading 69,000 tons of crude oil should not sound the ship's tanks first to see what was in them already. But equally it is surprising that the arbitrators did not intend to make any finding as to the knowledge or consent of the shippers or those who owned the oil as it was loaded, since
E absence of consent was a fundamental premise of the receivers' legal argument. Mr. Pollock for the owners observes that there may have been some confusion as to the status of the parties to the arbitration. In the heading of the award Indian Oil Corporation Ltd. are described as "respondents (charterers)" and in paragraph 3 it is recited that "the charterers" appointed Mr. Newcomb as arbitrator on their behalf. But
F according to the charterparty, which has been put before me by consent, the charterers were the Shipping Corporation of India Ltd. There is, moreover, a dispute between counsel as to the extent to which the point was raised in the arbitration. Mr. Rokison for the receivers asserts that the case was treated before the arbitrators as one of admixture without consent. If that be right I should not allow the owners now to raise the question whether the shippers or the
G owners of the oil at the time of loading consented. But Mr. Simon, who represented the owners at the time of the arbitration, says that documents showed and it was common ground that the shippers knew about the oil already on board the vessel. Mr. Gross, who represented the receivers, disputes that.

The point may be of crucial importance. It is essential to the receivers' argument that admixture took place without consent; and that must mean, in my judgment, without consent of those who owned the oil at the time of loading, or of any agent acting on their behalf. It is for consideration whether the award should be remitted to the arbitrators for them to state: (1) whether the case was, as Mr. Rokison says, treated by all as one of admixture without consent; if not, (2)(a) whether it was common ground that the shippers knew of
H the oil already on board the vessel; and if yes, (b) whether the shippers owned the oil at the time, or were acting as agents for those who owned it; if not, (3) whether in fact those who owned the oil at the time of loading or any agent acting on their behalf consented to the admixture.

The arbitrators may well be able to answer those questions sufficiently without difficulty; and if the answers are important that seems to me the best way to proceed. Perhaps there never was a snail

in the ginger beer bottle. But for the present I assume that there was no relevant consent by anybody. A

Whilst on the subject of what was and was not argued in the arbitration, Mr. Pollock sought to put forward a case which it is admitted was not before the arbitrators. This was that the receivers must show either that they owned the oil at the time of loading or that the title to the whole contents of the vessel passed to them by some means such as endorsement and delivery of the bill of lading. B
Seeing that this point might well have been met by further evidence from the receivers, was not raised at the time, and does not have any conspicuous merit about it, I decline to allow it to be raised now.

(1) *The tolerance of 0.55 per cent.*

This is a short point. The arbitrators say in their award: C

"In assessing this conventional shortage we have, based upon the documentation and expert evidence produced before us, allowed the owners 0.30 per cent. in respect of water and sediment in the crude oil cargo and 0.25 per cent. in respect of vapour losses while the cargo was being loaded and discharged. The owners might in other circumstances have been allowed more than a total D
tolerance of 0.55 per cent., but the inter-tank transfers and leakages during the ocean passage militated for a minimum allowance for the owners. The arithmetic regarding the shortage is as follows: Bill of lading quantity 507,977 barrels. Tolerance of 0.55 per cent. 2,793.87. The difference 505,183.13. Received in store tanks"—which presumably means shore tanks—"503,896.00. E
Shortage 1287.13 barrels."

The receivers complain that no tolerance should have been allowed and that they should have been awarded damages on their first claim based on the total shortage of 4,081 barrels. That in money terms would have come to U.S. \$145,895.75 instead of the sum of U.S. \$46,014.90 which they were in fact awarded by the arbitrators. The receivers contend that there is no finding of any custom which justifies a tolerance of 0.55 per cent. or any other figure; and as there was still F
crude oil on board when the vessel sailed, it cannot be assumed that 0.55 per cent. of the oil loaded was lost as water and sediment or by evaporation.

I agree that there is no finding of custom. But despite their use of the word "conventional" I do not think that the arbitrators were treating the point as governed by custom. It was said as long ago as *Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd.* [1963] 1 Q.B. 201, 218, and has been repeated since, that awards of commercial arbitrators are not to be examined with a fine-toothed comb. What the arbitrators were finding, as seems clear to me, is that crude oil cargoes usually lose 0.25 per cent. by evaporation on an ocean voyage and that 0.3 per cent. of the crude oil loaded was likely to have H
settled out as water and sediment. I see no reason why they should not have made those findings if they were justified by the documents and expert evidence before them. Only two months ago, in *Amoco Oil Co. v. Parpada Shipping Co. Ltd.* (unreported), 22 January 1987, I arrived at a figure of 0.2 per cent. for evaporation on the evidence that was then before me. For all practical purposes it is impossible to measure what loss in fact occurs by evaporation on every tanker

A voyage. The obvious solution is to act on the evidence of experts as to what loss is likely to have occurred. The difficulty is rather less with water and sediment, which can be measured in a sample of the oil before loading. But I see no ground for rejecting the arbitrators' finding of an apparent loss of 0.3 per cent. by water and sediment, settling out of the cargo. The fact that crude oil remained on board after discharge seems to me immaterial on this point. No doubt there was evaporation from the owners' oil as well; and it is plain from the figures that water settled out of it to a much greater extent than from the crude oil loaded.

The owners are not liable for the inevitable loss by evaporation, under the Hague Rules. And the apparent loss by settling out of water and sediment is not a loss of cargo at all, or at any rate not a loss of anything of value. Hence I uphold the arbitrators' conclusion on the tolerance point. The receivers' appeal in respect of their smaller claim fails.

(2) *The admixture claim*

D Mr. Rokison's submission is as follows: where B wrongfully mixes the goods of A with goods of his own, so that the original goods cannot be separated or identified, the whole of the mixture becomes the property of A. So it is a case of "happy undeserving A," if not also of "wretched meritorious B."

E Mr. Pollock's submission is this: where a wilful admixture occurs without consent, both parties have a joint interest in the whole and the innocent party is entitled to receive his full contribution from the mixture even if it has been diminished by subsequent accidental loss. Alternatively, he submits that the general rule is as above, but that the innocent party is entitled to the whole if (1) the admixture was deliberately brought about for the purpose of depriving the innocent party of his rights, or making them difficult of enforcement, and (2) it is impossible to tell with any certainty what the contributing proportions had been.

G There are numerous and very distinguished authorities. But it is agreed on both sides that none of them is binding on me. In the circumstances, I do not see that I can refrain from citing all those which were put before me, even if the result is an inordinately long judgment for a case where the argument lasted rather less than two days.

H *Stock v. Stock* (1594) Poph. 37, 38 has already been quoted in part. Even as a record of Tudor law I consider the case to be of very little authority. The reports of Popham have been described as a "mangled and ill-translated edition": *Wallace, The Reporters*, 4th ed. (1882), p. 207. And if one accepts that the report of this case is accurate, there is a degree of confusion in it which is not easy to resolve.

Warde v. Aeyre (1615) 2 Bulst. 323 is reported as follows:

"In an action of trespassse for an assault and battery, & quod cumulum pecuniae, containing five markes, cepit. The case appeared to be this, the plaintiffe and the defendant, being at play, the plaintiffe thrust his money into the defendant's heape, and so intermingled them together: the defendant kept all, and

upon this, being striving together for the money, for this the plaintiffe brings his action.

“Coke C.J. In this case, the law is, that if I.S. have a heape of corn, and I.D. will intermingle his corne with the corne of I.S. he shall here have all the corne, because this was so done by I.D. of his own wrong, and so it was adjudged in a case between Shordish and Moore, and so it is in case of money, if two being at play, and the one of them will intermingle his money in the others heap of money, he shall now have all, for this is so done by him of his own wrong, and this we have so adjudged in one *Sir Richard Martins case*, for that his own proper money, or corn cannot now be known, and therefore by this his intermingling, being his own act, and of his own wrong, by the law he shall lose all, for this is so used and done by him, onely as a trick, thinking thereby to deceive the other, and so to gain something by this to himself, but by this his so doing, he hath deceived himself, and shall now by this his tortious act, lose all; and if this should be otherwise, a man should be made to be a trespasser, volens nolens, by the taking him of his goods again, and for the avoiding of this inconvenience, the law in such a case is, that he shall now retein all; the whole court agreed with him herein against the plaintiffe, and for the reason aforesaid, and so the rule of the court was, quod querens nil capiat per billam.”

That case is consistent both with Mr. Rokison’s argument and also with Mr. Pollock’s qualified proposition. The admixture was brought about by a trick in order to deceive, and it seems likely that the proportion which each part had contributed to the mixture could no longer be determined.

In *Colwill v. Reeves* (1811) 2 Camp. 575 the headnote reads:

“A shopkeeper may maintain trespass for taking goods sent to him on sale or return. If A for a fraudulent purpose mixes his goods with B’s; still, if they can be distinguished, he retains the property in them; and he may maintain trespass against a person who, having a right to take B’s goods, ignorantly takes these goods of A as part of B’s.

Lord Ellenbrough C.J. said, at pp. 576–577:

“If a man puts corn into my bag, in which there is before some corn, the whole is mine; because it is impossible to distinguish what was mine from what was his. But it is impossible that articles of furniture can be blended together so as to create the same difficulty. The goods in question remained distinct, and the messenger might have discovered that they belonged to the plaintiff. He took them at his peril. Whatever fraud there might be in the case, the property was not divested from the plaintiff, and the stratagem described is no defence on the general issue to an action at his suit for taking and converting the goods.”

That case cannot be said to be inconsistent with Mr. Pollock’s qualified proposition.

Meanwhile the subject had received much fuller treatment in *Lupton v. White* (1808) 15 Ves. Jun. 432. There a dispute had arisen between the owners of adjoining lead mines and an injunction had

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A been granted. It was dissolved upon the defendant undertaking to
keep a distinct account of the ore which he might take from the
plaintiff's mine. Later it was shown that the ore had been mixed by
the defendant, at p. 433, "for the purpose of preventing a discovery
of the ore got" from the plaintiff's mine; that the accounts and books
had been, "so kept or contrived as to prevent a true discovery;" and
B that no true estimate could be formed of the quantity of ore got from
the plaintiff's mine. Lord Eldon L.C. said, at p. 436:

"If the result is, that the master cannot take the account, it is
clearly not for him, without a farther direction, to apply the great
principle, familiar both at law and in equity, that, if a man,
having undertaken to keep the property of another distinct, mixes
it with his own, the whole must both at law and in equity be
C taken to be the property of the other, until the former puts the
subject under such circumstances, that it may be distinguished as
satisfactorily, as it might have been before that unauthorised
mixture upon his part."

The case was reargued. On that occasion Lord Eldon L.C. said, at
pp. 439-441:

D "If a man by his own tortious act makes it impossible for another
to ascertain the value of his property, and that in a transaction, in
which the former was, not merely under an implied moral
obligation, but pledged by a solemn undertaking in a court of
justice, that such should not be the state of things between them,
by those means preventing the guard which the court would have
effectually interposed, is the argument to be endured, that, as the
E party, so injured, cannot distinguish his property, therefore he
shall have nothing? That is not the law of this country; as
administered in courts either of law or equity. The case (*Armory*
v. Delamirie (1722) 1 Str. 505) of the diamond ring, found by a
poor boy, proves the contrary. He had not the means of showing
the value. The person who took it from him, by wrong, prevented
F the jury from ascertaining the value by production of the ring, or
other evidence. Therefore, as it was proved, that the plaintiff's
evidence had been destroyed by the act of that person, who
ought to have refrained from placing the transaction in that state,
the Lord Chief Justice directed the jury to find, that the stone
was of the utmost value they could find; upon this principle, that
it was the defendant's own fault, by his own dishonest act, that
G the jury could not find the real value. The case of *Panton v.*
Panton (in the Court of Exchequer) applies to this. A clerk in a
banking-house at Chester remitted his own money, with that of
his employer, to an agent in London, to be laid out upon security;
and by management the securities were so changed, that the
property could not be distinguished. The Court of Exchequer
held, that, the confusion being occasioned by him, who so dealt
H with the property, the distinction lay upon him; and, if he could
not distinguish, what was his own, the whole must be considered
as belonging to the other. A principle, not dissimilar, though not
precisely the same, governed me in the case of Mr. Jackson's
executors (*White v. Lady Lincoln, The Duke of Newcastle v.*
Kinderley (1803) 8 Ves. Jun. 363). There was no more duty
imposed upon him than upon these individuals. He had kept the

account, and, as it appeared to me, not incorrectly, upon his own side: but, having kept it only upon his own, though bound to keep it upon the other, side, it was held, that he could not maintain a demand, to which under other circumstances he would have been fairly entitled. The decision was made, not upon the notion, that strict justice was done, but upon this; that it was the only justice, that could be done; and that no more could be done was the fault of Jackson himself; who, if he did not enable those parties to know, what demand they had upon him, could not be heard to say, he had any demand upon them.”

Then, at p. 441:

“What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity: but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person, mixing them, the other party cannot tell, what was the original value of his property, he must have the whole and the principle goes to the full extent of what is now contended.”

The analogy with *Armory v. Delamirie* (1722) 1 Str. 505 is striking. If the wrongdoer prevents the innocent party proving how much of his property has been taken, then the wrongdoer is liable to the greatest extent that is possible in the circumstances. That is consistent with Mr. Pollock’s qualified proposition, or at any rate with the second part of it. So too are Lord Eldon L.C.’s remarks about corn or flour. If the components are proved to be of equal value, the innocent party is entitled only to the *given* quantity, which I take to be that which he contributed. It is only if the innocent party cannot tell what was the original value of his property that he is entitled to the whole.

A footnote to the report of *Lupton v. White* (1808) 15 Ves. Jun. 432 refers to *Blackstone’s Commentaries*, 17th ed. (1830), vol. 2, pp. 404–405:

“But in the case of *confusion* of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another’s melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent.”

The arbitrators in the present case expressed a preference for the Roman law, in plain terms. For my part I am not convinced that either *Blackstone* or the arbitrators correctly summarised the Roman law. In the *Institutes of Justinian* II.I.28, dealing with the case of corn mixed by accident or deliberately by one party, it is said that

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A "the corn is no more made common property than there would be
a common herd if Titius' cattle were mixed with yours. And if
either of you holds the whole of the corn, the other will have an
action in rem for the amount of his grain, it being a matter for
the judge to estimate which grain is whose (in rem quidem actio
pro modo frumenti cuiusque competat, arbitrio autem iudicis
continetur, ut is aestimet, quale cuiusque frumentum fuerit)."*

B The effect, however, is in economic terms the same.

It is to be noted that the motive ascribed by *Blackstone* is, "to guard
against fraud." And Mr. Pollock emphasises the words "and endeavoured
to be rendered uncertain," as indicating an intention to conceal the
innocent party's property.

C Before returning to the cases, I refer to another respected
commentator. *Stephen's Commentaries on the Laws of England*, 12th ed.
(1895), vol. 2, p. 21, after citing *Blackstone* almost verbatim, continues:

D "However, this rule of the English law applies only to cases
where the confusion is such as to render it impossible to
subsequently apportion the respective shares; for if the goods
continue to be distinguishable, as in the instance of articles of
furniture thrown together, the confusion makes no alteration in
the property; or if the quality of the articles is uniform, and the
original quantities are known, as in the case of £500 of trust
money mixed with £300 of the trustee's own money, the party by
whose act the confusion took place would still be entitled to claim
his proper quantity, subject only to the quantity of the other
proprietor being first made good out of the whole mass."

E That, as it seems to me, entirely accords with Mr. Pollock's qualified
proposition, or at least with the second part of it.

F In *Spence v. Union Marine Insurance Co. Ltd.* (1868) L.R. 3 C.P.
427, bales of cotton belonging to different owners had lost their marks
owing to a casualty at sea. The case seems to have been treated as
one of accidental mixture and is therefore not directly in point. Bovill
C.J. said, at pp. 437-438:

G "In our own law there are not many authorities to be found upon
this subject; but, as far as they go, they are in favour of the view,
that, when goods of different owners become by accident so
mixed together as to be undistinguishable, the owners of the
goods so mixed become tenants in common of the whole, in the
proportions which they have severally contributed to it. The
passage cited from the judgment of Blackburn J. in the case of
the tallow which was melted and flowed into the sewers, is to that
effect: *Buckley v. Gross* (1863) 3 B. & S. 574. And a similar view
was adopted by Lord Abinger in the case of the mixture of oil by
leakage on board ship in *Jones v. Moore* (1841) 4 Y. & C. Ex.
351. It has been long settled in our law, that, where goods are
mixed so as to become undistinguishable, by the wrongful act or
default of one owner, he cannot recover, and will not be entitled
to his proportion, or any part of the property, from the other
owner: but no authority has been cited to show that any such

* Institutes of Justinian Text, Translation and Commentary, J. A. C Thomas (1975),
p. 69.

principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of two owners; and there is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become bona vacantia.” A

The obiter dictum in that passage as to wrongful admixture is direct support for Mr. Rokison’s argument. B

Cook v. Addison (1869) L.R. 7 Eq. 466 was a case of mixture of trust funds. Sir John Stuart V.-C. said, at p. 470:

“It is a well-established doctrine in this court, that if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, so as that they cannot be separated with perfect accuracy, he is liable for the whole. This doctrine was explained by Lord Eldon in *Lupton v. White* (1808) 15 Ves. Jun. 432. In this case it is impossible to say how much of the £250 received by the defendant Addison from Fowler for repairs consisted of what was due under the covenant to repair in the underlease. The consequence is, that the whole £250 is liable to the demands of the cestui que trust so far as necessary to make up, with the other sums admitted to be part of the trust property, the full amount of the trust fund of £520, with interest at 5 per cent. per annum from 30 April 1865 . . .” C D

That does not, as I see it, amount to a decision that the whole of the mixed fund belonged to the trust, but rather that it was available so far as necessary to make good the amount lost by the trust. E

In re Oatway [1903] 2 Ch. 356 was also a trust case. There is a significant passage in the judgment of Joyce J., at pp. 359–360:

“It is a principle settled as far back as the time of the Year Books that, whatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material: see *Blackstone*, vol. ii, p. 405 and *Lupton v. White* (1808) 15 Ves. Jun. 432. But this rule is carried no farther than necessity requires, and is applied only to cases where the compound is such as to render it impossible to apportion the respective shares of the parties. Thus, if the quality of the articles that are mixed be uniform, and the original quantities known, as in the case of so many pounds of trust money mixed with so many pounds of the trustee’s own money, the person by whose act the confusion took place is still entitled to claim his proper quantity, but subject to the quantity of the other proprietor being first made good out of the whole mass: 2 *Stephen’s Commentaries* (13th ed.), 20. Trust money may be followed into land or any other property in which it has been invested; and when a trustee has, in making any purchase or investment, applied trust money together with his own, the cestuis que trust are entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase or investment.” F G H

That is support for Mr. Pollock’s proposition, subject to the second part of his qualification.

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Indian Oil Corpn. v. Greenstone Shipping S.A. (Q.B.D.)

Staughton J.

A In *Sandeman & Sons v. Tyzack and Branfoot Steamship Co. Ltd.*
 [1913] A.C. 680 a consignee of bales of jute claimed that six of his
 bales were missing. It was found that 14 bales, belonging either to
 that consignee or to others, were missing; and that 11 bales were
 available without any marks. It was held that the consignee was
 entitled to claim for his six bales not delivered, and was not obliged
 to accept that any of the unmarked bales belonged to him. The obiter
 dictum of Lord Moulton is directly in point, at pp. 694–695:

B “My Lords, if we proceed upon the principles of English law, I
 do not think it a matter of difficulty to define the legal
 consequences of the goods of ‘A’ becoming indistinguishably and
 inseparably mixed with the goods of ‘B.’ If the mixing has arisen
 from the fault of ‘B,’ ‘A’ can claim the goods. He is guilty of no
 C wrongful act, and therefore the possession by him of his own
 goods cannot be interfered with, and if by the wrongful act of ‘B’
 that possession necessarily implies the possession of the intruding
 goods of ‘B,’ he is entitled to it (2 *Kent’s Commentaries*, 10th ed.,
 465). But if the mixing has taken place by accident or other
 D cause, for which neither of the owners is responsible, a different
 state of things arises. Neither owner has done anything to forfeit
 his right to the possession of his own property, and if neither
 party is willing to abandon that right the only equitable solution
 of the difficulty, and the one accepted by the law, is that ‘A’ and
 ‘B’ become owners in common of the mixed property. Farther
 than this I do not think that it is safe to go. That the whole
 matter is far from being within the domain of settled law is shown
 E by the divergence of opinions as to the relative shares of the
 participating parties in the case of an accidental commixtio.
 Blackburn J. in *Buckley v. Gross* (1863) 3 B. & S. 566, at p. 575
 (following *Kent’s Commentaries*) considers that they would be
 tenants in common in equal shares. In *Spence v. Union Marine*
Insurance Co. (1868) L.R. 3 C.P. 427 they were judged to possess
 F the mixed mass in proportion to the probable amounts of their
 contributions to it. The fact is that the conclusions of the courts
 in such cases, though influenced by certain fundamental principles,
 have been little more than instances of cutting the Gordian
 knot—reasonable adjustments of the rights of parties in cases
 where complete justice was impracticable of attainment. I doubt
 whether even the fundamental principles enunciated above would
 G be strictly adhered to in extreme cases where they would lead to
 substantial injustice. For instance, if a small portion of the goods
 of ‘B’ became mixed with the goods of ‘A’ by a negligent act for
 which ‘A’ alone was liable, I think it quite possible that the law
 would prefer to view it as a conversion by ‘A’ of this small
 amount of ‘B’s’ goods rather than do the substantial injustice of
 treating ‘B’ as the owner of the whole of the mixed mass.”

H Mr. Rokison relies on the first part of that passage, on the law as
 to wrongful admixture. The difficulty that I feel is over the later
 observation, that those principles might not be strictly adhered to if
 they would lead to substantial injustice—for example, if the innocent
 party’s contribution had been small. I have difficulty in understanding
 how a rule of law as to rights of property can be subject to the
 qualification that it must not cause substantial injustice. Rather than

conclude that some rule of equity prevails in such cases, I would suppose that Lord Moulton did not intend to lay down rules of settled law, but instead to offer an opinion as to what the law might turn out to be if such cases arose. A

The last of the cases cited was *Jones v. De Marchant* (1916) 28 D.L.R. 561. The headnote in that case reads:

“Where beaver skins belonging to a wife have been wrongfully taken from among her effects by her husband, who has them made up into a fur coat which he makes a gift of to a third person, the property in the coat is in the wife under the principle of ‘accession,’ and the coat may be recovered by her in an action of replevin.” B

It seems that the coat was made up of 18 skins taken from the plaintiff and another four provided by the husband. Nobody suggested that the coat should be severed or dismantled. The case was one of accessio. Apart from the fact that Richards J.A., at p. 563, cited *Blackstone’s Commentaries*, p. 405, with apparent approval, the decision is not of assistance in the present case. C

Other authorities relied on were *Smith’s Leading Cases*, 13th ed. (1929), vol. 1, p. 396; *Story on Bailments*, 9th ed. (1878), pp. 41–44; *Holdsworth, A History of English Law*, 2nd ed. (1937), vol. 7, pp. 501–502; *Halsbury’s Laws of England*, 4th ed., vol. 35 (1981), para. 1139, and vol. 2 (1973), para. 1537. With the possible exception of *Holdsworth*, those support Mr. Rokison’s argument. In modern times there is *Goff and Jones, The Law of Restitution*, 3rd ed. (1986), pp. 65–66: D

“At law, as in equity, the plaintiff must be able to identify his property in the hands of the defendant. Where the plaintiff is claiming non-fungible chattels, this important practical limitation will create little difficulty. But the identity of fungibles may become easily lost by their becoming mixed with other fungibles. Consequently if grain has become mixed in a ship or in a warehouse, the common law applies the special rules, akin to those developed in Roman law, of commixtio and confusio. Where A’s property has become inseparably mixed with B’s, the resultant mass will belong, in proportion to their contributions, to A and B as tenants in common. But if the mixing has been due to the wrongful act of either A or B, then English law appears to make a significant and punitive departure from the Roman doctrine and to give the property in the whole mass to the innocent party.” E F G

The arbitrators said of that passage: “The above erudition exemplifies some uncertainty about the English law on the topic thus allowing us to take our own course.”

Paton, Bailment in the Common Law (1952), pp. 156–158, appears to support Mr. Pollock’s qualified argument, although one section, at p. 157, has the heading “Present Law Uncertain.” *Birks, Introduction to the Law of Restitution* (1985), p. 368, refers to the maxim that everything is presumed against a thief, and continues: H

“This is the spirit in which the exercise of identification has been conducted against those who have been guilty of wrongful misappropriation.”

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A Matthews in *Current Legal Problems* (1981), vol. 34, p. 159, supports Mr. Rokison's argument.

Finally, I was referred to the American Law Institute's *Restatement of the Law of Restitution* (1937), para. 209:

"Where a person wrongfully mingles money of another with money of his own, the other is entitled to obtain reimbursement out of the fund."

B Paragraph 214 provides:

"The rules stated in paragraphs 209-213 are applicable where a person wrongfully mingles things other than money.

C "Comment: a. *Mingling of fungible things*. The rule stated in this section is applicable where a person wrongfully mingles fungible things, such as grain. If a person wrongfully mingles the grain of another with grain of his own in a bin, the other is entitled to receive from the grain in the bin the amount of his grain so mingled, even though a part of the grain has been withdrawn from the bin (compare paragraph 211)."

D Two points of significance in my view emerge from the authorities. First, in some cases a decision had to be made "not upon the notion, that strict justice was done, but upon this: that it was the only justice, that could be done," *per* Lord Eldon L.C. in *Lupton v. White*, 15 Ves. Jun. 432, 440. Or as Lord Moulton put it, such cases "have been little more than instances of cutting the Gordian knot—reasonable adjustments of the rights of the parties in cases where complete justice was impracticable of attainment," in *Sandeman & Sons v. Tyzack and Branfoot Steamship Co. Ltd.* [1913] A.C. 680, 695. Secondly, if the wrongdoer has destroyed or impaired the evidence by which the innocent party could show how much he has lost, the wrongdoer must suffer from the resulting uncertainty. Thus the jury in *Armory v. Delamirie*, 1 Str. 505 were directed by Pratt C.J. to award the plaintiff the value of the finest jewel which the socket would hold, not the finest jewel that had ever been known.

E The combined effect of those principles would justify and require that where it is totally unknown how much of the innocent party's goods went into the mixture, the whole should belong to him. But I do not see that they require or justify the same result where it is known how much was contributed by the innocent party, or even what the maximum quantity is that he can have contributed, being something less than the whole. That would not be the only justice that could be done; it would be injustice.

G As for the reason given by *Blackstone*—"to guard against fraud"—in my opinion that will be sufficiently achieved if the principle in *Armory v. Delamirie*, 1 Str. 505 is followed. I do not see that it is the function of civil justice to punish or discourage crime by awarding the victim more than he has lost, unless it be in the special case of an award of exemplary damages. There is the allied principle that the courts will not enforce an illegal contract or one that is tainted with illegality. But that has its limits. See the judgment of Devlin J. in *St. John Shipping Corporation v. Joseph Rank Ltd.* [1957] 1 Q.B. 267, 279-280:

H "When the master of the plaintiff's ship *St. John* was prosecuted at Birkenhead under the [Merchant Shipping (Safety and Loadline

Conventions) Act 1932] and, on 28 November 1955, found to have overloaded his ship by more than 11 inches, he was fined the maximum of £1,200; but the amount of cargo by which the ship was overloaded was 427 tons and the extra freight earned was £2,295. So the ship came very well out of this situation; and she and other ships will doubtless continue to come very well out of similar situations until the Act of 1932 is amended. I can see that it is a situation that must cause some concern to cargo owners whose property is at risk. The ship was carrying a cargo of about 10,000 tons of grain from Mobile, Alabama, U.S.A., to Birkenhead. The defendants held a bill of lading for about 3,500 tons of this quantity on which the freight due was nearly £19,000. The defendants, apparently in association with the charterers, decided that some additional punishment should be inflicted on the plaintiffs, and that it should take the form of withholding the £2,295 extra freight. The defendants have withheld £2,000, for which sum they are being sued in this action, and another cargo owner has withheld £295 and is being sued for it in an action that depends on this one. This is the explanation of how this dispute has arisen. But I, of course, have not got to decide whether the defendants are morally justified in trying to make good deficiencies in the criminal law; nor is any justification of that sort put forward in the case.”

In the present case there is, as I have said, a hint that the owners were engaged in wrong doing, but on the award as a whole I do not conclude that they mixed the cargo with their own oil for some commercial motive. It would be a severe penalty to impose on them a fine of U.S. \$342,000 for their conduct (that being the difference between the receivers' larger claim of U.S. \$388,000 and the award in respect of the shortage of some U.S. \$46,000). The arbitrators, who know a great deal about the business of carriage by sea, did not perceive justice in that; and neither do I. But in any event, the rule cannot, unless Lord Moulton's qualification in the *Sandeman & Sons* case [1913] A.C. 680, 695, represents the existing law, be altered to suit the circumstances of each particular case. It must be one rule for all cases. Those may vary between one where the shipowner deliberately mixes property with a view to stealing it, to another where he does so purely for convenience of carriage without any intention to harm anybody.

The other motive to be found in the cases is that of Coke C.J. in *Warde v. Aeyre* (1615) 2 Bulst. 323, 324, “otherwise, a man should be made to be a trespasser, volens nolens, by the taking of his goods again . . .” In theory there may still be cases where that reasoning is sound, for example, if a farmer wished to retake his hay from a heap where it had been wrongly mixed with that of somebody else. In practice, it is not likely to arise often and certainly not in the present case: the notion of the Indian receivers boarding the owners' vessel after the conclusion of discharge at Madras in order to retake their oil is implausible. I would not regard that argument as justification for a rule which may work substantial injustice.

In the days when corn and hay were to be found in heaps which could not be measured accurately, when such disputes were tried by jury and witnesses might be illiterate or ignorant, a rough and ready

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A rule which *Goff and Jones*, p. 66, describe as punitive may have been the best that the law could find. But a primitive rule is no longer appropriate when modern and sophisticated methods of measurement are available. The measurement of cargoes of oil is, as I learnt in *Amoco Oil Co. v. Parpada Shipping Co. Ltd.* (unreported), 22 January 1987, conducted with care and precision. It will not, of course, achieve absolute accuracy. What method of measurement ever does? But for all practical purposes the quantity of the innocent party's goods which have gone into the mixture can often be ascertained with a sufficient degree of precision, as it can be in this case. Similarly, there are methods of sampling and analysis which should enable the quality of the innocent party's goods, and of the mixture, to be assessed. If doubt remains as to either quantity or quality, the principle of *Armory v. Delamirie*, 1 Str. 505 provides a solution.

Seeing that none of the authorities is binding on me, although many are certainly persuasive, I consider that I am free to apply the rule which justice requires. This is that, where B wrongfully mixes the goods of A with goods of his own, which are substantially of the same nature and quality, and they cannot in practice be separated, the mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods which went into the mixture, any doubt as to that quantity being resolved in favour of A. He is also entitled to claim damages from B in respect of any loss he may have suffered, in respect of quality or otherwise, by reason of the admixture.

Whether the same rule would apply when the goods of A and B are not substantially of the same nature and quality must be left to another case. It does not arise here. The claim based on a rule of law that the mixture became the property of the receivers fails.

(3) *The bailment claim*

Mr. Rokison's submission on this point is that where A is the bailee of B's goods and A fails or refuses to deliver the same to B then B is entitled to claim those goods or damages in respect of the value of the same. The cause of action is said to be "in bailment." For my part I find difficulty in distinguishing it from the cause of action relied on in section (2) of this judgment; but one point of distinction became clear in the course of the argument. Whilst the claim just considered was for the whole of the pumpable oil on board the vessel, under this head the receivers claim only 97 per cent., being that proportion of it which they say was their property. They give no credit for the fact that, amongst the oil which was delivered to them, 3 per cent. was the property of the owners.

The answer to this point is, as Mr. Pollock submits and I agree, that the mixture was held in common by the receivers and the owners. The receivers were entitled to an amount equal to their contribution to the mixture. That has been delivered to them, except for the small shortage in respect of which the arbitrators awarded them damages. What remained in the vessel became the property of the owners alone. I do not consider that the decision in the *Sandeman & Sons* case [1913] A.C. 680, as opposed to Lord Moulton's observations, requires me to reach any other conclusion.

It might, I suppose, have been argued that the loss in transit of 0.55 per cent. should not have been deducted from the receiver's shortage claim, on the ground that the owners' share is deemed to suffer from accidental loss before the receivers' share. That argument was not put forward, but paragraph 214 of the American Law Institute's *Restatement of the Law of Restitution* might be said to support it, and Mr. Pollock's main proposition makes provision for accidental loss to be borne by the wrongdoer. In fact, the argument would not apply to the 0.3 per cent. apparent loss, by reason of water and sediment settling out of the crude oil. That, as I have said, was not a loss at all, or at any rate, not a loss of anything of value. As to the loss of 0.25 per cent. by evaporation, that was not an accidental loss but one by natural wastage. No doubt the oil loaded as cargo, the oil already on board, and the mixture all suffered equally from evaporation—or if there were differential rates the oil loaded recently suffered most. If this small point had been raised, I should not have held that the owners' share of the mixture must suffer all loss by evaporation before any is attributed to the receiver's share.

In those circumstances, no purpose would be served in remitting the case to the arbitrators on the point about consent, at all events, unless either party intends to appeal. This appeal fails and the award is upheld.

Appeal dismissed with costs, including costs of application for leave to appeal.

Certificate pursuant to section 1(7) of the Arbitration Act 1979 that question of law whether the receivers' claim that they were entitled to all pumpable oil on board vessel was correct was one of general public importance.

Leave to appeal.

Solicitors: Ince & Co.; Williamson & Westlake.

[Reported by ROBERT RAJARATNAM, ESQ., Barrister-at-Law]

3 W.L.R.

A

[COURT OF APPEAL]

SMITH v. ERIC S. BUSH (A FIRM)

1987 Feb. 25;
March 13Dillon and Glidewell L.JJ. and
Sir Edward Eveleigh

B

Negligence—Duty of care to whom?—Surveyor—Valuation and survey on behalf of building society for purpose of mortgage—No independent survey—Surveyor negligently failing to discover defect—Mortgage application form and report bearing disclaimers purporting to exclude surveyor's liability to mortgage applicant—Whether apt to exclude liability for negligence—Whether fair and reasonable to allow reliance on disclaimers—Whether disclaimers effective—Unfair Contract Terms Act 1977 (c. 50), ss. 2(2), 11(2)

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The plaintiff applied to a building society for a mortgage to assist her in purchasing a house. She signed a mortgage application form and paid an inspection fee, and the building society instructed the defendants, a firm of surveyors and valuers, to carry out a visual inspection of the house and to report on its value and any matter likely to affect the value. The defendants carried out the inspection but, having noticed that two chimney breasts had been cut away, they failed to check whether the chimneys above had been left adequately supported. They reported that the house was readily saleable for owner occupation, was likely to remain so at about the mortgage valuation and that no essential repairs were required. The report concluded with general disclaimers which warned the plaintiff that it was neither a market valuation nor a structural survey, expressly excluded any warranty, representation or assurance to her that the report was accurate or valid, and stated that the defendants had made the report without any acceptance of liability to the plaintiff. The mortgage application form signed by the plaintiff had contained a disclaimer in relation to the report to the same effect. The building society, pursuant to its agreement with the plaintiff, supplied a copy of the report to her, and she relied on it and purchased the house without any further survey. The chimneys were not adequately supported and they subsequently collapsed. The plaintiff claimed damages from the defendants in negligence, and the defendants relied, inter alia, on the general disclaimers in the report and the mortgage application form as exempting them from liability to the plaintiff. The plaintiff claimed that the disclaimers did not exclude the defendants' liability and that the defendants were in any event precluded by section 2 of the Unfair Contract Terms Act 1977¹ from so excluding their liability since the disclaimers did not satisfy the requirement of reasonableness set out in section 11(3) of the Act. The judge held that the disclaimers were not effective to exclude the defendants' liability for negligence and gave judgment for the plaintiff.

On the defendants' appeal:—

Held, dismissing the appeal, that since there was no contract between the plaintiff and the defendants, the disclaimers would have no meaning if they did not apply to exclude any liability of the defendants to the plaintiff in negligence, and on their true construction their effect was to relieve the defendants of such liability; but that (*per* Dillon and Glidewell L.JJ.) where a

¹ Unfair Contract Terms Act 1977, s. 2(2); see post, p. 895H.
S. 11(3); see post, p. 896A.

surveyor, having been engaged to carry out a visual inspection of a property at the lower end of the market, which he was obliged to carry out with reasonable care, prepared a mortgage valuation report for a building society in the knowledge that the mortgage applicant, who had paid for the report and herself had no relevant special skill, would be supplied with the report and would probably rely on it, it was not fair or reasonable to allow him to rely on such disclaimers so as to exempt him from his liability to the applicant for his negligence in carrying out the inspection; that (*per* Sir Edward Eveleigh) since the report contained the statement, as to which there was no warning of its unreliability, that the house was readily saleable for owner occupation, when, with the least attention to the task which the plaintiff was entitled to expect, the dangerous state of the premises would have been revealed, it was not fair or reasonable to allow reliance on the disclaimers; and that, accordingly, the disclaimers did not satisfy the requirement of reasonableness in section 11(3) of the Unfair Contract Terms Act 1977 and section 2(2) of the Act therefore precluded the defendants from excluding their liability to the plaintiff by reference to them (post, pp. 895D–G, 896H, 897D–E, 898E, 899D–F, 900C–E).

Per Dillon L.J. The position may be different where the mortgage applicant who chooses to rely on such a report, despite having read such disclaimers, is himself a surveyor or a lawyer (post, p. 897F).

The following cases are referred to in the judgment of Dillon L.J.:

Alderslade v. Hendon Laundry Ltd. [1945] K.B. 189; [1945] 1 All E.R. 244, C.A.

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.(E.)

Spalding v. Tarmac Civil Engineering Ltd. [1967] 1 W.L.R. 1508; [1967] 3 All E.R. 586, H.L.(E.)

The following additional cases were cited in argument:

Hadden v. City of Glasgow District Council, 1986 S.L.T. 557

Stevenson v. Nationwide Building Society (1984) 272 E.G. 663

Yianni v. Edwin Evans & Sons [1982] Q.B. 438; [1981] 3 W.L.R. 843; [1981] 3 All E.R. 592

APPEAL from Mr. Recorder Gerald Draycott sitting at Norwich Crown Court.

By a summons and particulars of claim dated 6 June 1983 the plaintiff, Jean Patricia Smith, claimed against the defendants, Eric S. Bush, a firm of surveyors and valuers, damages limited to £4,000 in respect of substantial disturbance, inconvenience and distress, loss and damage occasioned by the collapse of the chimney stacks at her home, 242, Silver Road, Norwich, alleging that the defendants had been negligent in the preparation or content of a report and mortgage valuation commissioned by the Abbey National Building Society in respect of the property, on which she had relied and by which she had been induced to purchase the property. By their amended defence dated December 1985 the defendants, *inter alia*, denied that they owed the plaintiff any duty of care and alleged that they were not in any event liable to the plaintiff for any defects which a valuation inspection would not have revealed, and that the express terms and/or disclaimers contained in the plaintiff's mortgage application and in the defendants'

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A report had put the plaintiff on notice that the defendants owed her no, or a restricted, duty of care, and operated to exclude any liability of the defendants to the plaintiff for any of the breaches alleged by her. By her amended reply dated 10 February 1986 the plaintiff, inter alia, relied on section 2(2) of the Unfair Contract Terms Act 1977 in so far as the defendants purported to exclude or restrict their liability for negligence by reason of the terms and/or disclaimers in the form and the report. On 17 April 1986 Mr. Recorder Draycott gave judgment for the plaintiff in the sum of £3,729.97 damages plus £650 interest, not to be enforced without leave of the court.

By a notice of appeal dated 14 May 1986 the defendants appealed on the grounds, inter alia, that (1) the recorder had erred in law and/or in fact in appearing to hold that the disclaimers contained in the mortgage application form and/or the valuation report were not to be construed as sufficient to exclude the defendants' liability to the plaintiff for negligence; (2) the recorder had erred in law in appearing to hold that the disclaimers were subject to an implied condition that there should have been a complete visual inspection of all parts in the fabric, and in holding that the defendants had been in breach of that condition, and had thereby rendered the disclaimers ineffective in excluding the defendants' liability in negligence; (3) the recorder had erred in law in appearing to hold that the disclaimers did not prevent a duty of care to the plaintiff arising; (4) the recorder had erred in law in failing to find that the provisions of the Unfair Contract Terms Act 1977 were inapplicable to the disclaimers; and (5) the recorder had erred in law and/or in fact in appearing to find that it was not fair and reasonable for the defendants to rely on the disclaimers, and in particular had failed to give sufficient weight to certain evidence.

The facts are stated in the judgment of Dillon L.J.

Nigel Hague Q.C. and *Jane Davies* for the defendants.

Robert Seabrook Q.C. and *Philip Havers* for the plaintiff.

Cur. adv. vult.

13 March. The following judgments were handed down.

DILLON L.J. The defendants in this action, a firm of surveyors, appeal against a judgment against them for damages for professional negligence awarded to the plaintiff by Mr. Recorder Gerald Draycott at the trial of this action in the Norwich County Court on 17 April 1986. The appeal raises a question of some general importance as to the application of the Unfair Contract Terms Act 1977.

The story begins in 1980. At that time the plaintiff, Mrs. Smith, lived at Coulsdon in Surrey in a house which she owned and which was subject to a mortgage in favour of the Abbey National Building Society ("Abbey National"). She decided, however, to move to Norwich. Her personal circumstances were that she was a state enrolled nurse, but had been working for some months as a clerk for a well-known firm, Reckitt & Colman; she had divorced or was separated from her husband, and she had two children, both living with her, a girl of 15 and a boy of 12.

She found a purchaser for her house in Surrey, and she also offered for a house at Horsham St. Faith's near Norwich. But that purchase fell through. By the beginning of October 1980 she was, as the judge's note of herevidence records, desperate to get another house in Norwich,

because she had been offered a good price for her house in Surrey and did not want to lose her purchaser. She then found the house with which this action was concerned, 242, Silver Road, Norwich. It was on offer at an asking price of £17,250, but the vendor said that he already had someone else interested at that price, and so she agreed to buy the house, subject to contract, for £17,500. It was a terraced house, some 70 years old, at the lower end of the housing market, but the plaintiff regarded it as suitable for herself and her children as it was well decorated, had central heating, and she could move in without doing any work to it.

To raise the price she needed a mortgage, and so on 6 October 1980 she applied to Abbey National for a mortgage and completed their standard mortgage application form. In fact she only required a mortgage for £3,500 which was well below the price of the house, but nothing turns on that.

Under section 25 of the Building Societies Act 1962 (now section 13 of the Building Societies Act 1986) a building society which makes an advance on the security of a freehold or leasehold property has to get a report from an appropriately experienced person as to the value of that property and as to any matter likely to affect the value thereof. Building societies satisfy this requirement either by instructing firms of surveyors in general practice or by using their own in-house employed surveyors. In the present case, Abbey National instructed the defendants, a firm of surveyors and valuers carrying on practice in Norwich; the defendants acted by their senior partner, Mr. Cannell, a chartered surveyor who was amply qualified for the job.

It has always been the case that applicants for mortgages are required by the building society to pay the fees for the valuation reports which the societies are by the statute required to get. It used for many years to be the practice that the building societies refused to disclose the reports to the applicants, on the footing that they were only obtained for the building societies' own purposes. But this practice gave rise to widespread discontent in that applicants could not see why they should not have copies of reports for which they had paid. Before October 1980, therefore, the building societies had adopted instead a new practice of making copies of the reports available to the applicants for mortgages, but with extensive disclaimers of liability.

In accordance with this new practice, there was included in a somewhat lengthy set of declarations just above the place where the plaintiff signed the mortgage application form, the following:

"I/We have read the notes for the guidance of mortgage applicants and accept that if the loan is approved the mortgage guarantee policy premium will be added to the loan. I/We accept that the society will provide me/us with a copy of the report and mortgage valuation which the society will obtain in relation to this application. I/We understand that the society is not the agent of the surveyor or firm of surveyors and that I am making no agreement with the surveyor or firm of surveyors. I/We understand that neither the society nor the surveyor or the firm of surveyors will warrant, represent or give any assurance to me/us that the statements, conclusions and opinions expressed or implied in the report and mortgage valuation will be accurate or valid and the surveyor(s)

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A report will be supplied without any acceptance of responsibility on their part to me/us.”

Just below the plaintiff's signature it is recorded that she had paid the inspection fee which was £36.89. There is a somewhat similarly worded disclaimer of liability in printed “Notes for the Guidance of Mortgage Applicants” which it was the practice of Abbey National to supply to all mortgage applicants, but I need not refer to those notes because the disclaimer there adds nothing to what appears in the mortgage application form, as above set out, and in the copy of the defendants' report which was supplied to the plaintiff as mentioned below.

Mr. Cannell inspected the property on 8 October 1980. It is common ground that he was not required to carry out a structural survey. What he was required to do was to make a reasonably careful visual inspection of the property, and to fill in Abbey National's standard printed form headed “Report and Mortgage Valuation.” Mr. Cannell said that he would usually spend about half an hour on an inspection for a building society; that was generally in line with the evidence, as to their own practice, given at the trial by two other experienced surveyors, Mr. Manwaring and Mr. Wreford. It seems that thousands of such inspections and reports are made by surveyors for the purposes of building society mortgage applications every year over England and Wales as a whole.

A copy of Mr. Cannell's report was sent by Abbey National to the plaintiff under cover of a letter from Abbey National dated 9 October 1980. The report gives the value of the property for mortgage purposes, with vacant possession, as £16,500. It answers affirmatively the printed question whether the property was readily saleable for the purposes of owner occupation and was likely to remain so at or about the mortgage valuation. The report states that the property had been modernised in recent years to a fair standard and that no essential repairs were required. The report amply warrants the plaintiff's reaction to it, as expressed in her evidence at the trial: “The impression I got from the report was that I was very pleased with it—it did not show anything seriously wrong with the property.” On the third page of the copy of the report sent to the plaintiff, there was the disclaimer on which the defendants particularly rely, distinctively printed in red, whereas the rest of the form is printed in black. It is as follows:

“TO THE MORTGAGE APPLICANT(S): IMPORTANT

“1. THIS DOCUMENT IS NOT A MARKET VALUATION. IT IS NOT AND SHOULD NOT BE TAKEN AS, A STRUCTURAL SURVEY. It has been obtained by the society from a qualified surveyor or firm of surveyors to comply with section 25 of the Building Societies Act 1962.

“2. If you are purchasing the property, you will receive a notice that the society does not warrant that the purchase price is reasonable.

“3. This is a report to the society by its surveyor(s) and neither the society nor the surveyor(s) give any warranty, representation or assurance to you that the statements, conclusions and opinions expressed or implied in the document are accurate or valid.

“4. The surveyor(s) has/have made this report without any acceptance of responsibility on his/their part to you.”

The plaintiff admits that she read this.

The plaintiff then proceeded to buy the property. She was forced by her vendor to increase her offer to £18,000, but nothing turns on that. She did not have any other survey of the property done because, as she said in evidence and the judge accepted, she relied on the building society survey. A

Unfortunately, in his inspection of the property Mr. Cannell overlooked a serious defect. He noticed that the chimney breasts in two of the first floor rooms, including the main bedroom, had been cut away, but it did not occur to him to check whether that had been done in a way which left the chimneys above adequately supported. Had it occurred to him to check, it would have been easy to have done so (since there was a trap door through which he could have looked into the roof space with the aid of the ladder he had with him) and it would have taken him no more than 10 minutes. Had he checked he would have seen at once that the brickwork of the chimneys had been left unsupported by the removal of the chimney breasts. The absence of adequate supports meant inevitably, as explained by Mr. Manwaring at the trial, that the flues would collapse at some time. The house was thus in truth a dangerous structure, and unfit for habitation until adequate support for the flues had been provided. B C

Some 18 months later, at about 10.20 p.m. on 1 June 1982, the inevitable happened. One of the flues collapsed through the main bedroom and landing ceilings, bringing down part of another flue with it. Rubble came down the stairs into the lounge. Fortunately the plaintiff was downstairs at the time; had she been in her bed she might have been killed or seriously injured. The building work to get the place right was put in hand at once by the plaintiff, but it was five weeks before she could move back into her bedroom. D E

By this action the plaintiff claimed damages from the defendants for the negligence of Mr. Cannell in failing to check whether the removal of the chimney breasts had left the chimneys without adequate support and consequently failing to give in his report correct advice as to the condition of the property. The recorder upheld the plaintiff's claim, and awarded her £4,379.97 damages, including interest. F

On this appeal two points only are raised to which I shall come. The defendants do not dispute the recorder's findings that (i) in preparing his report Mr. Cannell owed a duty of care to the plaintiff, apart from the disclaimers which I have mentioned, since he knew that she was likely to rely on his report; (ii) she did indeed rely on his report; (iii) he was negligent in the sense that in carrying out a reasonably careful visual inspection of the property he ought to have looked to see whether the chimneys had been left with adequate support after the removal of the chimney breasts; and (iv) there was no contributory negligence on the plaintiff's part. The defendants do not in this court dispute the amount of damages awarded in the court below, if liability is established. G

The defendants submit, however, that (1) the disclaimers, i.e. the provisions set out above in the form of mortgage application signed by the plaintiff and in the notice in red on the copy of Mr. Cannell's report which was supplied to the plaintiff, have the effect of absolving the defendants from all liability for negligence which would otherwise have fallen on them; and (2) the Unfair Contract Terms Act 1977 does not preclude the defendants from relying on the disclaimers because, they submit, the requirement of reasonableness under section 11(3) of the H

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A Act is satisfied in relation to the disclaimers. The recorder held against the defendants on issue (1) because he found that it was an implied condition of the disclaimers that if the disclaimers were to apply there should have been a complete visual inspection of all parts of the fabric of the house. In other words, the disclaimers would have applied if Mr. Cannell had looked into the roof space but had then negligently failed to see what was plain before his eyes there, but they did not apply as he negligently failed to look into the roof space at all. Counsel for the plaintiff in this court have, rightly, felt unable to support the reasoning of the recorder on this issue, but they have submitted that the wording of the disclaimers is not sufficiently explicit to exempt the defendants from liability for negligence. They say that so far as the defendants' position is concerned (as opposed to Abbey National's position) the disclaimers merely told the plaintiff that the defendants had not carried out a full structural survey of the property and that she had no contract with the defendants.

D Reference was made in a general way in the course of argument to the well known line of authorities, stemming from *Alderslade v. Hendon Laundry Ltd.* [1945] K.B. 189, in which the courts have considered the principles which are applicable to clauses which purport to exempt one party to a contract from liability to the other party for the consequences of the first party's own negligence. Assuming, however, that those are the principles which ought to be applied to the construction of these disclaimers, I find it impossible to conclude that the disclaimers do not cover tortious liability of the defendants for negligence. The final words in the notice on the copy of the report supplied to the plaintiff. "The surveyor(s) has/have made this report without any acceptance of responsibility on his/their part to you," and the corresponding words at the end of the declaration in the form of mortgage application are really meaningless if they do not extend to responsibility or liability in negligence. If authority is required, it is to be found in the speeches of Lord Upjohn and Lord Pearson in *Spalding v. Tarmac Civil Engineering Ltd.* [1967] 1 W.L.R. 1508, 1526, 1529.

F At common law, as is recognised in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 where there is no contract the assumption of a duty of care can by appropriate words be avoided, e.g. where a reference is given "without responsibility," and where a report is supplied subject to stipulations disclaiming responsibility the recipient cannot accept the report and ignore the stipulations: see *per* Lord Reid, at p. 492, and *per* Lord Morris of Borth-y-Gest, at p. 504. Apart, therefore, from the Act of 1977, the disclaimers relied on would, in my judgment, have provided an effective defence for the defendants against the plaintiff's claim.

I turn, therefore, to consider issue (2), the effect of the Unfair Contract Terms Act 1977. Section 2 of the Act provides:

H "(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence. (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness. . . ."

Section 11(3) provides:

"In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen."

A

Under section 11(5) the onus is on those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

B

The recorder includes in his judgment a finding that he had not been satisfied by the defendants that in all the circumstances of the case it would be fair and reasonable to allow reliance on the disclaimers. But this is tacked on to the section of his judgment which deals with the quantum of damages and it may relate back to the recorder's view that the disclaimers were inadequate because Mr. Cannell had never looked into the roof space at all.

C

The question is whether the requirement of reasonableness, referred to in section 2(2) of the Act of 1977 is satisfied, i.e. whether, on the words of section 11(3), it is fair and reasonable to allow reliance on the disclaimers, having regard to all the circumstances obtaining at the relevant time. In view of the generality of the words "all the circumstances," Mr. Hague for the defendants concedes that the court is not limited to considering merely the questions whether the notice referred to in the section was sufficiently clearly brought to the attention of the person concerned or was sufficiently clearly expressed for that person to have been able to understand it.

D

Whether in any particular case it is fair and reasonable in all the circumstances to allow reliance on a notice excluding liability for negligence must, of course, depend on the circumstances of the particular case. In that sense no case is a precedent for any other case. But the circumstances of the present case are very ordinary, and we are told that there were many other cases waiting the outcome of this appeal. That is not surprising considering the number of building society surveys that are carried out. It appears that it is the practice of very many, if not all, building societies to include as a matter of course in their printed forms disclaimers, to protect the society itself and its surveyors from all liability, in substantially the same terms as the disclaimers in the present case.

E

It is common ground that it was no part of Mr. Cannell's duty to carry out a full structural survey of the house, and this was understood by the plaintiff. She knew that she was taking a chance on there being no hidden defects in the house which would not have been apparent on a reasonably careful visual inspection of the house. To hold that the surveyor in such a case as the present cannot rely on the disclaimers does not involve extending the surveyor's obligations so as to make it incumbent on him to detect such hidden defects. His obligation is still merely to carry out a reasonably careful visual inspection.

F

G

H

But where he is dealing with a property at the lower end of the market and he knows that the purchaser is likely to rely on his report, and not instruct his or her own surveyor, I find it very difficult to see why it should be fair and reasonable to allow him to rely on an automatic blanket exclusion of all liability for negligence if his visual inspection of a property turns out not to have been reasonably careful.

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A The defendants have urged various considerations as showing that it is fair and reasonable that they should be allowed to rely on the disclaimers. They are all general considerations, unrelated to the particular facts of this case, and they are said to warrant an automatic blanket exclusion of all liability to mortgage applicants for negligence in respect of building society surveys. They say, for instance, that the surveyors never meet the mortgage applicants and so have no opportunity of clarifying or explaining anything they may have put in a report for a building society. They say also that it is of great benefit to the mortgage applicants that the report required by a building society under the statute, before it can agree to make a mortgage advance, should be available quickly and cheaply, and they suggest that neither of these ends will be attained if the surveyor has always in his mind the fear of litigation and the need to satisfy his insurers. They also naturally point to the fact that the interests of the building society, merely as mortgagee, and the interest of the purchaser as owner of the equity of redemption are not the same; but this point is greatly weakened when it is seen that the report covers such questions, in which the purchaser is vitally interested, as the marketability of the property and whether urgent repairs to the property are required.

D Giving full consideration to all that has been urged by Mr. Hague, I cannot see that it is fair or reasonable that a professional surveyor making a mortgage report at the lower end of the property market, when he knows that the would-be-purchaser who is applying for a mortgage on the property has paid the fee for the report, will be supplied with a copy of the report and is likely to rely on the report and so is not likely to instruct any other surveyor, should be able to rely on any general disclaimers, such as those in the present case, unrelated to any special factors affecting the particular property, to exempt him from liability to the purchaser for negligence if it should happen that he, the surveyor, carries out his visual inspection of the property without due care.

F It may be different—I express no opinion—where the mortgage applicant who chooses to rely on a building society's surveyor's report, despite having read such disclaimers, is himself a surveyor or a lawyer who understands these matters. So far as the plaintiff was concerned—I fancy this would go for most purchasers—I do not think she would have seen any reason to incur the additional cost of instructing a second surveyor after she had read the copy of Mr. Cannell's report.

G I do not doubt that Mr. Cannell, when he makes a visual inspection of a property with a view to making a mortgage report to a building society, intends to act with reasonable care. I do not see why he should not be liable in damages like any other professional man who fails to show reasonable care if on a particular occasion he has failed to take reasonable care in his inspection.

H I would accordingly dismiss this appeal.

GLIDEWELL L.J. I have had the advantage of reading in draft the judgment of Dillon L.J. I gratefully adopt his recital of the facts, including the relevant documents.

There are two issues in this appeal. (1) On their face, did the words of the disclaimer suffice to prevent any duty of care being owed by the defendants to the plaintiff? (2) If so, did the disclaimer satisfy the

requirement of reasonableness in sections 2(2) and 11(3) of the Unfair Contract Terms Act 1977? A

(1) *The effect of the disclaimer*

The documents which are particularly important are the declaration on the mortgage application form signed by the plaintiff and the notice at the end of the defendants' report of 8 October 1980, below their valuation. Dillon L.J. has set that out in his judgment. The plaintiff said in evidence that she read that notice. We are thus not concerned with the question whether the disclaimer was brought to her attention. Clearly it was. B

The reason which the recorder gave for holding that the disclaimer was not sufficient to avoid responsibility, i.e. that there was an implied condition that, if the disclaimer is to apply, there should have been a complete visual inspection, was unsound. Counsel for the plaintiff did not attempt to rely on it. C

Mr. Seabrook's argument is that the disclaimer did not cover liability for negligence. If that is correct, the disclaimer did not cover anything. The plaintiff was never in a contractual relationship with the defendants. If they were or could be liable to her, that liability could only be in the tort of negligence—which is how the plaintiff's claim is framed. D

The payment by the plaintiff of £36.89 was not a payment of a fee for the provision of a report to her. The building society required the inspection, report and valuation by a surveyor both for its own purposes and to comply with section 25 of the Building Societies Act 1962. At 6 October 1980 the only contract was a promise by the building society to obtain a report and valuation and then consider whether to make to the plaintiff the mortgage loan she required in consideration of the payment of £36.89 to it. E

In my view, the wording of the disclaimer set out in the notice on the defendants' report and valuation did suffice to prevent the defendants owing any duty of care to the plaintiff. In other words, it was so worded as to relieve them of all liability in negligence. F

(2) *Did that notice satisfy the test of reasonableness in the Act of 1977?*

Is it "fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining" at 8 October 1980, i.e. the date of the report? This is a question of policy, which could sensibly be answered either way.

The argument for the plaintiff, as it eventually emerged, is that it is necessary to distinguish between a disclaimer of liability for not doing something which Mr. Cannell was not purporting to do, i.e. carrying out a full structural survey, and doing incompetently that which Mr. Cannell was purporting to do, i.e. making a visual inspection sufficient to reveal any state of disrepair which would affect the value of the property, to ascertain the general condition of the property, and to place a value upon it. It is submitted that it is unfair to exclude liability for negligence in the latter category. G

Mr. Hague for the defendants has two main arguments on this. (a) The lack of support for the chimney flues in the roof space and the chimney stack above would only have been revealed by a full structural survey, not by a visual inspection of the sort Mr. Cannell was carrying out. In my view this is not correct. The judge accepted the evidence of H

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A Mr. Manwaring, a chartered building surveyor called as an expert
witness for the plaintiff, that the fact that the chimney breasts had been
removed (which Mr. Cannell observed) should have put him on inquiry
as to whether the flues and stack above had been left unsupported. That
inquiry would have involved no more than putting his head and
shoulders through the trap door into the roof space, when the lack of
support would at once have been apparent. The judge said that it would
B have taken no more than 10 minutes to check, and that Mr. Cannell
should have looked through the trap door but did not. I agree with him.
In my view Mr. Cannell was guilty of lack of proper care in doing the
sort of inspection he was purporting to do. (b) Mr. Cannell was carrying
out the inspection for, and reporting to, the building society and for
nobody else. Mr. Hague argues that it is not fair or reasonable that the
C defendants should be under any duty of care to a potential purchaser,
with whom they had no contractual relationship, simply because the
building society chose to supply a copy of their report to the plaintiff.
This is the nub of the case. If a surveyor's inspection is competently
carried out, a potential purchaser who chooses not to commission his
own inspection, despite the warning notice, will obtain the benefit of
the report. But, Mr. Hague argues, he cannot justifiably complain if the
D inspection fails to reveal some defect which a reasonably competent
inspection should have revealed. It is my opinion that this argument fails
because its basic premise is incorrect. While it is true that the surveyor
carried out his inspection and wrote his report and valuation because he
was commissioned to do so by the building society, he knew that a copy
of his report would be sent to the plaintiff and that most probably she
E would rely on his report and valuation without obtaining any other
advice. In my judgment a professional man, who knows that a potential
purchaser of a house, herself possessed of no special skill, will most
probably rely on his skill and competence, should not be allowed to
relieve himself of liability if he fails to exercise a reasonable degree of
skill and competence in the task on which he is engaged.

F In agreement with Dillon L.J. I would thus hold that, in so far as the
disclaimer excluded liability for negligence in the carrying out of the
limited sort of inspection Mr. Cannell was engaged to do and was
purporting to do, the notice of disclaimer did not satisfy the requirement
of reasonableness within sections 2(2) and 11(3) of the Act of 1977. For
this reason I, too, would dismiss the appeal.

G SIR EDWARD EVELEIGH. Section 2(2) of the Unfair Contract Terms
Act 1977 prevents the defendant firm from excluding "liability for
negligence except in so far as the term or notice satisfies the requirement
of reasonableness."

H In the present case it is first necessary to decide whether or not there
would be liability for negligence apart from the notice which seeks to
exclude that liability. The words in red displayed prominently in the
report are not simply a disclaimer of liability. They also constitute a
warning that the report is of limited value as a survey report. If the
plaintiff had relied on the report to an extent which would be
unreasonable bearing in mind the warning, there would be no liability
on the defendants and no need to consider the efficacy of a notice
excluding liability.

However, in so far as the words constitute a warning, they do not in
my opinion warn a person to place no reliance at all on the report. They

do not say that it is dangerous to rely on the report for what it purports to be or for what it says.

The report did not reveal what a valuation report would have revealed if properly prepared, albeit for its limited purpose. On the contrary, it asserted that the property was readily saleable for the purpose of owner occupation. The plaintiff relied on it in this respect but the report did not merit even that degree of confidence. The warning, in my opinion, was not such as to make it unreasonable for the plaintiff to rely on the report as she did. Therefore, the defendants will be liable to the plaintiff unless the notice is effective to exclude liability.

In this court counsel has not sought to argue that the defendants would not have been liable in the absence of a notice of disclaimer. None the less, I have analysed the position because I think it is important to bear in mind the basis of the defendants' liability when considering whether or not it would be fair and reasonable to allow reliance on the notice, having regard to all the circumstances obtaining when the liability arose.

A relevant part of the circumstances obtaining when liability arose was the fact that the report stated that the house was readily saleable for the purpose of owner occupation and was likely to remain so. There was no warning that this assertion was unreliable. It would have been perfectly simple to discover the dangerous state of the premises. No structural survey was needed for that. The least attention to the task that the plaintiff was entitled to expect from the defendants would have revealed the fault. The defendants' fault can hardly be regarded as a mere accidental error or omission.

I therefore am of the opinion that it would not be fair and reasonable to allow reliance on a disclaimer which might, I know not, be effective in other circumstances.

*Appeal dismissed with costs.
Leave to appeal refused.*

Solicitors: Barlow Lyde & Gilbert; Hood Vores & Allwood, East Dereham.

[Reported by CLIVE SCOWEN, Esq., Barrister-at-Law]

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[COURT OF APPEAL]

NATIONAL EMPLOYERS' MUTUAL GENERAL INSURANCE
ASSOCIATION LTD. v. JONES1987 Feb. 2, 3;
March 27May and Croom-Johnson L.JJ. and
Sir Denys Buckley

Sale of Goods—Title—Stolen vehicle—Possession of stolen car passing through series of sales to defendant—Whether defendant acquiring title to car—Whether title good against owner—Factors Act 1889 (52 & 53 Vict., c. 45), ss. 2, 9—Sale of Goods Act 1979 (c. 54), ss. 2, 25(1), 61(1)

Section 9 of the Factors Act 1889 (and section 25(1) of the Sale of Goods Act 1979) provides:

“Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods . . . the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods . . . under any sale, pledge, or other disposition thereof . . . to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . with the consent of the owner.”

Thieves stole H.'s car and purported to sell it to L., who sold it to T. The car was sold by T. to A. Ltd. and that company subsequently sold it to M. Ltd., which sold it to the defendant. Both companies and the defendant bought the car in good faith and without notice of H.'s title. The plaintiff, H.'s insurer, bought out her interest in the car and asked the defendant to return it. The defendant refused and the plaintiff brought proceedings claiming, *inter alia*, delivery up of the car or, alternatively, its value. The defendant resisted the claim on the basis that he had acquired good title to the car by virtue of section 9 of the Factors Act 1889. The judge gave judgment for the plaintiff for the value of the car plus interest.

On the defendant's appeal:—

Held, dismissing the appeal (Sir Denys Buckley dissenting), that it was a condition precedent to the operation of section 9 of the Factors Act 1889 that the person, with whose consent the deliverer or transferor of goods had possession of them, should himself have had, or had authority to transmit, the general property in them, since he would not otherwise be a seller within the meaning of the Act, and the transferor would not have “bought or agreed to buy” the goods; that section 9 did not confer on a person whose possession of goods derived ultimately from a thief any title which was good against that of the true owner and such a person could not by virtue of that section confer any such title on any purported purchaser from him, notwithstanding that both of them acted in good faith and without notice of the true owner's title; and that, accordingly, the defendant had not acquired title to the car under section 9 of the Act of 1889, and the plaintiff was entitled to recover the value of the car from the defendant (post, pp. 915c–h, 917g–918b, 919a, 920c–e).

Butterworth v. Kingsway Motors [1954] 1 W.L.R. 1286; *Elwin v. O'Regan and Maxwell* [1971] N.Z.L.R. 1124 and *Brandon v. Leckie* (1972) 29 D.L.R. (3d) 633 applied.

Du Jardin v. Beadman Bros. Ltd. [1952] 2 Q.B. 712; *Newtons of Wembley Ltd. v. Williams* [1965] 1 Q.B. 560, C.A.

National Employers' Insurance Ltd. v. Jones (C.A.)**[1987]**

and *Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.* [1965] A.C. 867, P.C. distinguished. A

Per Sir Denys Buckley. The language of section 9 of the Factors Act 1889 is clear and unequivocal and is susceptible of only one interpretation. The section confers no protection upon a purchaser from a thief but would, however, enable that purchaser to confer on an innocent purchaser from him an unassailable title. The operation of the section is not to strike from the hand of the original true owner of the goods his title of ownership, but to place in the hand of him who has acquired those goods from the notional mercantile agent an impregnable shield which makes it impossible thenceforth for the original true owner to assert his title against him who has the goods (post, pp. 924B–C, G, 926E–F). B

The following cases are referred to in the judgments: C

Attorney-General v. Milne [1914] A.C. 765, H.L.(E.)

Attorney-General for Canada v. Hallett & Carey Ltd. [1952] A.C. 427, P.C.

Brandon v. Leckie (1972) 29 D.L.R. (3d) 633

Bremmer v. Johnson [1946] 3 W.W.R. 39

Butterworth v. Kingsway Motors [1954] 1 W.L.R. 1286; [1954] 2 All E.R. 694

Car and Universal Finance Co. Ltd. v. Caldwell [1965] 1 Q.B. 525; [1964] 2 W.L.R. 600; [1964] 1 All E.R. 290, C.A. D

Cook v. Rodgers (1946) 46 S.R. (N.S.W.) 229

Du Jardin v. Beadman Bros. Ltd. [1952] 2 Q.B. 712; [1952] 2 All E.R. 160

Elwin v. O'Regan and Maxwell [1971] N.Z.L.R. 1124

Folkes v. King [1923] 1 K.B. 282, C.A.

Leader v. Duffey (1888) 13 App.Cas. 294, H.L.(I.)

Marten v. Whale [1917] 2 K.B. 480, C.A. E

Newtons of Wembley Ltd. v. Williams [1964] 1 W.L.R. 1028; [1964] 2 All E.R. 136; [1965] 1 Q.B. 560; [1964] 3 W.L.R. 888; [1964] 3 All E.R. 532, C.A.

Oppenheimer v. Attenborough & Son [1907] 1 K.B. 510

Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd. [1965] A.C. 867; [1965] 2 W.L.R. 881; [1965] 2 All E.R. 105, P.C.

Pearson v. Rose & Young Ltd. [1951] 1 K.B. 275; [1950] 2 All E.R. 1027, C.A. F

Van Casteel v. Booker (1848) 2 Ex. 691

Westminster Bank Ltd. v. Zang [1966] A.C. 182; [1966] 2 W.L.R. 110; [1966] 1 All E.R. 114, H.L.(E.)

The following additional cases were cited in argument:

Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591; [1975] 2 W.L.R. 513; [1975] 1 All E.R. 810, H.L.(E.) G

Cahn v. Pockett's Bristol Channel Steam Packet Co. Ltd. [1899] 1 Q.B. 643, C.A.

Helby v. Matthews [1895] A.C. 471, H.L.(E.)

Hugill v. Masker (1889) 22 Q.B.D. 364, C.A.

Lee v. Butler [1893] 2 Q.B. 318, C.A. H

Lloyds Bank Ltd. v. Bank of America National Trust and Savings Association [1938] 2 K.B. 147; [1938] 2 All E.R. 63, C.A.

Oppenheimer v. Attenborough & Son [1908] 1 K.B. 221, C.A.

APPEAL from Judge ap Robert sitting at Bridgend County Court.

By a summons and particulars of claim dated 28 September 1984, the plaintiff, National Employers' Mutual General Insurance Association

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A Ltd., claimed against the defendant, Robert William Jones, that a Ford Fiesta motor car which had been owned by Celia Hopkin but which had been assigned to the plaintiff by her for £2,750 on 21 March 1983, had been stolen on 3 February 1983 and, having passed through several hands, had been purportedly purchased by the defendant on 18 March 1983 from Mid-Glamorgan Motors (Bridgend) Ltd., and that the
B defendant had wrongfully failed and refused to deliver up the car on demand to the plaintiff, and had thereby wrongfully deprived the plaintiff of it, by reason whereof it had suffered loss and damage. The plaintiff claimed, inter alia, delivery up of the car, or alternatively £2,750, being its value, and damages for its detention.

C By his defence dated 29 October 1984 the defendant, inter alia, denied that he had wrongfully deprived the plaintiff of the car and averred that he was the owner of the car and entitled to possession of it by virtue of section 9 of the Factors Act 1889. By its reply dated 15 March 1985 the plaintiff denied, inter alia, that section 9 of the Act of 1889 had any application to the transaction in which the defendant had purported to purchase the car.

D On 30 January 1986 Judge ap Robert in Bridgend County Court gave judgment for the plaintiff with costs on its claim in the sum of £2,650 plus £824 interest.

E By a notice of appeal dated 10 February 1986 the defendant appealed on the grounds (1) that, in view of the fact that all the evidence was agreed inter partes, the judge had failed to make any findings as to whether, in the event of his construing section 9 of the Act of 1889 and section 25(1) of the Sale of Goods Act 1979 in the sense urged by the defendant (viz. that they should be given their literal and/or ordinary and/or natural meaning), the defendant was a person receiving the car in good faith whose receiving would therefore have the same effect as if the person making the delivery or transfer to him had been a mercantile agent in possession of it with the consent of the owner; (2) that the
F judge had failed to construe section 9 of the Act of 1889 and section 25(1) of the Act of 1979 in accordance with their literal meaning and/or had failed to accord the words "owner" and "seller" therein their literal and/or ordinary and/or natural meaning, and in equating those words as both meaning "owner" had erred in law and applied a strained and erroneous meaning to the words and/or to the sections; and (3) that in the premises the judge had erred in failing to find that the defendant had received good title to the car by reason of the operation of section 9 of the Act of 1889 and section 25(1) of the Act of 1979.

G The facts are stated in the judgment of May L.J.

*John Leighton Williams Q.C. and Roger Garfield for the defendant.
Malcolm Pill Q.C. and John Jenkins for the plaintiff.*

Cur. adv. vult.

H

27 March. The following judgments were handed down.

MAY L.J. This is a defendant's appeal against a judgment of Judge ap Robert of 30 January 1986 awarding the plaintiff £2,650 by way of damages, together with interest of £824 and costs. The defendant now seeks to have that judgment set aside and judgment entered in the action for him against the plaintiff.

All the facts in this case were agreed. A Miss Hopkin was the owner of a Ford Fiesta motor car which was stolen from her on 3 February 1983. On 23 September 1983 those thieves were convicted. Prior to this, however, they had sold the car to a person called Lacey on a date and at a price unknown. Lacey then sold on to one Roderick Thomas, again on a date and at a price unknown. On 7 February 1983 Thomas in his turn sold the car to Autochoice (Bridgend) Ltd. for £2,100. Five weeks later, on 14 March 1983 Autochoice (Bridgend) Ltd. sold the car to Mid-Glamorgan Motors Ltd. for £2,350. On 17 March 1983 Mid-Glamorgan Motors Ltd. sold the car to the defendant for £2,650. It was accepted that the defendant was completely honest when he bought the car. The plaintiff was Miss Hopkin's insurer which, having bought out its insured's interest after the theft for £2,750, thereby acquired rights to the car. It asked for the car back by letter of 6 January 1984 but the defendant refused to return it. The plaintiff accordingly began these proceedings in the Bridgend County Court on 27 September 1984 in which it succeeded, as I have indicated, in recovering damages representing the value of the car from the defendant. The short point which was argued below and before us is the extent to which, if at all, the operation of the maxim *nemo dat quod non habet* has been affected by the provisions of section 9 of the Factors Act 1889 and what is now section 25(1) of the Sale of Goods Act 1979, which is in very much the same terms.

As the relevant provisions of the two statutes are for present purposes identical, I quote those in the earlier statute for convenience. Section 1 of the Factors Act 1889 provides:

"For the purposes of this Act—(1) The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods: . . ."

Section 2(1) provides:

"Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Sections 8 and 9 of the Act are as follows:

"8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

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A "9. Where a person, having bought or agreed to buy goods, obtains
with the consent of the seller possession of the goods or the
documents of title to the goods, the delivery or transfer, by that
person or by a mercantile agent acting for him, of the goods or
documents of title, under any sale, pledge, or other disposition
thereof, or under any agreement for sale, pledge, or other disposition
B thereof, to any person receiving the same in good faith and without
notice of any lien or other right of the original seller in respect of
the goods, shall have the same effect as if the person making the
delivery or transfer were a mercantile agent in possession of the
goods or documents of title with the consent of the owner."

C The judge held that the operation of the maxim was not affected by, in
particular, section 9 of the Act of 1889 and that in effect one had to
construe the section as if the word "owner" had the same meaning as
"seller." The argument in brief on behalf of the defendant, which was
the argument advanced before the judge below, was that one should
look at the actual words of section 9 and interpret them literally. If one
did so on the facts of the instant case, it followed, it was contended, that
D the defendant acquired a good title to the car when he bought it from
Mid-Glamorgan Motors Ltd., as indeed may some or all of the earlier
sub-purchasers of it, other than the purchaser from the thieves
themselves.

E The argument advanced on behalf of the defendant was direct and
uncomplicated. Counsel submitted that there was no reason why one
should not give section 9 of the Factors Act 1889 its literal and clear
meaning. If one did so and, for instance, in relation to the sale by
Autochoice (Bridgend) Ltd. to Mid-Glamorgan Motors Ltd., substituted
the names of the appropriate parties for their descriptions in the relevant
words of section 9, it would read: "Where Mid-Glamorgan, having
bought or agreed to buy goods [the car], obtains with the consent of
Autochoice possession of the car, the delivery or transfer, by Mid-
F Glamorgan, of the car, under any sale, to the defendant receiving the
same in good faith and without notice of any lien or other right of
Autochoice in respect of the car, shall have the same effect as if Mid-
Glamorgan were a mercantile agent in possession of the car with the
consent of Miss Hopkin." Then, the argument continued, by virtue of
section 2 of the Act of 1889, the delivery or transfer of the car by Mid-
Glamorgan to the defendant under the sale agreed between them was as
valid as if the former had been expressly authorised by Miss Hopkin, as
the owner of the car, to make the sale. Thus at least on the facts of this
case, the defendant acquired a good title to the car and Miss Hopkin's
insurer ought not to have succeeded against the defendant in the court
below.

H Counsel supported this argument by a number of collateral
submissions. First, he contended that, other things being equal, the
court should always adopt a literal approach to the construction of
statutes. The court's task was to see what Parliament had said, giving
words their ordinary and natural meaning, and then to give effect to this
in respect of the facts of a given case. It was only when the words of a
statute in their ordinary meaning were unclear, or gave rise to an
ambiguity, that the court in construing them should depart from the
literal approach.

Secondly, unless there was any clear reason to the contrary, a court should give the same meaning to the same word where it is used in different places in a statute. Thus "the owner" of goods in section 2 clearly referred to the true owner, to the person having the general property in the goods. Unless there was any reason to the contrary, therefore, which counsel submitted there was not, the court should give the same meaning to the same words in section 9. On this basis any argument that one should read the word "owner" in section 9 as equivalent to "seller," or perhaps to "original seller," could not be correct. Further, where in the same section of an Act the draftsman had used specific and different words, the clear inference was that Parliament had intended them to mean different things. Thus where in section 9 the draftsman had specifically referred to the seller and to the original seller, and thereafter to the owner, it again could not be right to equate one with the other. The care with which the section was drafted was demonstrated by the use of the phrase "the original seller" at one point; this was used to make it quite clear that the reference was back to the seller referred to in the seventeenth word of the section and to avoid any possible confusion.

Thirdly, if the original seller in a section 9 situation already has the proprietary title to the relevant goods, then section 9 is not needed to pass that title to the ultimate buyer.

In further support of his argument, counsel traced the legislative history of the relevant provisions. Section 2 of the Factors Act 1889 had its general origin in section 1 of the Factors Act 1823. That enacted that where goods were entrusted by their owner to an agent for the purpose of sale, then if that agent shipped the goods in his own name he should be deemed to be the true owner to any consignee of the goods who took them in good faith and without notice of any adverse interest in them.

This basic principle was amended and extended by the Factors Acts of 1825 and 1842, by the Factors Act (Amendment) Act 1877 and ultimately by the Factors Act 1889 itself, where it was given effect by section 2. Throughout, in order that an agent in possession of goods could pass a good title under this particular legislation, he had to have been entrusted with the goods, with the consent of their owner, as a mercantile agent and those taking from that agent must have done so in good faith and without notice of any other interest.

The extension of a similar principle to transactions by sellers permitted to remain in possession of the goods sold or buyers allowed to have possession of the goods bought, now embodied in sections 8 and 9 of the Act of 1889 and sections 24 and 25 of the Sale of Goods Act 1979, was first brought about by sections 3 and 4 of the amending Act of 1877. Under those two sections the criterion to be complied with to enable an ultimate bona fide transferee without notice to obtain a good title was that after a sale the respective vendor or vendee should retain or obtain, as the case might be, the possession of the goods. Given that possession, then a subsequent delivery or transfer of the goods to such a transferee passed a good title. On the facts of the instant case, it was submitted, clearly Mid-Glamorgan had the necessary possession of the car, with the consent of Autochoice, and thus the sale by the latter to the defendant passed a good title to him.

So far as I am aware there are no English cases which are directly in point on this argument, that the simple and literal construction of section 9 of the Act of 1889 or section 25 of the Act of 1979 is to be

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A preferred, contended for on behalf of the defendant. There are, however, one New Zealand and one Canadian decision at first instance against such a construction, to which I shall refer later.

B In support of his argument, nevertheless, counsel for the defendant referred us to a number of decisions which have a substantial bearing on the points in issue in this appeal. The earliest to which I think I need refer is *Folkes v. King* [1923] 1 K.B. 282. In that case the owner of a motor car delivered it to a mercantile agent for sale on certain conditions. Dishonestly and in breach of those conditions the agent sold it to a purchaser who bought it in good faith and without notice of the agent's fraud. It was held by this court that the purchaser acquired a good title by virtue of section 2 of the Act of 1889. It was also held that the agent had not been guilty of the old larceny by a trick, since he was authorised by the erstwhile owner to pass the property in the car to a purchaser. Yet further, Bankes and Scrutton L.JJ. expressed the view that as the plaintiff had in fact consented to the mercantile agent having possession of the car, it was immaterial whether the latter had committed larceny by a trick. *Folkes v. King* was of course a case decided on section 2 and not section 9 of the Act of 1889, but counsel was able to make the general observation, so far as it went, that even though goods may have been stolen, title to them may pass where possession is or is deemed to be with the consent of the owners.

D Next, in *Pearson v. Rose & Young Ltd.* [1951] 1 K.B. 275, another motor car case, it was held that title did not pass to the ultimate transferee because a mercantile agent could not sell a car "in the ordinary course of business of a mercantile agent" unless he sold the registration book with the car. However, on the facts of that case, at the time of the purported sale to the transferee of both car and registration book the dishonest agent's possession of the latter was not "with the consent of the owner." Nevertheless, although obiter, the opening passage of the judgment of Denning L.J. is of interest in the context of the present appeal. He said, at pp. 286-287:

F "In the early days of the common law the governing principle of our law of property was that no person could give a better title than he himself had. But the needs of commerce have led to a progressive modification of this principle so as to protect innocent purchasers. We have had cases in this court quite recently about sales in market overt and sales by a sheriff; and now we have the present case about sales by a mercantile agent. The cases show how difficult it is to strike the right balance between the claims of true owners and the claims of innocent purchasers. The way that Parliament has done it in the case of mercantile agents is this: Parliament has protected the true owner by making it clear that he does not lose his right to goods when they are taken from him without his consent, as for instance when they have been stolen from his house by a burglar who has handed them over to a mercantile agent. The true owner can in that case claim them back from any person into whose hands they came, even from an innocent purchaser who has bought from a mercantile agent. But Parliament has not protected a true owner, if he has himself consented to a mercantile agent having possession of them: because, by leaving them in the agent's possession, he has clothed the agent with apparent authority to sell

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them; and he should not therefore be allowed to claim them back from an innocent purchaser.” A

A case whose facts were very close to that of the instant one was *Du Jardin v. Beadman Bros. Ltd.* [1952] 2 Q.B. 712. The essential ones for present purposes were that a rogue (Greenaway) agreed to buy a motor car from the defendants. He gave a cheque in payment and left another car with the defendants as security. They allowed him to take the first car and its registration book away with him. Subsequently the rogue surreptitiously took back the second car he had given as security. Three days later he sold the first car to the plaintiff, who received it in good faith and without notice of any defect in the rogue's title. However, his cheque was worthless and after he had been convicted of fraud that first car was returned to the defendants. The plaintiff then sued them for its return. The defendants denied that the car had at any material time belonged to the plaintiff. Having stated these facts, Sellers J. said, at p. 715: B C

“In these circumstances, notwithstanding the fraudulent conduct of Greenaway throughout, unless authority requires me to hold otherwise, I would find that Greenaway, having agreed to buy the Standard car, obtained possession of it with the consent of the defendants, the sellers, and that he sold and delivered it to the plaintiff, who received it in good faith and without notice of any lien or other right of the defendants, the original sellers, in respect of the car. If these findings are correct, then the plaintiff obtained a good title under section 9 of the Factors Act 1889.” D

The judge then considered whether he was in law entitled to hold that the rogue's possession of the car had indeed been with the consent of the defendants, having regard to the fact that this had been brought about by the rogue's larceny by a trick. Having referred to the earlier authorities the judge held that he was so entitled, saying that he saw no reason to interpret “consent” in the Factors Act 1889 in an artificial way in order to bring it into harmony with the criminal law which, in so far as larceny by a trick was concerned, was itself based upon artificiality. The judge finally held, therefore, that the plaintiff had established a good title to the motor car which he claimed and made an order for its return to him. E F

As will appear, however, I think that the crucial distinction between *Du Jardin's* case and the one presently under appeal is that whereas in the former the root title to the motor car had been a good one in the defendants, nevertheless the relevant string of transactions in the present case began with a party with no title at all, namely the thieves who stole the Ford Fiesta from Miss Hopkin. G

A similar point can be made in relation to the decision in *Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.* [1965] A.C. 867. That was an appeal to the Privy Council from the High Court of Australia concerning section 28(1) of the New South Wales Sale of Goods Act 1923 which was in the same terms as section 8 of the Factors Act 1889 and what is now section 24 of the English Sale of Goods Act 1979. The opinion of the Privy Council, delivered by Lord Pearce, contained this paragraph, at p. 882: H

“The English statutory provision which was the origin of section 28(1) was introduced in 1877 with the object of mitigating the

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A asperity of the common law towards an innocent party purchasing goods from a person who has all the trappings of ownership but in truth has no proper title to the goods. *Nemo dat quod non habet.*"

B Later passages in the opinion delivered in this case stress the necessity to give the words of the relevant section their natural and ordinary meaning. For instance Lord Pearce said of the section under consideration in that case, at p. 886:

C "One may, perhaps, say in loose terms that a person having sold goods continues in possession as long as he is holding because of and only because of the sale; but what justification is there for imposing such an elaborate and artificial construction on the natural meaning of the words? The object of the section is to protect an innocent purchaser who is deceived by the vendor's physical possession of the goods or documents and who is inevitably unaware of legal rights which fetter the apparent power to dispose. Where a vendor retains uninterrupted physical possession of the goods why should an unknown arrangement, which substitutes a bailment for ownership, disentitle the innocent purchaser to protection from a danger which is just as great as that from which the section is D admittedly intended to protect him?"

E In this part of this judgment I turn finally to *Newtons of Wembley Ltd. v. Williams* [1964] 1 W.L.R. 1028, tried at first instance by Davies L.J. In that case the plaintiffs sold a car to a rogue for which he paid by cheque. This was dishonoured. The plaintiffs then took all possible steps to trace the rogue and told the Hire Purchase Information Bureau that they claimed that the car still belonged to them. By so doing they took all sufficient steps to avoid their contract of sale with the rogue in accordance with the principles laid down in *Car and Universal Finance Co. Ltd. v. Caldwell* [1965] 1 Q.B. 525. A little later the rogue sold the car in Warren Street for cash and his purchaser resold it to the defendant, who took the car in good faith and without F notice of any defect in his vendor's title to the car. The plaintiffs demanded it back, but the defendant refused to return it. The trial judge dismissed the plaintiffs' claim. He said, at pp. 1033–1034:

G "On the facts of this case, Andrew [the rogue], having bought the car, obtained possession of it with the consent of the plaintiffs. It is well established that consent in such circumstances obtained by fraud is nevertheless consent: *Pearson v. Rose & Young Ltd.* [1951] 1 K.B. 275, 288, 289, *per* Denning L.J.; *Du Jardin v. Beadman Brothers Ltd.* [1952] 2 Q.B. 712. From the decision in *Car & Universal Finance Co. Ltd. v. Caldwell* [1964] 2 W.L.R. 600, mentioned above, it must be taken that the plaintiffs withdrew their consent. But this makes no difference: section 2(2) of the Factors Act; and see *Cahn v. Pockett's Bristol Channel Steam Packet Co. Ltd.* [1899] 1 Q.B. 643, 658, *per* Collins L.J. It follows, therefore, H that the sale by Biss to Biss was covered by sections 9 and 2 of the Factors Act 1889. It had the same effect as though Andrew were a mercantile agent in possession of the car with the consent of the plaintiffs: that is to say, that if the sale was in the ordinary course of business of a mercantile agent it was effective to transfer title provided that Biss acted in good faith without notice of any

rights of the plaintiffs in respect of the car and without notice that Andrew had no authority to sell.”

He then raised the question whether the sale by the rogue could be said to have been in the ordinary course of business of a mercantile agent, but held that it should be so described on the evidence before him that in Warren Street and its neighbourhood there was a well-established street market for cash dealing in used cars.

The whole decision was affirmed by the Court of Appeal in *Newtons of Wembley Ltd. v. Williams* [1965] 1 Q.B. 560. That court was principally concerned with the difficult question of construction about the effect of the words in section 2(1) of the Act of 1889—“made by him when acting in the ordinary course of business of a mercantile agent”—in a case under section 9 of a buyer obtaining possession and then making a disposition. However this need not trouble us in the present appeal since both Mid-Glamorgan Motors Ltd. and Autochoice (Bridgend) Ltd. were recognised dealers and each sold the Ford Fiesta in the course of their business as such.

However in the course of his judgment Sellers L.J. gave voice to this caution, at p. 574:

“Before one takes too favourable a view for the sub-buyer and too harsh a view against the true owner of the goods as to the cases where section 9 can be invoked, one must remember that it is taking away the right which would have existed at common law, and for myself I should not be prepared to enlarge it more than the words clearly permitted and required. It seems to me that all that section 9 can be said clearly to do is to place the buyer in possession in the position of a mercantile agent when he has in fact in his possession the goods of somebody else, and it does no more than clothe him with that fictitious or notional position on any disposition of those goods.”

On this material the contention of counsel for the defendant in our present case can be summarised in this way. Apart from the New Zealand and Alberta decisions at first instance (to which I myself have not as yet referred, but will do hereafter) there is no case directly deciding that the literal construction of section 9 of the Act of 1889 is wrong. Prima facie such a construction should be the preferred one. At least on their own facts such a clear construction was the one adopted in *Du Jardin v. Beadman Brothers Ltd.* [1952] 2 Q.B. 712 and *Newtons of Wembley Ltd. v. Williams* [1964] 1 W.L.R. 1028; [1965] 1 Q.B. 560, in each of which the decision of the trial judge was upheld in this court. It has been applied in cases where the title passed by the original vendor has been no more than a voidable one, and indeed when on the facts that title has been avoided before the rogue passed the goods on. To adopt such a construction does “mitigate the asperity of the common law” in this type of case. Although in the early development of the Factors Acts the important consideration was that the goods subsequently sold had been entrusted to an agent by the true owner, their later development stressed the importance of the possession of the goods through which the ultimate title was derived. Such an approach had received the approval of the Privy Council in *Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.* [1965] A.C. 867 and it took care of the mischief against which the material statutory provisions

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A were directed, namely, the protection of innocent purchasers. On policy grounds there was no reason not to adopt the construction contended for: as between the two innocent parties, the original true owner and the ultimate innocent purchaser, it let the loss lie where it had fallen; it made for certainty; it avoided unnecessary litigation; the interests of the public were well protected by the requirement that to be protected the purchaser should have acquired the goods for value and without notice.

B The judge in the court below rejected the argument based on the literal construction of section 9 of the Act of 1889 and section 25 of the Act of 1979. In his opinion common sense dictated that "dominium . . . cannot arise or begin with the possession of a thief" and that the draftsman intended that in these two sections the words "owner" and "seller" should "have one and the same meaning." With respect to the
C judge, however, unless I am forced to this somewhat artificial construction of the two sections, I would prefer not to adopt it.

There has been some academic interest on this point. Some commentators have favoured the literal construction contended for by the defendant. Others have argued for various constructions, which respectfully I have found artificial, in order to avoid the result that an ultimate purchaser of goods can obtain a good title through a thief—and
D not merely one guilty of larceny by a trick: see W. R. Cornish, "Rescission Without Notice" (1964) 27 M.L.R. 472; G. Battersby and A. D. Preston, "The Concepts of 'Property', 'Title' and 'Owner' used in the Sale of Goods Act 1893" (1972) 35 M.L.R. 268; D. G. Powles, "Stolen Goods and the Sale of Goods Act 1893 section 25(2)" (1974) 37 M.L.R. 213; G. Battersby and A. D. Preston, "Stolen Goods and the Sale of Goods Act 1893 section 25(2)—A Rejoinder" (1975) 38 M.L.R. 77 and D. G. Powles, "Stolen Goods and the Sale of Goods Act 1893
E section 25(2)—A Surrejoinder," 38 M.L.R. 83.

However, as Professor Atiyah has written in his treatise, *The Sale of Goods*, 7th ed. (1985), pp. 302–303, if the conclusion contended for by the defendant is correct it is a startling one

F "which at first sight seems so contrary to everything one knows about the law that it cannot be right. If this indeed is the law, there can be little doubt that a large number of cases have been wrongly decided and many innocent buyers of motor vehicles have been wrongfully deprived of their vehicles, because it never seems to have occurred to anybody that a buyer from a thief has a greater power to pass title than the thief himself has."

G As Professor Atiyah also says, however, the argument in favour of a literal construction and the consequent result is not easy to refute. In the instant appeal, counsel for the plaintiff sought to do so by submitting that section 9 of the Act of 1889 and section 25 of the Act of 1979 had to be construed as applying solely to the one transaction to which one is seeking to apply them. The "owner" in the two sections means merely
H the owner of the title which is the subject matter of the particular transaction which one is considering. In support he quoted and adopted a passage from *Goode, Commercial Law*, 2nd ed. (1982), pp. 413–414:

"One other problem remains. Though the consent to possession necessary to attract section 9 is the consent of the *seller*, the delivery or transfer is given the same effect as if the person making it were a mercantile agent in possession with the consent of the owner. From this it has been deduced that section 9 can operate

even if the original seller lacked title. Such an interpretation would produce the result, absurd in policy terms, that whilst a thief could not pass title in the stolen goods to his purchaser, yet that purchaser could pass title on a resale. This conclusion has rightly been rejected by courts in Kenya, Canada and New Zealand, though they have been hard put to it to escape from the language of the section. One can see how, as a matter of drafting, the problem has arisen. The draftsman, whose compression of language has caused difficulty elsewhere, evidently felt that rather than spell out the effect of section 9 in extenso he could achieve the same result more elegantly by incorporating by reference the effect of section 2. But this section, dealing with a different problem, refers to the consent of the *owner*, so that the concluding words of section 9 necessarily had to refer to the consent of the owner, for a reference to the consent of the *seller* would have been meaningless when translated back into section 2. There is no wholly satisfactory method of reading the language of section 9; but the most satisfactory explanation is that advanced by Professor Battersby and Mr. Preston, that 'owner' is to be read as meaning 'the relevant owner,' that is, the owner of the title which is the subject of the transaction, i.e. the title vested in S. If this is the best title, then that is what passes on the buyer's disposition. If it is merely a possessory title, then the innocent third party acquires a mere possessory title, good against anyone except the true owner. In producing this last result, section 9 is admittedly otiose, for the third party would anyway acquire a possessory title under the general law. An alternative approach, which does somewhat more violence to the language of the section but produces much the same result, is to read 'seller' as meaning 'seller who is the owner.' This has the effect that only an indefeasible title could pass under section 9; but if S had a mere possessory title, this would still pass to the sub-purchaser at common law."

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Counsel for the plaintiff contended that at common law the principle embodied in the maxim *nemo dat quod non habet* was a fundamental one; that it would be surprising to find it disappplied merely by the somewhat ambiguous words of section 9 of the Act of 1889; that an indication of the invalidity of this particular construction of the relevant sections is the fact that for over 100 years no one is reported to have advanced it before this case, or if they have then in no case has it succeeded.

F

In so far as the mischief referred to by counsel for the defendant as justifying his literal approach to the relevant sections is concerned, counsel for the plaintiff echoed *arguendo* the comment by Lord Donovan towards the end of his Reservation to the Twelfth Report of the Law Reform Committee, on the Transfer of Title to Chattels (1966) (Cmnd. 2958) to the effect that only a small proportion of stolen property is ever recovered, and that it does not seem that the successful disposal of such property is particularly difficult or that the innocent purchasers of it are being dispossessed on a scale which calls for their protection.

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Counsel then referred us to the two Commonwealth decisions which I have mentioned. In *Elwin v. O'Regan and Maxwell* [1971] N.Z.L.R. 1124, Beattie J. had before him in the Supreme Court in Wellington, first, a claim by the ultimate purchaser of a motor car against the agent of a finance company which had purported to repossess the car. The

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A allegation was that a person who had originally taken the car on hire-purchase from the finance company had sold it without their consent, and that after a number of subsequent sales it had been bought by the plaintiff in good faith and without notice of any defect in the title of his seller. The plaintiff relied on the same argument as that raised by the defendant in this appeal, based upon a literal reading of section 27(2) of the New Zealand Sale of Goods Act 1908 which was in the same terms as section 9 of the English Factors Act 1889 or section 25 of our Sales of Goods Act 1979.

B Before Beattie J. counsel submitted that the deliberate wording of the section had always been regarded as putting the point beyond doubt and that it could not be assumed that the use of the word "owner" at the end of the section was a slip. However the judge then quoted from C *Atiyah, The Sale of Goods*, 3rd ed. (1966), p. 163 in which a similar passage to that which I have quoted appeared, and then said, at p. 1131:

"I am inclined to think that what *Atiyah* has said seems to accord with common sense and what has apparently been the practice adhered to in the past. By use of the word 'seller' it seems to me that the section clearly envisages a *contract of sale*."

D The judge then referred to *Butterworth v. Kingsway Motors* [1954] 1 W.L.R. 1286 and quoted a passage from the judgment of Pearson J., at p. 1295 in which the latter clearly thought that the maxim *nemo dat quod non habet* applied in similar circumstances to those in the New Zealand case, at least until the original purported seller who had been in breach of her hire-purchase agreement perfected her title by paying the finance company the outstanding sum due. Beattie J. then continued, E [1971] N.Z.L.R. 1124, 1132:

"It seems to me that these comments of Pearson J. lend some weight to the interpretation of the section by *Atiyah* and I cannot accept, for example, that stolen goods finding a haven with a third or fourth purchaser would give title, yet on the argument for the plaintiff it appears they would. I say this against an argument before F me that it is one thing for the 'owner' of a chattel to maintain title against the purchaser for value without notice who had purchased direct from a fraudulent 'seller' who had no title, but it is quite a different thing for the owner to assert title against a purchaser for value without notice who has purchased, in turn, from a purchaser for value without notice. Counsel contended that, viewed in this G light, the policy of the section seems to indicate that when there is a chain of transactions as here, there must be a point at which the 'owner's' title is extinguished at which moment the most recent purchaser in the chain acquires an unassailable title. While I can appreciate the hardship that is demonstrated by finding against this argument and the difficulty that later purchasers in the chain are confronted with concerning making of fruitful inquiries, regrettably H it seems to me the principle . . . 'nemo dat quod non habet' is applicable."

In *Brandon v. Leckie* (1972) 29 D.L.R. (3d) 633 in the Alberta Supreme Court, Moore J. in his turn had before him for trial two actions in which two plaintiffs sought to recover caravans which had been stolen from them, but which had later been sold through a mercantile agent to the defendants who were each bona fide purchasers

for value without notice of any defect in their sellers' titles. Section 27(2) of the Alberta Sale of Goods Act 1970 is in the same terms as section 25(1) of the English Act of 1979 and the defendants relied upon its literal construction in the same way as does the defendant before us. A

In his judgment on this point, Moore J. also referred to Professor Atiyah's comments which I have quoted and then later in his judgment said, at pp. 637-638:

"Section 27(2) of the Sale of Goods Act makes no reference to the rights of the true and lawful owner or for that matter to the rights of anyone other than the seller. Section 3(1) of the Factors Act states that the sale is 'as valid' as if the mercantile agent were expressly authorised by the owner of the goods to make the same. It does not remove any right accruing in the true owner, either by statement or by implication. It therefore follows that the section applies on the face only to rights between a buyer and a seller and not against the true owner. It simply does not seem logical that the Legislature of this Province, in its wisdom, would enact legislation, the effect of which would be to preclude a true owner, who has done no wrongful act, from attempting to regain and in act regaining a chattel stolen from him. Never at any time from the moment of the original theft of each motor home has title passed from the original owners. As counsel for the plaintiff argued—*nemo dat quod non habet*. Nobody can give good title to what he does not possess. . . . B C D

"George Young [the rogue in the case] never had title to give to Calgary Automotive and consequently neither [of the defendants] could receive good title from Calgary Automotive. The rule *nemo dat quod non habet* must prevail in the absence of overriding statutory provisions. One can paraphrase sections of statutes with magnificent results. However, in the instant case George Young had nothing to sell—thus the end of the paraphrasing. There is no need to distinguish 'seller' and 'owner' other than to say that Young never fell into either category as he could never sell something he did not have the right to sell and obviously he was never the owner of either motor home. Nor is there any need to comment on the fact that Calgary Automotive was admitted to be a mercantile agent at the outset of the trial. Calgary Automotive could not in any way, shape or form pass on good title." E F

For my part, I agree with Professor Atiyah's comment that the defendant's argument in the instant appeal is at first sight, and indeed on further consideration so contrary to everything one knows or has been taught about the law that it cannot be right. On the other hand I would prefer not to have to adopt any artificial construction of either section 25 of the Sale of Goods Act 1979 or the other statutory provisions with which we are concerned in this appeal. Although the drafting of the sections is not entirely clear, if the draftsman in 1889 used the word "owner" in section 9 of the Act of that year in error for the word "seller," I find it surprising that he repeated the error in 1893 and still more surprising that he repeated it again in 1979. G H

Ever mindful of Lord Halsbury L.C.'s warning in *Leader v. Duffey* (1888) 13 App.Cas. 294, 301, to which Sir Denys Buckley refers, nevertheless in my respectful opinion the resolution of the problem lies in large measure in adopting the approaches of Beattie J. in *Elwin v.*

A *O'Regan and Maxwell* [1971] N.Z.L.R. 1124 and of Moore J. in *Brandon v. Leckie*, 29 D.L.R. (3d) 633 and concentrating more on the earlier part of section 25 than on the latter—to which alone the argument for the defendant herein has in truth been addressed.

B By section 2(1) of the Act of 1979, “A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.” By
 C section 2(4), the Act provides: “Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.” By section 61(1) of the Act, “‘property’ means the general property in goods, and not merely a special property.” Thus the essence of sale is the transfer of the ownership or general property in goods from a seller to a buyer for a price. By the same subsection,
 D “‘buyer’ means a person who buys or agrees to buy goods;” and a “seller” is similarly defined *mutatis mutandis*. Thus in my opinion the opening words of section 25(1), those which lay down the condition precedent for the consequences provided for by the later words of the section, only contemplate a transaction in which the general property in the relevant goods has been acquired or it has been agreed should be acquired. A transaction whereby a thief purports to sell goods to A, in which he purports to but cannot pass the general property in the goods to A because it is not vested in him, is not one which can bring section 25(1) into operation at all.

E Similarly where A, *ex hypothesi* having no property in the goods, purports to sell them on to B who receives them in good faith and without notice of the absence in A of any property in them, the transaction is not a “sale” within the definition in the Act, nor can A or B respectively properly be described as “seller” or “buyer.” Thus the condition precedent to the subsequent operation of the later part of section 25 has not been satisfied.

F The same result, or non-result, follows on any purported further sales from B to C, or C to D and so on. If the original transferor is a thief from the true owner, then he has never acquired property in the goods and no purported “sale” by him or by anyone to whom he may have purported to “sell” the goods can attract the consequences of section 9 of the Act of 1889 or section 25 of the Act of 1979.

G Where however a rogue buys a motor car from its true owner and sells it on, whether before or more particularly after the true owner has rescinded the contract between him and the rogue, there is at least for a time a “sale” in law and thus scope for the subsequent operation of the second half of section 25 on later transactions involving the car between innocent parties.

H If this is the correct approach to the construction of section 25, then there is no need to construe the word “owner” in the section in any other sense than its literal, ordinary meaning. However there is only scope for section 25 to operate at all where the general property in the goods passed at some stage, at least temporarily to a transferee from him.

In my opinion, therefore, the judge in this case reached the correct conclusion, although by a somewhat different route from the one I have followed. I would therefore dismiss this appeal.

CROOM-JOHNSON L.J. The agreed facts are that Miss Hopkin was the owner of a Ford car number DUH 635V which was stolen on 3 February

1983. On 23 September 1983 the thieves were convicted. The thieves sold it to a person called Lacey. Lacey then sold it to Roderick Thomas. On 7 February 1983 Mr. Thomas sold to Autochoice (Bridgend) Ltd. for £2,100. On 14 March 1983 Autochoice sold it to Mid-Glamorgan Motors Ltd. for £2,350. On 17 March 1983 Mid-Glamorgan sold it to the defendant for £2,650. It is agreed that the defendant is completely honest. The plaintiff bought Miss Hopkin's interest for £2,750 and acquired her rights to the car. It wrote to the defendant asking for the car back. He did not return it, and was sued to judgment for £2,650 plus interest. The defendant now appeals.

The plaintiff says that once the car was stolen no subsequent purchaser acquired any title to the car because *nemo dat quod non habet*. It relies on section 21(1) of the Sale of Goods Act 1979:

"Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

No question arises of any estoppel against the plaintiff or Miss Hopkin. Section 21(2) provides:

"Nothing in this Act affects—(a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner; . . ."

The defendant relies, as he did before the judge, on section 9 of the Factors Act 1889 which was included (with one immaterial omission) in the Sale of Goods Act 1893 as section 25(2). It has now been re-enacted as section 25 of the Sale of Goods Act 1979. Since its interpretation requires consideration of other provisions of the Factors Act 1889, it is convenient to quote section 9, which is still in force. It deals with the position of a buyer who obtains possession:

"Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof . . . to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

"Mercantile agent" is defined in section 1 of the Act of 1889:

"For the purposes of this Act—(1) The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods . . ."

The powers of such a mercantile agent are set out in section 2(1):

"Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting

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A in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

B By section 1(2) a person shall be deemed to be in possession of goods or of the documents of title where the goods or documents are in his actual custody or subject to his control.

C The defendant's submission is that section 9 gives him a good title to the car which defeats that of Miss Hopkin and therefore that of the plaintiff. This is because if one gives the words of the section their ordinary and natural meaning it means that Mid-Glamorgan bought the car from the seller Autochoice, that they obtained possession of it with the consent of Autochoice and delivered it to the defendant. The result is that the delivery to him had the same effect as if Mid-Glamorgan were a mercantile agent in possession of the car with the consent of the owner. "Owner" it is said means "true owner" whoever that may be, in this case Miss Hopkin. It is submitted that this process of reasoning D applies to everyone in the chain after the purchaser from the thief. It is submitted that Lacey, who bought from the thief, would not get a good title himself but would be able to give one to Thomas, who in turn gave one to Autochoice and so on down the line.

E Before the trial judge the plaintiff argued that in section 9 "owner" and "seller" are to be equated, an argument which the judge accepted. As a matter of construction that has great difficulties, because the statute could hardly be using, within one section, two different words to describe the same person. Before this court the argument was put in a different way, on the basis that "owner" is not referring to the "true owner" (Miss Hopkin) but to the owner of the mere possessory title which is being transferred in the particular transaction. The meaning of "owner" in section 9 has been the subject of much discussion by legal F writers. Professor Goode, in his *Commercial Law*, 2nd ed. (1982), p. 414 suggests that "owner" here means "relevant owner," which again means the seller.

G One difficulty in giving the word "owner" the suggested special meaning lies in the context in which it is found. The delivery of the goods has the same effect "as if" the deliverer were a mercantile agent as defined in section 1. *Newtons of Wembley Ltd. v. Williams* [1965] 1 Q.B. 560 requires that the notional mercantile agent can only exercise the powers given to a real one by section 2(1). This requires him to be in possession of the goods with the consent of the owner. "Possession" is given a wide definition in the Act. There is no definition of "owner," which must therefore be given its ordinary meaning.

H Section 9 comes into operation where someone has bought or agreed to buy goods. Buying and selling in a commercial context means the transfer of title, of ownership. Agreeing to buy or sell means a binding agreement to the same effect. On this interpretation, the section requires an effective transaction, even though it may later be avoided by one of the parties on sufficient grounds. At any rate, it must be a transaction capable of transferring the true title. If that is what "bought" means in the section it follows that both the seller and his buyer must have been parties to such a transaction. This does not mean that the "owner" is

always the same person as the seller, although in many cases he will be. The seller is the person who consents to the buyer having the possession of the goods but the seller might be a duly authorised agent of the true owner. Nevertheless, the "owner" who is bound by the transaction is the true owner.

The proper approach where there is a chain of transactions is to start with the initial defect in the title, in this case the thief. Lacey, who bought from the thief, got no title. Nor could he give one. The situation was the same as in *Butterworth v. Kingsway Motors* [1954] 1 W.L.R. 1286 where a Miss Rudolph, who had hired the car, sold it on. It went through several further sales. None of the purchasers acquired a title until it so happened that Miss Rudolph belatedly completed her own hire-purchase transaction and obtained thereby a title which was transmitted down the line and "fed" the title of the later purchasers. But until that happened only the hire-purchase company were the true owners.

The first Factors Act was passed in 1823. Others were passed in 1825 and 1842. They were concerned with protecting innocent purchasers or pledgees of goods or documents of title where they had been "entrusted" by the owner to a mercantile agent. The Act of 1889 was both an amending and a consolidating Act. It substituted for the concept of entrusting that of obtaining possession with consent. The pre-1889 Acts were in 1899 declared to be in force in New South Wales. Section 9 of the Act of 1889 was later paralleled in the New South Wales' Sale of Goods Act 1923 as section 28(2), and section 2(1) of the Act of 1889 in almost identical language became section 5 of the Factors (Mercantile Agents) Act 1923 of New South Wales.

In *Cook v. Rodgers* (1946) 46 S.R.(N.S.W.) 229, a case in the Supreme Court of New South Wales, Roper J. had to consider claims to a car both by the true owner and by a possessor at the end of a chain of transactions which included a sale by the hirer under a hire-purchase agreement. The possessor relied on section 5 of the New South Wales Factors (Mercantile Agents) Act 1923. Roper J. referred to a number of English decisions on the pre-1889 Acts, where the matters at issue were whether the goods had been "entrusted" and whether the agent in question was a mercantile agent so as to come within the terms of the Acts. He observed that they were all cases where the "entrusting" arose from the acts of, or acts binding on, the true owner. He referred in particular to *Van Casteel v. Booker* (1848) 2 Ex. 691, 698 where Parke B. indicated in argument that to bring the transaction within the Factors Acts of 1825 and 1842 the entrusting must be by the true owner. He recognised that in section 2(1) of the Act of 1889 the wording now required that the mercantile agent should be in possession of the goods "with the consent of the owner," while in section 5 of the New South Wales' Factors (Mercantile Agents) Act 1923 the wording was "entrusted" with the possession, but he adopted the words of Channell J. in *Oppenheimer v. Attenborough & Son* [1907] 1 K.B. 510, 516, that there was no real difference between the two expressions. He decided that to obtain title from a mercantile agent the possession (in the English Act) and the entrusting with possession (in the New South Wales Act) required the possession to come from or be with the consent of the true owner of the goods.

Nevertheless, the wording in the new section 9 is different, and it would be right to consider its meaning afresh, and not to rely on that

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A part of the approach of Roper J. For the reasons which I have already given, I conclude that the buying and the selling referred to in section 9 presuppose a valid transaction by or on behalf of the true owner at some stage.

B In the present case the judge followed *Elwin v. O'Regan and Maxwell* [1971] N.Z.L.R. 1124. The plaintiff bought a car from Maxwell. Maxwell had purchased it from a company which in turn had purchased it from a man called Nevin. Nevin had obtained it in New South Wales under a hire-purchase agreement and wrongfully sold it on. O'Regan had seized possession of the car on behalf of the true owners, the finance company. It was held that notwithstanding that there was a chain of purchasers for value without notice of any defect of title, the principle of *nemo dat quod non habet* applied, and the true owner could assert his right to the car. Reliance was placed by the plaintiff on section 27(2) of the New Zealand Sale of Goods Act 1908, which is identical to section 28(2) of the New South Wales' Sale of Goods Act 1923, section relied on in *Cook v. Rodgers*, 46 S.R. (N.S.W.) 229. They are both identical to section 9 of the Factors Act 1889. The conclusion to which Beattie J. came was that in the section "owner" means "seller," in reliance on a dictum of Scrutton L.J. in *Marten v. Whale* [1917] 2 K.B. 480, 486, where he equated the two.

D But Beattie J. also adopted a dictum of Pearson J. in *Butterworth v. Kingsway Motors Ltd.* [1954] 1 W.L.R. 1286, 1295:

E "The various purported sales all took place at times when Bowmaker Ltd. were still the owners of the car, so that all the purported sellers in this rather long chain had no title to it at the times when the . . . purported sales . . . were made."

Beattie J. appears to have adopted as an alternative finding that the "seller" in section 9 of the Act of 1889 must be someone who can give a title.

F The only other case in which this problem seems to have been decided is *Brandon v. Leckie* and *Avco Corporation v. Borgal* (1973) 29 D.L.R. (3d) 633, consolidated actions tried in the Alberta Supreme Court. These, like the present, were cases where the goods were stolen. In each case the thief, a man called Young, sold to a mercantile agent who in turn sold on to a bona fide purchaser. The question was whether the purchaser could rely on section 10(1) of the Alberta Factors Act 1970 which again is the same as section 9 of the Act of 1889. That section involved reading into it section 3(1) of the Alberta Factors Act, which was the equivalent of section 2(1) of the Act of 1889. Again the point was taken that "seller" means the same thing as "owner."

G The trial judge, Moore J., put the matter simply. For simplicity I am indicating in square brackets the English equivalent of the Alberta legislation. He said, at p. 637:

H "Section 27(2) of the Sale of Goods Act [section 9 of the Act of 1889] makes no reference to the rights of the true and lawful owner or for that matter to the rights of anyone other than the seller. Section 3(1) of the Factors Act [section 2(1)] states that the sale is 'as valid' as if the mercantile agent were expressly authorised by the owner of the goods to make the same. It does not remove any right accruing in the true owner, either by statement or by implication. It therefore follows that the section applies on the face only to rights between a buyer and a seller and not against the true owner."

After referring with approval to a decision of Judge Sargent of the British Columbia County Court in *Bremmer v. Johnson* [1946] 3 W.W.R. 39, he said, at p. 638:

"The rule *nemo dat quod non habet* must prevail in the absence of overriding statutory provisions. . . . in the instant case George Young had nothing to sell . . . There is no need to distinguish 'seller' and 'owner' other than to say that Young never fell into either category as he could never sell something he did not have the right to sell and obviously he was never the owner of either motor home. Nor is there any need to comment on the fact that Calgary Automotive [the purchasers from Young] was admitted to be a mercantile agent at the outset of the trial. Calgary Automotive could not in any way, shape or form pass on good title."

These cases are not directly in point with the present case on their facts, because there was no "seller" to Calgary Automotive who put them in possession of the motor homes. There was no equivalent to Roderick Thomas. But the principle is clear. Just as the thief could not give title to Lacey, so Lacey could not be a "seller" to Thomas, or Thomas a "seller" to Autochoice, or Autochoice to Mid-Glamorgan.

My conclusion is that section 9 of the Act of 1889 did not by a sidewind change the law as it had been up to that time. "Owner" in that section means the true owner, but the effect of the section is not to give title where the seller's own possession is derived from unlawful possession, as from a thief. I base this conclusion on the construction of sections 9 and 2(1) read together, on the history of the Factors Acts, and on the authorities such as they are. The dearth of case law on this point is only an example of the saying that the more self-evident a proposition is, the harder it is to find authority for it.

I would dismiss the appeal.

SIR DENYS BUCKLEY. When a court is required to interpret a statute its function is to discover the intention of the legislature in enacting the particular statutory provision under consideration. The material from which that intention must primarily be discovered is the language used in the particular provision, read in the context of the statute as a whole. If that language is clear and unequivocal, the court must interpret and give effect to the provision in the sense of that clear and unequivocal language, unless to do so would be incongruent with some other part of the statute, or produce an irrational result thus engendering uncertainty about the legislature's true intention. If authority is required in these respects, it is to be found in *Leader v. Duffey* (1888) 13 App.Cas. 294, 301, *per* Lord Halsbury L.C.; *Attorney-General v. Milne* [1914] A.C. 765, 771, *per* Viscount Haldane L.C.; *Attorney-General for Canada v. Hallett & Carey Ltd.* [1952] A.C. 427, 449, *per* Lord Radcliffe; *Westminster Bank Ltd. v. Zang* [1966] A.C. 182, 222, *per* Lord Reid, and many other authorities cited in the notes to paragraphs 856 and 857 in *Halsbury's Laws of England*, 4th ed., vol. 44 (1987).

The question in the present case is whether the defendant can successfully assert that he has in the events which happened an indefeasible title as owner of the relevant motor car. The amount at stake is not great, but the question is one of general public interest.

The answer depends upon the true interpretation and effect of section 9 of the Factors Act 1889 and section 25 of the Sale of Goods

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A Act 1979. Those sections are for present purposes in identical terms. I shall refer to section 9 only, but precisely similar considerations apply to section 25.

B For the sake of clarity and ease of reference I will set out the words used in the sections, omitting all words which can be regarded as surplusage in relation to the facts of the present case, and introducing letters to identify the persons referred to in the various parts of the sections. When so treated section 9 reads:

C "Where a person [B], having bought or agreed to buy goods, obtains with the consent of the seller [A] possession of the goods, . . . the delivery or transfer, by that person [B], . . . of the goods, . . . under any sale, pledge, or other disposition thereof . . . to any person [C] receiving the same in good faith and without notice of any lien or other right of the original seller [A] in respect of the goods, shall have the same effect as if the person making the delivery or transfer [B] were a mercantile agent in possession of the goods . . . with the consent of the owner."

D It will be observed that everything in that passage which follows the words "as if" sets up a fictitious hypothesis upon which the section is to operate. I will call this "the section 9 hypothesis." To understand the effect of it, one must then turn to section 2(1) of the Factors Act 1889 which provides:

E "Where a mercantile agent is, with the consent of the owner, in possession of goods . . . any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

F This section clearly infers that a mercantile agent to whom it applies has not in fact full authority to make the disposition in question, for, if he were duly authorised, the section would be otiose. Section 2 consequently, when read in conjunction with section 9, introduces a further hypothetical element to the operation of section 9, viz. that the person who makes the disposition is doing so in the purported exercise of an authority with which he is not clothed.

G Having regard to the section 9 hypothesis, it is not necessary for the purpose of applying section 9 to establish that B was in fact a mercantile agent at the relevant time or (if in fact he was so) that he was acting as a mercantile agent in his relevant transaction with C: nor is it necessary to establish that he was in possession of the goods with the consent of the owner. These matters are to be assumed. Nor, in my judgment, is it necessary to consider who is the owner whose consent is to be assumed. In a case to which section 2 alone applies, the fact of the owner's consent must be established, in which connection the identity of the owner must be ascertained; but in a case in which section 2 is called into play only as a feature or consequence of the section 9 hypothesis, it is the quality of the assumed consent that is significant, not the identity of the person whose consent is to be assumed. In other words, the owner

referred to in the section 9 hypothesis is as hypothetical as are the mercantile agent and the consent.

The hypothetical basis of the operation of section 9 was remarked on by Sellers and Pearson L.J.J. in *Newtons of Wembley Ltd. v. Williams* [1965] 1 Q.B. 560. As was recognised in that case, some difficulty arises in applying section 2 as part of the section 9 hypothesis because section 2 requires that the disposer of the goods shall have disposed of them when acting in the ordinary course of business as a mercantile agent. This is not a feature which is expressly required to be assumed as part of the section 9 hypothesis. In the *Newtons of Wembley* case the party answering to B in my exposition of section 9 had bought a car and obtained possession of it with the consent of A, the vendor. The vendor subsequently rescinded the contract, but the car was still in B's possession when he sold it at a later date to C. The sale by B to C took place in a kerbside market in Warren Street, London, but it was not suggested that this constituted a sale in market overt. B by then had no subsisting title to the car, but section 9 was held to enable C to resist a claim by A for the return of the car. B seems not in fact to have been selling as a mercantile agent, but this court treated the conditions of section 2 as satisfied upon the ground, as was expressed by Pearson L.J. at p. 579, either (i) that B's hypothetical business should be assumed to be that of a mercantile agent or (ii) that B upon his sale to C was doing something which would constitute acting in the ordinary course of business if he were a mercantile agent.

I must now consider the circumstances in which the section 9 hypothesis is to operate. These are set out in that part of section 9 which precedes the words "as if," the requirements of which must historically have been fully satisfied for the section to apply. These requirements can be analysed as follows: (a) B must have bought or agreed to buy the relevant goods from A; (b) B must have obtained possession of the goods with A's consent; (c) B must have delivered or transferred the goods to C; (d) that delivery or transfer must have been effected under a sale, pledge or other disposition of the goods; and (e) C must have received the goods in good faith and without notice of any lien or other right "of the original seller." It is, in my view, clear that the transaction between A and B must be a sale, or an agreement to sell, in which A is the seller and B the purchaser. It is also clear that the transaction between B and C must be a sale or a pledge or some other kind of disposition by B to C.

The objective of the section is clearly, in my judgment, to confer on C an unassailable title to the ownership of the goods notwithstanding some circumstance which would otherwise prevent him having such a title. The circumstance in the present case which might have that effect is the fact that the car was stolen from Miss Hopkin. The contention of the plaintiff is that the thief, having no title to the ownership of the car could pass no such title to Lacey, and that that disability continued through the chain of successive sub-purchasers, so that the defendant could acquire no title to the ownership of the car from Mid-Glamorgan Motors. This, it was submitted, is the consequence of the ancient maxim of the common law *nemo dat quod non habet*. The question for consideration appears to me to be whether section 9 on its true construction confers a statutory title to the ownership of the goods overriding the title of the original owner.

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A Suppose that goods in the ownership of O are stolen by a thief, T. T acquires no legal right to either the ownership or possession of the goods. T, having the goods de facto in his possession or under his control, sells or agrees to sell them to X, or purports to do so. Having no title to the goods, T cannot pass any title in them to X, who accordingly acquires no title to them at common law. The transaction between T and X is not affected by section 9 because T has not bought or agreed to buy the goods, and so cannot be equated with B in my exposition of section 9; so X acquires no statutory title to the goods. So far I am entirely in agreement with this analysis. X obtains possession of the goods with T's consent and sells them to Y. At that point (if T, X and Y are to be equated with A, B and C in my exposition of section 9) the section will come into play, provided that Y has acted in good faith and without notice of any lien or other right of "the original seller." In that case O would, in my judgment, be barred by the section from recovering the goods from Y, who would consequently become entitled to the ownership of the goods against all the world. The fact that T had stolen the goods from O must thereupon, in my judgment, cease to have any relevance to the ownership of the goods.

D Who then is to be understood to be referred to by the description "the original seller?" One cannot go back further than T, for O was not a seller. If T can be regarded as a seller, he is not, I apprehend, a seller who could assert a lien or other right in the goods because, having stolen them, he could not claim to have had any title to them or interest in them. I for my part think that the most acceptable interpretation of "the original seller" is to relate it to that party who answers to A in my exposition of section 9. That party is the first seller referred to in the section, that is to say, the earliest seller whose sale is relevant to the operation of the section.

E But, as in the present case, the goods may have been the subject of a considerable series of sub-sales before O attempts to recover them. I must consider how the section works in such a case.

F The list of persons through whom the possession of the car passed in the present case is Miss Hopkin—the thieves—Lacey—Thomas—Autochoice—Mid-Glamorgan Motors—the defendant. We are without information about the transfers from the thieves to Lacey and from Lacey to Thomas. Accordingly none of the requirements of section 9 can be shown to be satisfied by anyone before Autochoice. We do know that Autochoice bought the car from Thomas in good faith and without notice of any lien or other right existing in any other person, and obtained possession of it with Thomas's consent. Autochoice consequently, in my view, fulfills the requirements relating to party B in section 9. We also know that Mid-Glamorgan Motors Ltd. bought the car from Autochoice in good faith and without any such notice, and obtained possession of it with the consent of Autochoice. Mid-Glamorgan Motors Ltd. consequently, in my view, fulfils the requirements relating to party G C in section 9. Where, as in this case, there are several successive possessors in the chain, the section, in my judgment, only requires consideration of the circumstances relating to the last three members of the chain, the last of whom will be the party invoking the protection of the section, that is to say in the present case the defendant. It follows in my judgment that, unless the presence of the thieves in the chain of successive possession somehow excludes the operation of the section, the plaintiff cannot succeed in this action.

Counsel for the plaintiff have contended that section 9 can confer upon the last person in the chain (i.e. the party from whom the true owner seeks to recover the goods) no better title than that of the "original seller," who in the present case, he says, was either the thieves, or some subsequent possessor of the goods who could have no better title than the thieves. They submitted that, where the goods have been stolen, the section has no effect upon the title of the true owner from whom they have been stolen. In this respect they submitted that section 9 only affects the rights inter se of the parties whom I have called A, B and C and has no effect upon the title of the original true owner.

Counsel for the defendant relied upon a literal construction of section 9. With deference to those who think otherwise, I consider that the language of section 9 is clear and unequivocal, free from ambiguity and uncertainty. It is, in my opinion, susceptible of only one interpretation. The difficulty involved in applying the language of section 2 to the section 9 hypothesis is, in my view, disposed of, so far as this court is concerned, by the decision in *Newtons of Wembley Ltd. v. Williams* [1965] 1 Q.B. 560. Indeed the present case is, I think, a stronger case than that because, as is common ground, Mid-Glamorgan Motors Ltd. does carry on a business of selling cars as a mercantile agent and its sale to the defendant was carried out at its business premises and in just such a manner as a sale in the course of its business as mercantile agents would have been.

Those who take the contrary view, and hold that section 9 should be considered in some sense other than what its language appears literally to say, seem to me, with great deference, to fall into the error against which Lord Halsbury L.C. gave a warning in *Leader v. Duffey*, 13 App.Cas. 294, 301:

"But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made."

I do not find anything elsewhere in the Factors Act 1889 which conflicts with section 9 construed in its literal sense. Nor, in my view, does a literal construction of section 9 produce an unreasonable or unsensible result. The Factors Act 1889 was the latest of a series of Acts of Parliament for the protection of innocent purchasers which at each stage increased the amount of protection afforded. The section as I would construe it confers no protection upon a purchaser from a thief. Such a purchaser might by diligent inquiry have been able to discover that his vendor was a thief. The section, so construed, would, however, enable that purchaser to confer on an innocent purchaser from him an unassailable title. The latter purchaser would be unlikely to be aware of any circumstances that would put him on inquiry whether his vendor's vendor had stolen the goods. In such a case it would not, in my view, be at all irrational that the legislature should consider that it would be right to let the loss resulting from the theft rest where it falls upon the original owner, who would, as was pointed out in argument, very probably be insured, rather than upon the innocent purchaser.

May L.J. has placed reliance upon the definition of "a contract of sale of goods" contained in section 2(1) of the Sale of Goods Act 1979 and upon sections 2(4) and 61(1) of the same Act. With very great

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A diffidence, I do not think that a solution can be found by this route. When a thief contracts to sell stolen property, the fact that he cannot transmit a good title in that property to the purchaser does not, as I understand the law, mean that he has not contracted to sell it. He has contracted to sell it, and can be made liable in damages if and when the purchaser suffers damage by reason of the thief's breach of contract by selling without a good title. In the present case, on the assumed facts, B the thieves, in my view, agreed to sell and sold the car to Lacey within the meaning of section 9, and each successive sub-purchaser did the same. Moreover, in my opinion, by handing over the car to Lacey the thieves conferred on him a possessory title good against the thieves and indeed everyone except the true owner. So in my respectful opinion, C each of the transactions in the chain in the present case was a contract to sell the car resulting in a sale of the car, notwithstanding any defect there may have been in the vendor's capacity to transmit a good title to it. The first requirement of section 9 is thus satisfied.

D It is certainly surprising that the argument in favour of a literal construction of section 9 which has been presented in the present case by the defendant does not seem to have been presented in any reported case except to some extent in *Newtons of Wembley Ltd. v. Williams* [1965] 1 Q.B. 560. We have been referred to a considerable number of English authorities. I hope I shall not be thought discourteous to counsel's arguments if I do not discuss these cases in detail. Some were decisions on section 2 of the Factors Act 1889 and were not concerned with section 9. I do not find these of assistance in construing section 9.

E Two Commonwealth cases were referred to in which arguments, which were evidently on similar lines to the defendant's argument in the instant case, were presented and rejected in each case. Each of those cases was concerned with statutory provisions in identical terms with sections 2(1) and 9 of the Factors Act 1889. Those decisions, although not binding on us, are worthy of great respect. *Brandon v. Leckie*, 29 D.L.R. (3d.) 633 related to stolen vehicles which were sold F by the thief to a concern called Calgary Automotive Brokerage Ltd. (a mercantile agent) by whom the vehicles were sold to members of the public. Moore J. of the Alberta Supreme Court took the view that the sections with which he was concerned made no reference to the rights of the true and lawful owners from whom the vehicles had been stolen, nor to the rights of anyone other than the seller, and did not remove any rights of the true owners. He held that the rule *nemo dat quod non* G *habet* must prevail in the absence of overriding statutory provisions; that the thief could not sell something he did not have the right to sell; and that the mercantile agent could not pass on a good title. With respect to the judge, I consider that, for reasons which I have already indicated, section 9 of the Factors Act 1889 is a statutory provision which is designed to override the *nemo dat* principle and effectively does so, not H by expressly destroying the rights of the true and lawful owner, but by conferring on the purchasers from the hypothetical mercantile agent a statutory title which is unassailable by that owner.

Elwin v. O'Regan and Maxwell [1971] N.Z.L.R. 1124 is concerned with a car which was initially the subject matter of a hire-purchase agreement. The hire-purchaser sold the car, while there were still instalments unpaid, to Broadlands Finance Ltd., who sold it to the defendant Maxwell, who sold it to the plaintiff. The defendant O'Regan

was an agent of the true owners of the car, that is to say the hire-purchase company, who had repossessed the car. Beattie J. in the New Zealand Supreme Court held with regret that the principle *nemo dat quod non habet* applied. He consequently upheld the claim of the hire-purchase company. In the course of his judgment the judge referred to the decision of Pearson J. in *Butterworth v. Kingsway Motors* [1954] 1 W.L.R. 1286, which was also a case of a car subject to a hire-purchase agreement. In that case also the hire-purchaser purported to sell the car while there were still instalments unpaid, and there were three further sub-sales. Pearson J. said, at p. 1295:

"The next question is as to the present ownership of the car. The various purported sales all took place at times when Bowmaker Ltd. [the hire-purchase company] were still the owners of the car, so that all the purported sellers in this rather long chain had no title to it at the times when the sales, or purported sales, were made; But on or about 25 July 1952, Miss Rudolph [the hire-purchaser] acquired a good title from Bowmaker Ltd. or, at any rate, made a payment to Bowmaker Ltd. which extinguished their title and induced them to relinquish any claim which they had to the car. I think that the right view is that Miss Rudolph did acquire the title as between her and Bowmaker Ltd., but I further hold on authority that the title so acquired went to feed the previously defective titles of the subsequent buyers and enured to their benefit."

It is perfectly clear that the judge there assumed that section 9 of the Factors Act 1889 had not conferred a good title to the car upon any of the sub-purchasers, but it was unnecessary for him to decide that question or even to give it close consideration, in view of the effect of the payment off of the arrears under the hire-purchase agreement.

In my judgment, once the factual requirements of section 9 of the Factors Act 1889 have been satisfied, the operation of this section is not to strike from the hand of the original true owner of the goods his title of ownership, but to place in the hand of him who has acquired those goods from the notional mercantile agent an impregnable shield which makes it impossible thenceforth for the original true owner to assert his original title against him who has the goods.

For these reasons I for my part would allow this appeal.

*Appeal dismissed with costs.
Leave to appeal.*

Solicitors: Kenwright & Cox for Randalls, Bridgend; Dolmans, Cardiff.

[Reported by CLIVE SCOWEN, ESQ., Barrister-at-Law]

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A

[HOUSE OF LORDS]

LEWIS RESPONDENT

AND

B

SURREY COUNTY COUNCIL APPELLANT

[On appeal from SURREY COUNTY COUNCIL v. LEWIS]

1987 July 13, 14, 15;
Oct. 15Lord Bridge of Harwich,
Lord Hailsham of St. Marylebone,
Lord Roskill, Lord Ackner
and Lord Oliver of Aylmerton

C

*Employment—Continuous employment—Hours normally worked—
Employee working for same employer under series of concurrent
fixed term contracts—No one contract satisfying minimum
requirements as to hours of work normally involved or length
of employment—Whether permissible to aggregate periods of
employment under separate contracts—Employment Protection
(Consolidation) Act 1978 (c. 44), Sch. 13, paras. 4, 9(1)(b)*

D

The employee was a part-time teacher who, since 1969, had taught concurrently in three departments at the employers' colleges of further education, her work in each department being governed by a series of fixed term contracts following each other at intervals of varying length. In June 1983 she was informed by her employers that she would not be offered a contract for the autumn term 1983 and she made a complaint of unfair dismissal or redundancy. A preliminary issue arose as to whether the employee had a sufficient period of continuous employment under the Employment Protection (Consolidation) Act 1978 to bring her complaint. The employee accepted that no one contract met either the requirements of paragraph 4 (as modified by paragraph 6) of Schedule 13 to the Act¹ as to the normal weekly requirement of hours to be worked or the requirements of the Act as to the minimum periods of 12 months' continuous employment for unfair dismissal or two years for redundancy; but submitted that the separate concurrent contracts should be looked at together and their hours of work aggregated, and that sequentially the contracts should be amalgamated to form an unbroken period of employment. The industrial tribunal held that the whole of the employee's work pattern during her employment in the colleges had to be taken into account and that the periods between terms and thus between contracts when she did not work for the employers, were not sufficient to break the continuity of her employment, and paragraph 9(1)(b) of the Schedule operated to preserve that continuity. The tribunal therefore found that she had been continuously employed for a period of five years or more; that during all that time she had been governed by contracts of employment which normally involved employment for eight hours or more per week; and that, accordingly, she was entitled to have her complaint considered. The appeal tribunal allowed

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¹ Employment Protection (Consolidation) Act 1978, Sch. 13, para. 4: see post, p. 935A.

Para. 6: see post, p. 935A–D.

Para. 9(1): see post, p. 935D–F.

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[1987]

an appeal by the employers. On appeal by the employee, the Court of Appeal allowed the appeal and remitted the matter to the industrial tribunal.

On appeal by the employers:—

Held, allowing the appeal, that in calculating the number of hours of employment per week normally involved in a contract of employment for the purposes of paragraphs 4 and 6 of Schedule 13 to the Employment Protection (Consolidation) Act 1978 regard could only be had to the particular contract of employment in relation to which the complaint of unfair dismissal or redundancy had been made, and that it was impermissible to aggregate the hours worked per week under separate concurrent contracts with the same employer since the total absence of any reference to aggregation or guidance on how it was to be carried out was the clearest indication that aggregation was not contemplated by the Act (post, pp. 929A, 931C–F, H—932A, 938D, 939E–F, 942A).

Per curiam. Even if aggregation were permissible under paragraphs 4 and 6 of Schedule 13, there was no valid claim in the present case since paragraph 9(1)(b) in the circumstances did not avail the employee (post, pp. 940H—941A).

Ford v. Warwickshire County Council [1983] 2 A.C. 71, H.L.(E.) distinguished.

Decision of the Court of Appeal [1987] I.C.R. 232 reversed.

The following cases were referred to in their Lordships' opinions:

Ford v. Warwickshire County Council [1983] 2 A.C. 71; [1983] 2 W.L.R. 399; [1983] I.C.R. 273; [1983] 1 All E.R. 753, H.L.(E.)

O'Kelly v. Trusthouse Forte Plc. [1984] Q.B. 90; [1983] 3 W.L.R. 605; [1983] I.C.R. 728; [1983] 3 All E.R. 456, C.A.

The following additional cases were cited in argument:

Fitzgerald v. Hall, Russell & Co. Ltd. [1970] A.C. 984; [1969] 3 W.L.R. 868; [1969] 3 All E.R. 1140, H.L.(Sc.)

Flack v. Kodak Ltd. [1986] I.C.R. 775, C.A.

I.T.T. Components Group (Europe) v. Kolah [1977] I.C.R. 740, E.A.T.

Land v. West Yorkshire Metropolitan County Council [1981] I.C.R. 334, C.A.

Larkin v. Cambos Enterprises (Stretford) Ltd. [1978] I.C.R. 1247, E.A.T.

Lloyd v. Brassey [1969] 2 Q.B. 98; [1969] 2 W.L.R. 310; [1969] 1 All E.R. 382, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the employers, Surrey County Council, from the judgment dated 31 July 1986 of the Court of Appeal (Watkins, Purchas and Glidewell L.JJ.) [1987] I.C.R. 232, allowing an appeal by the employee, Elizabeth Lewis, from the judgment dated 19 September of the Employment Appeal Tribunal (Waite J., Mr. J. P. M. Bell and Ms. P. Smith) [1986] I.C.R. 404, which had allowed an appeal by the employers from the decision dated 8 February 1984 of an industrial tribunal sitting at Brighton, holding on a preliminary point that the employee had a sufficient period of continuous employment with the employers computed in accordance with the Employment Protection (Consolidation) Act 1978 so that she was entitled to have her complaint of unfair dismissal or redundancy considered.

The facts are stated in the opinion of Lord Ackner.

Eldred Tabachnik Q.C. and *Christopher Jeans* for the employers.

Stephen Sedley Q.C. and *Laura Cox* for the employee.

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A Their Lordships took time for consideration.

15 October. LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speeches to be delivered by my noble and learned friends Lord Hailsham of St. Marylebone and Lord Ackner. I agree with them both and for the reasons they give I would allow the appeal.

B

LORD HAILSHAM OF ST. MARYLEBONE. My Lords, by a series of statutes now consolidated in the Employment Protection (Consolidation) Act 1978, as subsequently amended, Parliament conferred two important new rights on employees against their employers which arise independently of any rights or obligations contained in their contracts of employment.

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The first is a right not to be unfairly dismissed and if unfairly dismissed to receive an award either of reinstatement or compensation: sections 54 and 67 to 69. The second gives a right to an employee to receive redundancy payments in case of dismissal on the grounds of redundancy: section 81. By section 55 of the Act of 1978 dismissal includes termination without renewal of a fixed term contract of employment. Both rights are enforceable by originating application through the industrial tribunal network with appeal (on a question of law only) to the Employment Appeal Tribunal and thence to the Court of Appeal with a further appeal by leave to your Lordships' House. The present proceedings have run the whole course.

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Like most such rights which have marked the move from contract to status characterising so much modern social legislation, these rights arise independently of the rights and obligations arising under the terms of the relevant contract of employment, and, by section 140, may not be excluded or abridged by anything in the contract which is inconsistent with their exercise.

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In order to qualify for either right the employee must be able to show a period of "continuous employment" of one year (section 64 as amended) in the case of the right not to be unfairly dismissed and of two years in the case of the right to receive redundancy payments. Subject to a presumption in favour of continuity section 151 and Schedule 13, paragraph 1(3) the qualifying periods of one year and two years (measured as calendar years or months) are computed week by week of weeks that "count" in accordance with the somewhat elaborate provisions of Schedule 13 to the Act: section 151 and Schedule 13. In

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order to show that he has qualified, and subject to the presumption of continuity referred to above, the employee must establish (a) that the employment is "of a kind counting towards a period of continuous employment" and (b) that the periods, consecutive or otherwise but calculated week by week, are to be treated as "forming a single period of continuous employment:" section 151 and Schedule 13, paragraph 4. Only those weeks "during the whole or part of which the employee's

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relations with the employer are governed by a contract of employment which normally involves employment for 16 hours or more" (eight hours in the case where the period of continuous employment has subsisted for five years) "count" for the purpose of computing the period of continuous employment: Schedule 13, paragraphs 4, 6. Subject to special provisions applying, inter alia, to absence from work on account of a "temporary cessation of work" (Schedule 13, paragraph 9(1)(b)) a break of a single whole week in the weeks which "count" in estimating the period of

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continuous employment may deprive the employee of his rights under section 54 and section 84: section 64(1).

In the present appeal the employee (respondent) was employed by the employer (appellant) more or less continuously (as to which see later) from January 1969 to June 1983, a period of about 14 years, when her last employment (a fixed term) terminated in circumstances which amount to "dismissal" for the purposes of section 55. In fact it was a contractual period for a fixed term which was not renewed as the result of a change of policy on the part of the employer. By her originating application in September 1983 the respondent claimed both compensation under section 54 and section 64 in respect of alleged unfair dismissal and redundancy payments under section 84. She was, however, immediately met by a preliminary objection on the part of her employer (respondent to the application but appellant in this appeal) that she could not establish the relevant qualifying periods respectively of one and two years of continuous employment. Since the relevant facts are not in dispute there is no room here for the presumption of continuity. The question is one of the legal implication of admitted facts, and this preliminary objection on the part of the appellant constitutes the sole matter of debate in this appeal. The respondent won before the industrial tribunal, lost before the Employment Appeal Tribunal, won before the Court of Appeal, and the matter now falls to be determined by your Lordships. In passing, the process which began in 1983 and is still current in 1987 may seem a somewhat lengthy one in the light of the fact that the system designed by Parliament for the decision of such matters was intended to be speedy, inexpensive, informal, and lacking in complexity.

The respondent is a teacher of photography. Throughout her periods of engagement she was employed by the appellant on a series of fixed term and part time contracts at one or more of their educational establishments, situated respectively at Guildford, Farnham, and Epsom and latterly only at Epsom and Farnham. At the relevant time the contracts were by the term, or by the course at the relevant institution and department, and in consequence were intermitted amongst other interruptions by the usual vacations. Nothing would turn on these periods of intermission if the employee were entitled to add each terminal fixed term contract to its predecessors or successors for the purposes of the calculation: see *Ford v. Warwickshire County Council* [1983] 2 A.C. 71. But each was a separate contract. None of the "contracts" (if that be the right description for some fairly imprecise documents) was in any way colourable, improper, or designed in any way to defeat the purposes of the Act of 1978 properly construed; either by finding of the industrial tribunal (which is unchallengeable) or by concession or admission by or on behalf of the respondent (which after hearing argument on the point I believe to have been binding, as was the ultimate view formed by the Court of Appeal) the concurrent contracts were separate from and independent of one another, and though in practice operated so that the obligations under one did not conflict with the obligations under any other in time or place, did not form part of a single composite whole. Had this not been the case and had there been supporting evidence to enable one to conclude that, although expressed in different documents, there was in existence a single implied contract of service or a composite contract contained in

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Lord Hailsham
of St. Marylebone

A the several documents, I might very well have taken a contrary view to that which I am now constrained to express.

The respondent's difficulty resides in the fact that she can only establish the requisite periods of continuous employment whether for deciding that "the whole or part of the employee's relations with the employer was governed by a contract of employment which normally involved employment for 16 hours or more weekly" (Schedule 13, paragraph 4) or for the purpose of considering whether "the periods" (consecutive or otherwise) are to be treated as forming a single period of continuous employment if she is permitted to add both the hours and periods of work actually done under one engagement respectively to the hours and periods of work actually performed under one or more of the others. In my opinion neither computation will avail the respondent if it is once established that the engagements are quite separate and distinct from one another, and do not, in one way or another, form a part of a single composite whole—entitling the employee to add one to the other for both purposes. I give full weight to the provisions of section 6 of the Interpretation Act 1978 in which, unless the contrary intention is implied, the singular embraces the plural and vice versa in the language of a statute. But in my view, once it is established that the "contracts" involved were distinct and separate arrangements and did not form part of a single composite relationship. I do not believe that the Interpretation Act can avail the respondent. The whole structure of the Employment Protection Act 1978 read with Schedule 13 is built on the supposition that to create the qualifying period there must be a single relationship contained in a single contractual complex, whether oral, in writing, or implied, and whether or not contained in a single document or a number of documents, and there is no room therefore for importing into paragraph 4 of Schedule 13 any such phrase as would give the meaning "a contract *or contracts* of employment which normally, *whether singly or collectively involve* employment for 16 hours." In my view the whole structure of the Act precludes this interpretation and accordingly neither the Interpretation Act 1978 nor the ambivalence, in English, of the indefinite article, to which I referred in the argument before your Lordships, is available to the respondent. It must follow that the appeal must be allowed and the judgment of the Employment Appeal Tribunal restored.

I feel bound to add that I arrive at this conclusion after considerable hesitation and not a little regret. After 14 years of what in the ordinary course might have been regarded as continuous service the respondent's contracts were allowed to lapse without imputed fault on her part and she is entitled to nothing either by her contracts or by virtue of the statute. The best that can be said is that, without the statute, the legal result would have been the same.

Since preparing the above I have had the advantage of reading in draft the speech about to be delivered by my noble and learned friend, Lord Ackner. Although I have approached the matter from a slightly different angle, I am happy to say that I agree with his more detailed analysis of the facts and chain of reasoning, which I believe to be wholly compatible with my own conclusions.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speeches delivered by my noble and learned friends Lord

Hailsham of St. Marylebone and Lord Ackner. I agree that the appeal should be allowed for the reasons which they have given.

LORD ACKNER. My Lords, this appeal raises two points of construction of certain provisions of the Employment Protection (Consolidation) Act 1978 as amended. The questions are very narrow and arise from a decision on a preliminary issue on a set of facts, either as found by the industrial tribunal or admitted by Mrs. Lewis, the respondent. These facts, to which I will make more detailed reference hereafter, seem to me, and I believe to your Lordships, somewhat surprising if not unreal. I much doubt whether they are likely to be repeated again in a substantially similar form.

The facts

Mrs. Lewis was first employed by the Surrey County Council, the respondents, in January 1969 to teach photography (which included graphics), on a part-time basis at the Guildford School of Art. For the first year or two, the contract was a yearly one covering the academic year but thereafter she was employed by a series of consecutive contracts each being for the duration of a term.

In 1975 the Guildford School amalgamated with the Farnham College of Further Education to become the West Surrey College of Art and Design. Thereafter Mrs. Lewis worked at Farnham. In 1980 the "foundation" element of the course, that is the introductory part, which takes place only in the spring term, was separated out and was no longer taught by her in the Department of Audio Visual Studies of the Farnham College but was taught in their Foundation Department. Thereafter she was provided with separate contracts for each of those two departments. In the autumn of 1981 the graphics part of her teaching was transferred to the Epsom College of Further Education and she was provided with further consecutive contracts for a term's duration for that part of her work.

Thus, from the autumn 1981 onwards Mrs. Lewis's engagement at each department was regulated by three separate series of consecutive contracts. Each single contract was confined to the duties to be performed at the work place of the particular department involved. Each single contract was evidenced by a separate letter of engagement, introducing the new contract, to apply to each college term at the relevant department. It was a feature common to all the contracts that the weekly work requirement in terms of hours was not specified in the letter of agreement. All such letters spoke only of a global number of hours, the totality of which had to be worked during that particular college term within the department in question. The allocation of those contractual hours to particular weeks was left for the individual department to arrange, and this, no doubt, it did according to the programme which met the needs of each of the departments.

The particular points I would wish to stress as showing the very restricted nature of the facts of Mrs. Lewis's case are:

1. It might well have been argued before the industrial tribunal and the Employment Appeal Tribunal, but it was not, that this division of Mrs. Lewis's activities between the two departments of the Farnham College (the Audio Visual Department and the Foundation Department) and the one department in the Epsom College (the Graphics Department) and the issue of separate contracts in respect of each department, was

A occasioned solely by organisational or budgetary reasons. Accordingly, so it might have been argued, the reality of the relationship between Mrs. Lewis and the county council was that of an employee and employer under *a single series of consecutive contracts*, each single contract in the series embracing all the work to be performed by Mrs. Lewis under one contract at the county council's three different departments of further education in any one term. This argument could
B have been advanced without any attack on the bona fides of the county council.

2. It was, however, common ground at the hearing before the industrial tribunal and the Employment Appeal Tribunal, that the separate and distinct contracts which I have described, under which over the years Mrs. Lewis worked, were quite *genuine independent contracts*.
C In neither tribunal was it sought to contend that the numerous contracts which governed Mrs. Lewis's engagement represented a mere facade designed to deprive her of the protection rights to which she would have been entitled, had her whole engagement been incorporated in a single contract of employment. On 14 June 1983 Mrs. Lewis was informed by the clerk to the governors of the West Surrey College of Art and Design that the college did not intend to offer her a part-time teaching contract
D for the next term, adding "we may be offering you contracts on a block basis for specific topics, but it is very unlikely that we shall be able to offer you regular, termly part-time contracts as in the past." Mrs. Lewis treated that as a notice entitling her to make an application for compensation for unfair dismissal/redundancy and accordingly made the appropriate application to the industrial tribunal. The county council in their answer to this application made the following allegations. (i) Mrs.
E Lewis had been employed under a series of termly fixed-term contracts with different further education colleges in the county since 17 March 1969. (ii) The employment in respect of which her originating application had been submitted was at West Surrey College of Art and Design ("W.S.C.A.D."), Farnham under two separate contracts of employment in the summer of 1983, the latter of which ended on 14 June, and also at
F Epsom School of Art and Design in the spring term 1983 which ended on 25 February. It was assumed that the claim related only to the employment at W.S.C.A.D.

3. Mrs. Lewis was employed by W.S.C.A.D. as a photography lecturer (Grade A) in the Audio Visual Studies Department under a fixed-term contract during the summer term 1983 working normally six
G hours per week, usually one day per week, starting on 27 April and ending on 14 June. Separately, she worked in the Foundation Studies Department as a casual photography lecturer (Grade B) working normally for six hours per week between 20 April and 31 May. Neither employment was renewed when it ceased.

4. Mrs. Lewis had not therefore completed one year's continuous service of 16 hours or more per week necessary to establish a right to the remedies for unfair dismissal. Additionally, she was not employed
H under a contract of employment normally involving employment for eight or more hours per week which would similarly be required, if continuous service had lasted for five or more years.

The issue

The question in this appeal is whether at the date of termination of her employment Mrs. Lewis had been continuously employed by the

county council for long enough to qualify for the statutory right to receive a redundancy payment and/or to be protected against unfair dismissal. The answer to this question depends initially upon whether the hours worked by Mrs. Lewis under these *distinct and separate concurrent contracts* as they were so held to be, can be aggregated for the purpose of determining whether, in a given week, she was employed under a contract which normally involved the minimum hours specified in the Act. It was common ground that during the period of five years immediately prior to the termination of her employment fewer than eight hours teaching per week were normally involved under her contracts taken *separately*, but more than eight hours work taken jointly.

If such aggregation is permissible the further question arises, namely, whether an interval *between these separate contracts*, as opposed to the interval between the successor and predecessor contract in the same series, breaks the continuity of employment.

The relevant statutory provisions

Unfair dismissal is dealt with in Part V of the Act. The basic provisions are contained in section 54 which provides that "In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer." "Employee" is defined by section 153(1) as meaning "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." In the same section "contract of employment" is defined as "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing." Under section 55(2)(b) of the Act, an employee shall be treated as dismissed where her contract of employment is for a fixed term which expires without being renewed by her employer. However, by section 64(1)(a) the right not to be unfairly dismissed is excluded unless at the time of dismissal the employee has been continuously employed for not less than one year and the employee may not claim a redundancy payment unless at that time she has been continuously employed for at least two years: section 81(1) and (4). The computation of periods of continuous employment is the subject matter of section 151 which provides in the first subsection that references in any provision of the Act to a period of continuous employment are, except where provision is expressly made to the contrary, to a period computed in accordance with the provisions of the section and Schedule 13.

Schedule 13 lies at the heart of the problem with which your Lordships are concerned. Paragraph 1(1) as amended by paragraph 7(2) of Schedule 2 to the Employment Act 1982 provides that a week which does not count under the provisions of paragraphs 3 to 12 breaks the continuity of the period of employment, except as otherwise provided. The exceptions have no relevance to this case. Paragraph 1(3) provides that a person's employment during any period shall, unless the contrary is shown be presumed to have been continuous. Paragraph 3 deals with normal working weeks and provides that "Any week in which the employee is employed for 16 hours or more shall count in computing a period of employment." Apart from this presumption of continuity, in order to decide whether an employee has been continuously employed for the requisite periods, the vital paragraphs of the Schedule are paragraphs 4, 6 and 9 and it is convenient to set these out in full:

A “4. Any week during the whole or part of which the employee’s relations with the employer are governed by a *contract of employment which normally involves* employment for 16 hours or more weekly shall count in computing a period of employment.”

B “6(1) An employee whose relations with his employer are governed, or have been from time to time governed, by a *contract of employment which normally involves* employment for eight hours or more, but less than 16 hours, weekly shall nevertheless, if he satisfies the condition referred to in sub-paragraph (2), be treated for the purposes of this Schedule (apart from this paragraph) as if his contract normally involved employment for 16 hours or more weekly, and had at all times at which there was a contract during the period of employment of five years or more referred to in sub-paragraph (2) normally involved employment for 16 hours or more weekly. (2) Sub-paragraph (1) shall apply if the employee, on the date by reference to which the length of any period of employment falls to be ascertained in accordance with the provisions of this Schedule, has been continuously employed within the meaning of sub-paragraph (3) for a period of five years or more. (3) In computing for the purposes of sub-paragraph (2) an employee’s period of employment, the provisions of this Schedule (apart from this paragraph) shall apply but as if, in paragraphs, 3 and 4, for the words ‘16 hours’ wherever they occur, there were substituted the words ‘eight hours.’”

E “9(1) If in any week the employee is, for the whole or part of the week—(a) incapable of work in consequence of sickness or injury, or (b) absent from work on account of a *temporary cessation of work*, or (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for all or any purposes, or (d) absent from work wholly or partly because of pregnancy or confinement, that week shall, notwithstanding that it does not fall under paragraph 3, 4 or 5, count as a period of employment. (2) Not more than 26 weeks shall count under paragraph (a) or, subject to paragraph 10, under paragraph (d) of sub-paragraph (1) between any periods falling under paragraph 3, 4 or 5.” (Emphasis added.)

The matter for construction

G 1. The question whether the hours worked by Mrs. Lewis under her distinct and separate concurrent contracts can be aggregated for the purpose of determining whether, in a given week, she was employed under a contract which qualifies her to claim that she has been unfairly dismissed or to claim redundancy payments depends upon the proper construction of the words “a contract of employment which normally involves . . .” in paragraphs 4 and 6 of Schedule 13.

H 2. The question whether an interval between these separate contracts, as opposed to an interval between the successor and predecessor contract in the same series, breaks the continuity of employment depends upon the proper interpretation of the words “a temporary cessation of work” in paragraph 9(1)(b) of Schedule 13.

The first question

The industrial tribunal approached the matter on the basis that the whole of Mrs. Lewis’s work pattern, during her entire employment by

the county council must be taken into account. Having considered the evidence that in some weeks in the last two years she had worked for less than eight hours they said:

“There is no doubt but that, looking back at the applicant’s employment as a whole, she normally worked for more than eight hours a week and often for more than sixteen, and we find that that was her normal pattern of work . . . the use of the word ‘normally’ in Schedule 13 allows for the possibility that an employee may not always work for the requisite number of hours, and we are satisfied that the weeks in which the applicant fell short do not, when compared with much more numerous weeks in which she worked for more than eight hours, break the continuity of her employment . . . all the applicant’s contracts of employment envisage the possibility of at least eight hours work during the weeks when the courses for which she was responsible were continuous . . .”

The Employment Appeal Tribunal concluded that the industrial tribunal fell into the error of simply calculating the hours worked per week and striking an average as opposed to the process of inferential analysis of the normal contractual working week. It was common ground before your Lordships that to equate hours actually worked with the normal work requirement and merely striking an average of hours worked would be an error.

Before the Employment Appeal Tribunal it was argued on behalf of Mrs. Lewis that industrial good sense and realism required paragraph 4 to be applied in such a way that the weekly hours of work found by the industrial tribunal to be involved normally under one contract should be added to the equivalent hours found in relation to another concurrent contract. It was submitted that this aggregation was not only required by general considerations of fairness but was permitted by a proper interpretation of the legislation and by the terms of paragraph 4 of Schedule 13 in particular. It was submitted that Parliament must advisedly have made use of the indefinite article and deliberately avoided a reference to any specific contract of employment as being material for consideration. However, the Employment Appeal Tribunal in a carefully reasoned judgment given by Waite J. [1986] I.C.R. 404, were unable to accept this submission. Waite J. said, at p. 413:

“The statutory code defining the requirements of continuity of employment, although it is undoubtedly complex and elaborate in its detail, appears to us to be clear and straightforward in its general terms. It is designed to place a defined limit on the otherwise unqualified right given to any employee to claim that his dismissal has been unfair or to make the corresponding claim in redundancy. At the heart of that right lies loss of employment under the particular contract of employment in relation to which the complaint of termination is made. The whole code is geared to a consideration of that particular contract. We can find no warrant for putting a gloss on the language used by Parliament which would justify any industrial tribunal in taking into account, when calculating the normal hours of work requirement for the purposes of paragraph 4 of Schedule 13 to the Act of 1978, hours worked or required to be worked under some other contract whether or not such other contract involves the same employer.”

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A In the Court of Appeal [1987] I.C.R. 232, where Mr. Sedley appeared in this appeal for the first time, his main argument was based on section 6 of the Interpretation Act 1978 which provides: "In any Act, unless the contrary intention appears . . . (c) words in the singular include the plural . . ." He submitted that applying this to section 153 of the Act, "employment means employment under a contract *or contracts* of employment" and the same phraseology can be read into paragraphs B 4 and 6 of Schedule 13. Thus, the question is, so he submitted, was the employee an employee under contracts of employment which at any one time normally involved employment for eight hours or more? This submission raises two separate questions:

C 1. Does it appear from the Act that there is an intention that section 6(c) of the Interpretation Act 1978 should not apply? and

2. Even if section 6(c) of the Interpretation Act 1978 is to apply would that solve Mrs. Lewis's problem?

D The Court of Appeal were satisfied that the contrary intention, negating the provisions of section 6(c) of the Interpretation Act 1978 did not appear in the Act. Glidewell L.J., in giving the leading judgment, recognised that in relation to some sections of the Act, the reference to an individual contract means employment under a *single* contract. He referred specifically to section 54(1) where the words are "In every employment" and section 64 where the words are "dismissal of an employee from any employment . . ." and he accepted that the use of the word "any" indicated a contrary intention to the word being used in the plural. Moreover he accepted that the phrase "the period of employment" in paragraph 1(1) of Schedule 13 could most probably only be read in the singular. Nevertheless, he was of the view that the phraseology of paragraphs 4 and 6 of Schedule 13 did not disclose an intention that the phrase "a contract of employment" should be read only in the singular and not in the plural. Purchas L.J. in expressing his agreement with the conclusion of Glidewell L.J. appeared to indicate F that there is an area in which the industrial tribunal has a discretion in deciding whether or not to aggregate hours worked under separate concurrent contracts for the purpose of satisfying the minimum hours requirement of Schedule 13. He said, at p. 244:

G "I wish to emphasise that the circumstances in which an employee may have more than one contract with an employer will vary widely from case to case. In considering other contracts of employment in relation to the particular employment in respect of the termination of which relief is being sought under the Act for the purposes of paragraphs 4, 6 and 9 of Schedule 13, the industrial tribunal will have to decide whether or not any such collateral contract forms part of the relevant relationship for the purpose of the contract under consideration. There may well be cases, particularly in the H case of vertical aggregation of employment for the purpose of paragraph 9, where separate and unconnected contracts of employment may have been made between the same employer and employee, which the industrial tribunal may consider to be irrelevant. Such considerations must depend upon the facts of each case and will be essentially matters falling within the province of the industrial tribunal. Bearing in mind the expertise enjoyed by the industrial

tribunal and their access to the details of each contract of employment, decisions as to the relevance of, and, if relevant, the true effect of, other and collateral contracts between the same employee and employer can be safely left to the tribunal.”

Purchas L.J. gave no clue as to the principles upon which this discretion should be exercised, and certainly no guidance is to be found in the Act. Indeed, Mr. Sedley did not contend for such a discretion, accepting that whether “a contract of employment” in paragraphs 4 and 6 can be pluralised is a question of law which admits of a single answer in all situations. Of course, if there was here, contrary to what was decided in the industrial tribunal and accepted in the Employment Appeal Tribunal, a single contractual relationship, the contract being for the discharge of an identified professional task on a single set of terms and conditions, the work being distributed over one or more departments or locations, no problem would have arisen and no element of discretion would have entered into the decision. There would have been no need to aggregate, the totality of the hours having all been worked under one contract, or one series of single termly contracts.

I agree with the judgment of the Employment Appeal Tribunal that at the heart of the right to claim that a dismissal has been unfair or to make the corresponding claim in redundancy lies the loss of employment under the particular contract of employment in relation to which the complaint of termination is made. The relevant provisions all focus upon that particular contract. In the case of unfair dismissal, dismissal occurs when *the* contract in respect of which complaint is made is terminated: section 55. That complaint must be presented within three months of the termination of *that* contract: section 67. Moreover, if the complaint succeeds, the applicant receives a basic award which reflects the hours worked *under the* contract in respect of which the complaint is made: Schedule 14. Schedule 13 lays down a detailed code to which reference has to be made in order to discover whether following the termination of *a* particular contract, the necessary qualifying period has been established, or to compute the length of such employment for the purposes of compensation. Accordingly, references to employment or contract of employment in Schedule 13 are focussed upon the particular contract of employment in respect of which relief is claimed under the appropriate provision of the Act.

Mr. Tabachnik in his helpful submissions on behalf of the county council placed considerable emphasis in support of his argument upon section 146(4), which section does not appear to have been considered by the Court of Appeal. It reads as follows:

“Subject to subsections (5), (6) and (7), the following provisions of this Act (which confer rights which do not depend upon an employee having a qualifying period of continuous employment) do not apply to employment under a contract which normally involves employment for less than 16 hours weekly, that is to say, sections 1, 4, 8, 27, 28 and 29.”

Section 1 imposes the obligation on the employer to give the employee written particulars of his terms of employment. Section 4 obliges the employer, where there is a change in the terms of

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A employment, to provide a written statement within a limited time of the
nature of the alteration. Section 8 deals with the right to itemised pay
statements. Sections 27, 28 and 29 deal with provisions relating to time
off work. Thus section 146(4) makes it clear that, subject to subsections
(5), (6) and (7), where the employment normally involves less than 16
B hours a week, the rights conferred by sections 1, 4, 8, 27, 28 and 29 do
not apply. To allow aggregation of the hours of a number of concurrent
short term periodic contracts involving less than 16 hours but in the
aggregate more than 16 hours thereby imposing the obligations contained
in these sections upon each and every such short term contract would be
clearly contrary to the whole scheme and purpose of section 146(4).

C Mr. Tabachnik was, in my judgment, wholly justified in pointing to
the anomalous position which would arise if aggregation were to be
permitted. Paragraph 4 of Schedule 13 contemplates that a contract will
only qualify if it is a contract for a normal working week of 16 hours
(subject, of course, to paragraph 6). If aggregation is allowed a contract
which does not qualify, because it does not satisfy the minimum hour
requirement, would nevertheless qualify if there is in existence a
D concurrent contract which also does not qualify, providing the hours
which each normally involves, when aggregated, do qualify. Thus, an
employee who is dismissed from a four hour per week contract (e.g.
lecturing to an evening class) could complain of unfair dismissal by
virtue of having a concurrent 12 hour week with the same employer
(e.g. teaching in a school) even though he had not been dismissed from
the 12 hour employment. Moreover, further complications arise if
aggregation is permitted, in cases where contracts of employment are
E not operating contemporaneously. Is one to look at each separately and
add the result together? How far, if at all, are periods carried over,
where the pattern of employment changes as in this case, in relation to
the very limited periods of teaching on the foundation course. In my
judgment, if Parliament had intended that hours worked under separate
concurrent contracts were to be aggregated for the purposes of
F paragraphs 4 and 6 of Schedule 13 it would have provided guidance as
to how this was to be done. The total absence of any reference to
aggregation seems to me to be the clearest indication that aggregation is
not permissible.

G But even if section 6(c) of the Interpretation Act 1978 was to permit
“pluralisation” with the result that paragraph 4 would read “by contracts
of employment which normally involve employment for . . .” this would
clearly create an ambiguity. Does the minimum hours requirement relate
to each such contract or to the contracts taken together. The only
solution for avoiding this ambiguity would be to add the further words
“taken cumulatively.” For reasons I have given I can see no justification
for that implication.

H *The second question*

In the light of my decision on the first question, namely that there is
no entitlement to aggregate the hours worked on separate and distinct
contracts, the question as to whether there was *continuity* of employment
over a sufficient period of time does not arise. However, in deference to
the submissions addressed to your Lordships, I will shortly give my view
on this aspect of the appeal. The scope and operation of the words “a

temporary cessation of work" in paragraph 9(1)(b) of Schedule 13 was considered by your Lordships' House in *Ford v. Warwickshire County Council* [1983] 2 A.C. 71. Mrs. Ford was also a teacher. She had been employed by the county council on a series of consecutive fixed-term contracts, each for an academic year, for a total of eight years. There was no question of her being employed under separate and concurrent contracts. In her case there was a break each summer between the end of one contract and the beginning of the next contract. Your Lordships held that paragraph 9(1)(b) of Schedule 13 could apply to preserve the continuity of her employment. In his speech Lord Diplock said, at p. 81:

"My Lords, since paragraph 9 only applies to an interval of time between the coming to an end of one contract of employment and the beginning of a fresh contract of employment, the expression 'absent from work' where it appears in paragraph 9(1)(b), (c) and (d), must mean not only that the employee is not doing any actual work for his employer but that there is no contract of employment subsisting between him and his employer that would entitle the latter to require him to do any work. So, in this context, the phrase 'the employee is . . . absent from work on account of a temporary cessation of work' as descriptive of a period of time, as it would seem to me, must refer to the interval between (1) the date on which the employee would otherwise be continuing to work under an existing contract of employment is dismissed because for the time being his employer has no work for him to do, and (2) the date on which work for him to do having become again available, he is re-engaged under a fresh contract of employment to do it; . . ."

At a later stage in his speech, Lord Diplock said, at pp. 83-84:

"In harmony with what this House held in *Fitzgerald's* case [1970] A.C. 984, paragraph 9(1)(b), in cases of employment under a succession of fixed term contracts of employment with intervals in between, requires one to look back from the date of the expiry of the fixed term contract in respect of the non-renewal of which the employee's claim is made over the whole period during which the employee has been intermittently employed by the same employer, in order to see whether the interval between one fixed term contract and the fixed term contract that next preceded it was short in duration relative to the combined duration of those two fixed term contracts during which work had continued; for the whole scheme of the Act there appears to me to show that it is in the sense of 'transient', i.e. lasting only for a relatively short time, that the word 'temporary' is used in paragraph 9(1)(b). So, the continuity of employment for the purposes of the Act in relation to unfair dismissal and redundancy payments is not broken unless and until, looking backwards from the date of the expiry of the fixed term contract on which the employee's claim is based, there is to be found between one fixed term contract and its immediate predecessor an interval that cannot be characterised as short relatively to the combined duration of the two fixed term contracts."

Thus, paragraph 9 is dealing only with periods which are not to be treated as interrupting a continuous period of employment under a

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A contract of employment, notwithstanding that during the period of interruption there is in law no subsisting contract of employment. This is to be contrasted with the situation where there is a subsisting contract of employment and which is catered for by paragraphs 4 to 7 of the same Schedule 13. As Mr. Tabachnik rightly submits, there is thus a dovetailing between paragraphs 4 to 7 on the one hand, and paragraph 9 on the other and to “aggregate” would disrupt this scheme. Moreover, to assess “temporary cessation” by reference to contracts other than the successor and predecessor contracts in the same series would give rise to comparable anomalies. Moreover, following the decision in *Ford’s* case [1983] 2 A.C. 71, the continuity of a succession of fixed term contracts of employment with intervals between them, which would satisfy the continuity test required by paragraph 9(1)(b), would, however, fail if there was a concurrent contract for say a two hour per week evening class continuing throughout the year, unless the series of fixed term contracts are to be viewed in isolation. Further, as was pointed out during submissions, unless one series of contracts is considered in isolation from another, there would be anomalous consequences for the employer, since an interval which does not amount to a temporary cessation and which would therefore break continuity, would be disregarded simply because another series of contracts subsist during the interval. To my mind the whole thrust of the decision in *Ford’s* case suggests that employment which is not pursuant to contracts in the same series is irrelevant in assessing whether an interval constitutes a “temporary cessation.”

I would therefore, with reluctance, allow this appeal. My reluctance is not to be ascribed to any hesitation to accept the validity of the interpretation which I have put upon the relevant provisions of the Act, but to the consequences to Mrs. Lewis. As I have sought to underline in the course of expressing my views, this result follows from the finding, which your Lordships are obliged to accept, that she was employed under and pursuant to a series of separate and distinct concurrent contracts. The Employment Appeal Tribunal were well alive to the possibility that a case might occur in which, to quote the words of Waite J. [1986] I.C.R. 404, 409–410:

“an unscrupulous employer, served by an employee in diverse capacities or in different workplaces, would be found deliberately to have subjected the employment relationship to a mosaic of separate contracts dealing individually with each function, or each workplace, for the purpose of depriving the employee of the protection rights to which he would have been entitled had his whole engagement been incorporated in a single employment contract.”

The Employment Appeal Tribunal rightly took the view that the industrial tribunal could be safely trusted to penetrate the superficial disguise, to look to the substance of the arrangements and not to the form and to arrive (in pursuance of the fact-finding mission which is their exclusive function) at a conclusion that the purported multiple contracts were in reality one single contract. I would add that if the facts fitted, it would also be open to an industrial tribunal to find that, even though there were separate contracts, there was also a unifying contract of employment collateral to the separate contracts, of the type which has been referred to as an “umbrella contract” of employment (see *O’Kelly*

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v. *Trusthouse Forte Plc.* [1984] Q.B. 90, 124H) under which the minimum hours requirements were satisfied.

LORD OLIVER OF AYLMEYTON. My Lords, I have had the advantage of reading in draft the speeches delivered by my noble and learned friends Lord Hailsham of St. Marylebone and Lord Ackner. I agree that the appeal should be allowed for the reasons which they have given.

Appeal allowed.
Legal aid taxation.

Solicitors: Sharpe, Pritchard & Co.; Seifert Sedley Williams.

J. A. G.

[COURT OF APPEAL]

ATTORNEY-GENERAL v. NEWSPAPER PUBLISHING PLC.
AND OTHERS

1987 May 20, 21;
June 2

Sir Nicolas Browne-Wilkinson V.-C.

1987 June 22, 23, 24;
July 13, 14, 15; 17

Sir John Donaldson M.R.,
Lloyd and Balcombe L.JJ.

Contempt of Court—Pending proceedings—Third party—Action to preserve confidential information—Interim injunctions granted prohibiting publication pending trial—Third party publishing information—Whether third party in contempt of court

In 1985, the Attorney-General brought an action in Australia to restrain a retired officer of the British Security Service from publishing his memoirs in breach of his duty of confidentiality to the Crown. Pending the trial, the officer and his publishers gave an undertaking in court not to publish. In 1986, the Attorney-General brought actions in England to restrain the "Observer" and "The Guardian" newspapers from publishing material from the memoirs. Pending the English proceedings, in which interim injunctions against the publication had been granted, extensive extracts and summaries of the memoirs appeared in "The Independent" and two other English newspapers. On an application to commit the three newspapers for contempt of court, the Vice-Chancellor held, in a preliminary ruling, that since the respondents were neither parties to the actions nor subject to the injunctions, their conduct in publishing the memoirs with knowledge of the outstanding injunctions did not constitute a criminal contempt of court.

On appeal by the Attorney-General:—

Held, allowing the appeal, that the purpose of granting the injunctions in the Guardian and Observer actions was to preserve the confidential nature of the information pending the trial of the actions in circumstances where any prior publication

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A would destroy the subject matter of those actions; that the destruction of the subject matter of a pending action impeded or prejudiced the administration of justice and, therefore, a third party who published information alleged to be confidential, knowing that it was the subject matter of a pending action and the subject of a court order prohibiting its publication, committed the actus reus of contempt of court; and that, accordingly, the matter would be remitted to the High Court for that court to determine whether the respondents intended to impede or prejudice the administration of justice (post, pp. 975A, 976D-E, 977D, H—978A, C-D, 982B-C, G—983A, 985A, H, 988D, H—989D).

B Lord Wellesley v. Earl of Mornington (No. 1) (1848) 11 Beav. 180; Lord Wellesley v. Earl of Mornington (No. 2) (1848) 11 Beav. 181; Smith-Barry v. Dawson (1891) 27 L.R. Ir. 558; Z Ltd. v. A-Z and AA-LL [1982] Q.B. 558, C.A. and In re X (A Minor) (Wardship: Injunction) [1984] 1 W.L.R. 1422 considered.

C Per Balcombe L.J. It would be preferable, where it is apparent that the subject matter of an action could be destroyed by its publication by any person, whether a party to the action or not, for the court to make its initial protective order in terms which make it clear to third parties that they, too, must not destroy the subject matter (post, p. 989E-F).

D Decision of Sir Nicolas Browne-Wilkinson V.-C., post, pp. 946B et seq. reversed.

The following cases are referred to in the judgments in the Court of Appeal:

- Attorney-General v. Butterworth [1963] 1 Q.B. 696; [1962] 3 W.L.R. 819; [1962] 3 All E.R. 326, C.A.
- E Attorney-General v. Leveller Magazine Ltd. [1979] A.C. 440; [1979] 2 W.L.R. 247; [1979] 1 All E.R. 745, H.L.(E.)
- Attorney-General v. News Group Newspapers Ltd. [1987] Q.B. 1; [1986] 3 W.L.R. 365; [1986] 2 All E.R. 833, C.A.
- Attorney-General v. The Observer Ltd., The Times, 26 July 1986; Court of Appeal (Civil Division) Transcript No. 696 of 1986, C.A.
- Attorney-General v. Times Newspapers Ltd. [1974] A.C. 273; [1973] 3 W.L.R. 298; [1973] 3 All E.R. 54, H.L.(E.)
- F Bassel's Lunch Ltd. v. Kick (No. 1) [1936] O.R. 445
- Bassel's Lunch Ltd. v. Kick (No. 2) [1937] 1 D.L.R. 235
- Bonnard v. Perryman [1891] 2 Ch. 269, C.A.
- Brydges v. Brydges and Wood [1909] P. 187, C.A.
- Catkey Construction Ltd. v. Moran (1969) 8 D.L.R. (3d) 413
- F. (or se A.) (A Minor) (Publication of Information), In re [1977] Fam. 58; [1976] 3 W.L.R. 813; [1977] 1 All E.R. 114, C.A.
- G Galaxia Maritime S.A. v. Mineralimportexport [1982] 1 W.L.R. 539; [1981] 1 All E.R. 796, C.A.
- Ismail v. Polish Lines [1976] Q.B. 893; [1976] 2 W.L.R. 477; [1976] 1 All E.R. 902, C.A.
- Iveson v. Harris (1802) 7 Ves.Jun. 251
- Johnson v. Grant, 1923 S.C. 789
- Marengo v. Daily Sketch and Sunday Graphic Ltd. [1948] 1 All E.R. 406, H.L.(E.)
- H Ranson v. Platt [1911] 2 K.B. 291, C.A.
- Reg. v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society [1984] Q.B. 227; [1984] 2 W.L.R. 370; [1984] 2 All E.R. 27, C.A.
- Reg. v. Moloney [1985] A.C. 905; [1985] 2 W.L.R. 648; [1985] 1 All E.R. 1025, H.L.(E.)
- Scott v. Scott [1913] A.C. 417, H.L.(E.)
- Seaward v. Paterson [1897] 1 Ch. 545, C.A.

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- Smith-Barry v. Dawson* (1891) 27 L.R. Ir. 558
Sunday Times, The v. United Kingdom [1979] 2 E.H.R.R. 245
Tilco Plastics Ltd. v. Skurjat (1966) 57 D.L.R. (2d) 596
United Kingdom Nirex Ltd. v. Barton, *The Times*, 14 October 1986
Wellesley (Lord) v. Earl of Mornington (No. 1) (1848) 11 Beav. 180
Wellesley (Lord) v. Earl of Mornington (No. 2) (1848) 11 Beav. 181
X (A Minor) (Wardship: Injunction), In re [1984] 1 W.L.R. 1422; [1985] 1 All E.R. 53
Z Ltd. v. A-Z and AA-LL [1982] Q.B. 558; [1982] 2 W.L.R. 288; [1982] 1 All E.R. 556, C.A.

The following additional cases were cited in argument in the Court of Appeal:

- Acrow (Automation) Ltd. v. Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676; [1971] 3 All E.R. 1175, C.A.
Balogh v. St. Albans Crown Court [1975] Q.B. 73; [1974] 3 W.L.R. 314; [1974] 3 All E.R. 283, C.A.
Elliot v. Klinger [1967] 1 W.L.R. 1165; [1967] 3 All E.R. 141
Littler v. Thomson (1839) 2 Beav. 129
Project Development Co. Ltd. S.A. v. K.M.K. Securities Ltd. [1982] 1 W.L.R. 1470; [1983] 1 All E.R. 465
Reg. v. Belfon [1976] 1 W.L.R. 741; [1976] 3 All E.R. 46, C.A.
Reg. v. Evening Standard Co. Ltd. [1954] 1 Q.B. 578; [1954] 2 W.L.R. 861; [1954] 1 All E.R. 1026, D.C.
Reg. v. Griffiths, Ex parte Attorney-General [1957] 2 Q.B. 192; [1957] 2 W.L.R. 1064; [1957] 2 All E.R. 379, D.C.
Reg. v. Hancock [1986] A.C. 455; [1986] 2 W.L.R. 357; [1986] 1 All E.R. 641, H.L.(E.)
Reg. v. Hyam [1975] A.C. 55; [1974] 2 W.L.R. 607; [1974] 2 All E.R. 41, H.L.(E.)
Reg. v. Ingrams, Ex parte Goldsmith [1977] Crim.L.R. 40, D.C.
Reg. v. Machin [1980] 1 W.L.R. 763; [1980] 3 All E.R. 151, C.A.
Reg. v. Nedrick [1986] 1 W.L.R. 1025; [1986] 3 All E.R. 1, C.A.
Reg. v. Odhams Press Ltd., Ex parte Attorney-General [1957] 1 Q.B. 73; [1956] 3 W.L.R. 796; [1956] 3 All E.R. 494, D.C.
Reg. v. Thomas (Derek) [1979] Q.B. 326; [1979] 2 W.L.R. 144; [1979] 1 All E.R. 577, C.A.
Rex v. Tibbits and Windust [1902] 1 K.B. 77
Reg. v. Withers [1975] A.C. 482; [1974] 3 W.L.R. 751; [1974] 3 All E.R. 984, H.L.(E.)
Thorne Rural District Council v. Bunting (No. 2) [1972] 3 All E.R. 1084, C.A.

The following cases are referred to in the judgment of Sir Nicolas Browne-Wilkinson V.-C.:

- Bassel's Lunch Ltd. v. Kick (No. 1)* [1936] O.R. 445
Bassel's Lunch Ltd. v. Kick (No. 2) [1937] 1 D.L.R. 235
Catkey Construction Ltd. v. Moran (1969) 8 D.L.R. (3d) 413
Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd. [1978] 1 W.L.R. 966; [1978] 3 All E.R. 164, C.A.
Marengo v. Daily Sketch and Sunday Graphic Ltd. [1948] 1 All E.R. 406, H.L.(E.)
Mareva Compania Naviera S.A. v. International Bulkcarriers Ltd. [1975] 2 Lloyd's Rep. 509
Seaward v. Paterson [1897] 1 Ch. 545, C.A.
Smith-Barry v. Dawson (1891) 27 L.R. Ir. 558
Tilco Plastics Ltd. v. Skurjat, In re (1966) 57 D.L.R. (2d) 596
United Kingdom Nirex Ltd. v. Barton, *The Times*, 14 October 1986, Henry J.

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- A *Wellesley (Lord) v. Earl of Mornington (No. 1)* (1848) 11 Beav. 180
Wellesley (Lord) v. Earl of Mornington (No. 2) (1848) 11 Beav. 181
X (A Minor) (Wardship: Injunction), In re [1984] 1 W.L.R. 1422; [1985] 1 All E.R. 53
Z Ltd. v. A-Z and AA-LL [1982] Q.B. 558; [1982] 2 W.L.R. 288; [1982] All E.R. 556
- B The following additional cases were cited in argument before Sir Nicolas Browne-Wilkinson V.-C.:
- Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440; [1979] 2 W.L.R. 247; [1979] 1 All E.R. 745, H.L.(E.)
Attorney-General v. Times Newspapers Ltd. [1974] A.C. 273; [1973] 3 W.L.R. 298; [1973] 3 All E.R. 54, H.L.(E.)
- C *Elliott v. Klinger* [1967] 1 W.L.R. 1165; [1967] 3 All E.R. 141
F. (or se. A) (A Minor) (Publication of Information), In re [1977] Fam. 58; [1976] 3 W.L.R. 307; [1976] 3 All E.R. 274
Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A. [1981] Q.B. 65; [1980] 2 W.L.R. 488; [1980] 1 All E.R. 480
Iveson v. Harris (1802) 7 Ves.Jun. 251
Montague v. Hill (1827) 4 Russ. 128
- D *Thorne Rural District Council v. Bunting (No. 2)* [1972] 3 All E.R. 1084, C.A.

SUMMONS

The Attorney-General brought proceedings against, inter alia, Guardian Newspapers Ltd. and Observer Ltd. for injunctions restraining publication of extracts of Peter Maurice Wright's book *Spycatcher* in "The Guardian" and "Observer" newspapers on the ground that the book included confidential information obtained by Mr. Wright as an employee in the British Security Service. On 25 July 1986, the Court of Appeal granted an injunction restraining publication of extracts from the book in those two newspapers until trial of the actions.

On 27 April 1987, articles appeared in "The Independent" newspaper which included information obtained from Mr. Wright's manuscript of *Spycatcher* and that was followed by similar articles in "The London Evening Standard" and "The London Daily News." By notice of motion dated 11 May 1987, the Attorney-General alleged contempt of court against the six respondents, the publisher of "The Independent," Newspaper Publishing Plc., its editor, Andreas Whittam Smith, the publisher of "The London Evening Standard," Evening Standard Co. Ltd., its editor, John Leese, and the publisher of "The London Daily News," London Daily News Ltd., and its editor, Magnus Linklater. The grounds of the application were that the conduct of the respondents in publishing the articles was intended or calculated to impede, obstruct or prejudice the administration of justice in that they were severally intended or calculated and in any event likely to thwart orders of the Court of Appeal made on 25 July 1986 in the High Court proceedings brought by the Attorney-General against Guardian Newspapers Ltd. and Observer Ltd. The relief sought was that the respondent publishers should be fined and that the respondent editors be committed to prison for their contempt.

The facts are stated in the judgments of Sir Nicolas Browne-Wilkinson V.-C. and Sir John Donaldson M.R.

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[1987]

*John Laws and Philip Havers for the Attorney-General.**Christopher Clarke Q.C. and Adrienne Page for the publisher and editor of "The Independent."**John Mathew Q.C. and Jonathan Caplan for the publisher and editor of "The London Evening Standard."**Charles Gray Q.C. and David Pannick for the publisher and editor of "The London Daily News."**Cur. adv. vult.*

2 JUNE. SIR NICOLAS BROWNE-WILKINSON V.-C. read the following judgment. This is a motion brought by the Attorney-General alleging that the proprietors and editors of three newspapers, "The Independent," "The London Evening Standard" and "The London Daily News" have committed contempts of court. The alleged contempts lie in the publication on 27 April 1987 of certain articles referring to the memoirs of Peter Maurice Wright and to information contained in such memoirs. The actual point for decision, although difficult and important, is a narrow one. But I must first explain the background.

Mr. Wright was for many years a member of the British Security Service, holding senior positions with access to highly classified and sensitive information. He retired in 1976 and went to live in Tasmania. He considered that the Security Service had been penetrated by foreign agents and called for an inquiry. When no inquiry was held, he decided to publish his memoirs disclosing facts supporting not only the allegation of penetration of the Security Service by foreign agents but also making other allegations of unlawful conduct by members of the Security Service. In 1985 it was proposed to publish Mr. Wright's memoirs in Australia. On discovering the proposed publication the Attorney-General took proceedings in the Supreme Court of New South Wales against Mr. Wright and the publishers claiming an injunction restraining publication on the ground that the publication would be a breach of the duty of confidentiality owed to the Crown as Mr. Wright's former employers. The defendants in the Australian proceedings gave undertakings pending trial not to disclose information obtained by Mr. Wright as an officer of the British Security Service.

On 22 and 23 June 1986 (before the trial of the Australian proceedings) the "Observer" and "The Guardian" newspapers published articles outlining a number of the allegations which were said to be contained in the Wright memoirs. The Attorney-General then applied in the High Court in England for injunctions against the "Observer" and "The Guardian" restraining them from making any publication. His claim was again based on the principle that the information in the memoirs is confidential. Ex-parte injunctions were granted. The matter then came before Millett J. inter partes. On 11 July 1986 Millett J. granted interlocutory injunctions against "The Guardian" and the "Observer" until trial or further order ("the 1986 injunctions"). The proceedings before me relate to the 1986 injunctions which, so far as relevant, read:

"The defendants and each of them be restrained until trial or further order from doing whether by himself or itself or by his or its servants or agents or any of them or otherwise howsoever the following acts or any of them that is to say: 1. Disclosing or

- A publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know or have reasonable grounds to believe to have come or been obtained whether directly or indirectly from the said Peter Maurice Wright. 2. Attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise."
- B

C There were two provisos: the first permitted quotation of attributions to Mr. Wright contained in works or broadcasts previously published; the second provided that disclosure of any information to be disclosed in the Supreme Court of New South Wales would not be a breach of the order.

D "The Guardian" and the "Observer" appealed to the Court of Appeal. Millett J.'s decision was upheld save that a further proviso permitting the reporting of proceedings in the United Kingdom Parliament and law courts was added. The Court of Appeal refused leave to appeal to the House of Lords but leave was subsequently granted by the House of Lords. That appeal is due to be heard before the end of July.

E The reasons given by both Millett J. and the Court of Appeal for their decision to grant the 1986 injunctions were broadly the same. Mr. Wright as a member of the Security Service owed the highest duty of confidentiality to the Crown, which duty would be breached by his publication of any memoir based on his experience in the service. It is essential for the proper working of the Security Service that all its dealings are totally confidential and are seen to be such; if former members are free to publish memoirs of their experiences, the Security Service would not appear to be leak proof which would gravely harm its relations with the security services of other friendly powers. In addition, although the memoirs were based on matters no more than 10 years old, the memoirs were said to contain information which was still extremely sensitive and might harm the operations of the British Security Service if disclosed. These facts, on which the decisions were based, were all derived from affidavits sworn by the Secretary to the Cabinet, Sir Robert Armstrong, which, as the Court of Appeal emphasised, were uncontroverted in the evidence before the court. The court held that on an interlocutory application the public interest in preserving the confidentiality of the Security Service outweighed the public interest relied upon by "The Guardian" and the "Observer," namely, the general freedom of newspapers to publish news and the need to disclose the allegations of unlawful conduct by the Security Service. Both courts were influenced, amongst other things, by the fact that the unlawful conduct alleged took place so long ago and by the lack of evidence that there was any overwhelming need to publish the allegations immediately instead of waiting until after the hearing of the action. This is an inadequate précis of the very full judgments delivered; but it is sufficient for present purposes.

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The Australian case was tried by Powell J. at the end of 1986. It lasted for many weeks. Sir Robert Armstrong was cross-examined. Both that cross-examination and the whole of the proceedings received exceptionally detailed reporting in the media, not only in this country but world-wide. Powell J. gave judgment on 13 March 1987 dismissing

the Attorney-General's claim in Australia for injunctions against the publication of Mr. Wright's memoirs. The judgment runs to some 286 pages but it is unnecessary to refer to it save to mention that Powell J. found the evidence given by Sir Robert Armstrong in some respects unsatisfactory and unreliable. The Attorney-General has appealed in the Australian courts against the decision of Powell J. That appeal is due to be heard in July. The defendants in Australia have given undertakings pending the hearing of the appeal not to publish Mr. Wright's memoirs.

This was the position which obtained when, on 27 April 1987, "The Independent" published the articles complained of. The articles took up the whole of the front page of "The Independent." They stated that the newspaper had received a copy of the manuscript of Mr. Wright's memoirs and then published the gist of a number of allegations contained in the book expressly ascribing them to Mr. Wright. The articles contained passages purporting to be verbatim quotations from the memoirs. In addition they contained details of the facts alleged in the Wright memoirs in support of the allegations made by Mr. Wright that the Security Service had been guilty of unlawful conduct. On the same day, "The London Evening Standard" and "The London Daily News" quoted those stories from "The Independent" although in considerably less detail. Although not in terms admitted, it appears that "The Independent" and the other two newspapers had done exactly what "The Guardian" and the "Observer" were restrained from doing by the 1986 injunctions.

The Attorney-General's response was to make an immediate application to the Queen's Bench Divisional Court for leave to move against the three newspapers for contempt of court. Leave was granted on 29 April. Although the Attorney-General was anxious to have the application determined speedily (as was "The London Daily News") "The Independent" wished to conduct considerable research before putting in evidence in answer: no direction for speedy trial was made. On the same day that leave was granted to bring the contempt proceedings, 29 April, "The Guardian" and the "Observer" gave notice of motion in the Chancery Division to discharge or vary the 1986 injunctions. The motion came before me on 7 May 1987. There were two grounds for the application: the first relied on what had transpired in the Australian courts and in particular on the evidence given by Sir Robert Armstrong under cross-examination; the second relied on the publication of the articles in the three newspapers which had been followed by a large number of other reports (both here and abroad) revealing the allegations made and ascribing them to Mr. Wright. This second ground gave rise to the formidable argument: how can it be right to continue an injunction which prevents only "The Guardian" and the "Observer" from publishing matters which the rest of the world are freely publishing?

It seemed to me that the validity of the second ground on which "The Guardian" and the "Observer" were relying largely depended on whether or not the publications by other papers were contempts of court and could therefore be punished or restrained. Doubts had arisen whether the contempt proceedings were properly brought in the Queen's Bench Division since they relate to an order made in the Chancery Division. I therefore suggested (and I must take full responsibility for the suggestion if it is thought to be mistaken) that the contempt proceedings against the three newspapers should be brought before me

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Sir Nicolas
Browne-Wilkinson V.-C.

A by a fresh notice of motion so that I could first determine the preliminary point of law whether the publication could be a contempt of court, given that the three newspapers (as opposed to "The Guardian" and "Observer") were not subject to any order restraining them from publishing the material. This suggestion was adopted and I directed a preliminary point of law in these terms:

B "Whether a publication made in the knowledge of an outstanding injunction against another party, and which if made by that other party would be in breach thereof, constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction."

This is my judgment on that preliminary point of law.

C In outline the parties' submissions are as follows. Mr. Laws, for the Attorney-General, accepts that the publication by the three newspapers did not constitute a breach of the 1986 injunctions since the publication was not made by the only persons restrained by the 1986 order but independently by the three newspapers. However, says Mr. Laws, there are two types of contempt. The first is civil contempt which consists of a breach by a party to proceedings of an order made against him; that is not the present case. The second type is a criminal contempt which consists of conduct which frustrates or impedes the due administration of justice: that, says Mr. Laws, is the present case. The conduct of the three newspapers in publishing the very material publication of which, to the knowledge of the newspapers, Millett J. and the Court of Appeal have held to be contrary to the public interest constitutes a criminal contempt in that it thwarts and frustrates the 1986 injunctions. They were made for the purpose of preserving the right of the Crown to preserve the confidentiality of the matters contained in Mr. Wright's memoirs. If those memoirs or excerpts therefrom are published by others, that very confidentiality has gone, robbing the 1986 injunctions of their utility and indeed destroying the very subject matter of the action i.e. the confidentiality of the information. What is more, in frustrating an interlocutory order by publication, the three newspapers have deprived or impaired the Crown's right to a trial on the merits of the main hearing of the action against "The Guardian" and "Observer;" the sole, or main, purpose of such hearing would be to obtain a permanent injunction so as to preserve the secrecy of the information relating to the Security Service which, in the public interest, must remain confidential. So runs the argument for the Crown.

G On the other side, the three newspapers contend that the Attorney-General is seeking to widen the law of criminal contempt and that any extension of the criminal law is nowadays a matter for Parliament, not the judges. To hold that a third party, who is not subject to the order, is bound to give effect to its purpose would run contrary to the whole basis of English law: the court decides the issues between the parties before it and makes orders which bind the parties only. The court acts in personam not in rem. To hold the three newspapers guilty of contempt by breaking the spirit, but not the letter, of the 1986 injunctions would offend all the basic principles of natural justice: they would be held guilty of a crime in treating as not applicable to them an order not directed to them, made by a court which had not given them an opportunity to be heard and which made its order in ignorance of the facts and circumstances applicable to the three newspapers. Moreover,

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once the Crown accepts that there is no breach of the 1986 injunctions, what constitutes contempt by acting contrary to the purpose or spirit of that order becomes wholly uncertain.

Before dealing with these arguments, there are two fundamental factors which have to be borne in mind. First, this case arises out of facts affecting national security and state secrets which have attracted massive attention from the media. But that background must not obscure the fact that the only right asserted by the Crown before Millett J. and the Court of Appeal and the only right protected by the 1986 injunctions is a private right of action under the civil law viz. the right of an employer to restrain a former employee from disclosing confidential information. Of necessity, the public interest in preserving national security was a major factor in assessing the degree of confidentiality required of a member of the Security Service and in considering the balance of convenience. But the basic right protected by the 1986 injunctions is exactly the same as the right of a manufacturer to stop an employee disclosing trade secrets or of one spouse to restrain the other from revealing "pillow-talk." The court in granting the 1986 injunctions was not enforcing any public right referable to the preservation of official secrets or the public welfare.

The second factor flows from the first. Since the 1986 injunctions are protecting a private, not a public, right of the Crown, the question I have to determine will affect many other types of case involving private litigants in which the Crown is not a party. In such cases no question of national interest or national security will apply. It is therefore important not to allow the decision in this case to be overborne by the desire to preserve state secrets. If the Attorney-General is right in the principle he asserts in this case it will be applicable in many other cases as between private individuals where no question of security arises. It is important not to distort the general law of contempt so as to make it applicable in such cases in a manner which would be capricious, unfair or unworkable. As I have said, the three newspapers allege that the Attorney-General is extending the law of contempt. Mr. Laws, whilst denying that he is seeking any extension of the law, accepts that I am being asked to elucidate the application of a general principle to a new state of facts. Either way, I must first consider how the law presently stands.

The basic principles of criminal contempt are not in dispute. It has often been said that contempt of court is an unhappy phrase, suggesting as it does that a judge is concerned to protect his personal or judicial dignity. That is far from the case. One of the foundations of a free society is that there should be courts to which all can have access, in which the justice dispensed is impartial and whose orders are obeyed. The law of contempt is the means by which these vital requirements are preserved. Thus to seek to prevent or dissuade a litigant or witness from coming to court is a criminal contempt. So is any interference with the impartiality of the judge or jury. So is any interference with the course of the trial. Disobedience to a court order by a party to the proceedings against whom the order has been made is a civil contempt. I accept fully that the public interest in ensuring far and effective justice is very great. However, I am not prepared to go as far as Mr. Laws submitted in holding that a judge should prefer that public interest to any other public interest with which it may come in conflict: there are many cases where such preference has not been given, for example, in allowing the

- A public interest in preserving the confidentiality of certain documents to outweigh the requirements of justice that they should be available as evidence in a trial.

The English authorities demonstrate that hitherto actions by a third party which interfere with a court order have only been held to constitute a criminal contempt of court if both (a) the action by the third party complained of constituted a breach of the express terms of the order; and (b) the third party has aided and abetted or been privy or party to a breach of the order by the person enjoined by the order. In this judgment I will refer to the plaintiff in the proceedings as "A," the defendant in the proceedings who is enjoined from doing the act complained of as "B" and the third party who is not a defendant and is not enjoined by the express terms of the order from doing the act, as "C."

The authorities establish that if B breaches the order he is guilty of a civil contempt which the court will punish in proceedings brought by A: see *Seaward v. Paterson* [1897] 1 Ch. 545. If C aids and abets B to do the act which B is enjoined from doing, he does not commit a breach of the order. In *Lord Wellesley v. Earl of Mornington* (1848) 11 Beav. 180 the agent of Lord Mornington who cut down the trees which Lord Mornington was forbidden to fell was held not guilty of the civil contempt of disobedience of the order against Lord Mornington. However, one month later, the agent was held liable in criminal contempt in knowingly aiding and abetting a breach of the order: see *Lord Wellesley v. Earl of Mornington (No. 2)* (1848) 11 Beav. 181. Lord Langdale M.R., at p. 183, said that the agent

"in the position in which he was, and knowing the duty of the Earl of Mornington, ought to have taken care not to do any acts, in violation of the order of the court."

The same conclusion was reached in *Seaward v. Paterson* [1897] 1 Ch. 545. The rationale behind holding C liable for criminal contempt was set out by Lindley L.J. in *Seaward v. Paterson*, at p. 554:

"Now let us consider what jurisdiction the court has to make an order against [C]. There is no injunction against him—he is no more bound by the injunction granted against [B] than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction, which has a technical meaning. . . . It has always been familiar doctrine . . . that the orders of the court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the court, or by assisting those who are bound by its orders."

Mr. Laws submits that, although the actual decision does not cover the present case, the rationale extends to a case such as the present where C has not aided and abetted B and there has been no breach of

the express terms of the order. It is to be noted that in those two cases (and indeed in all the other cases cited to me) although C is said to be in criminal contempt, the proceedings to punish such criminal contempt have been brought by A (the plaintiff in the main proceedings) and not by the Attorney-General.

Mr. Laws also relied on the decision of the Court of Appeal in *Z Ltd. v. A-Z and AA-LL* [1982] Q.B. 558. In that case the Court of Appeal considered the impact of a *Mareva* injunction on banks holding the assets of the defendant against whom the order was made. In particular, it considered the position where the bank, but not the defendant who was enjoined, had been served with the order. It was argued that in such a case the bank could not be guilty of contempt of court by disposing of the defendant's assets under its control since the defendant could not himself be in contempt: the bank could not be aiding and abetting someone who was not himself in contempt. The Court of Appeal rejected this argument. Lord Denning M.R., at pp. 572-573, founded his decision that the bank could be in contempt on the ground that a *Mareva* order operated in rem in the same way as an Admiralty order arresting a ship. With respect, I am unable to accept this as being correct. The Court of Appeal in an earlier case, *Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd.* [1978] 1 W.L.R. 966 (which was not cited in the *Z Ltd.* case) expressly held that a *Mareva* injunction does not operate in rem but in personam: see *per* Buckley L.J. at pp. 974c and 976g.

Reverting to the *Z Ltd.* case [1982] Q.B. 558, Eveleigh L.J. did not adopt the same reasoning as Lord Denning M.R. He said, at p. 578:

"I think that the following propositions may be stated as to the consequences which ensue when there are acts or omissions which are contrary to the terms of an injunction. (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction. . . . I will give my reasons for the second proposition and take first the question of prior notice to the defendant. It was argued that the liability of a third party arose because he was treated as aiding and abetting the defendant (i.e. he was an accessory) and as the defendant could himself not be in breach unless he had notice it followed that there was no offence to which the third party could be an accessory. In my opinion this argument misunderstands the true nature of the liability of the third party. He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted."

As those words made clear, Eveleigh L.J. was considering a case where the act of C (the bank) did constitute a breach of the order. Although B (the defendant) could not be liable for contempt until he had notice of the order, the order took immediate effect. Therefore if a bank in

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A handling B's money disposes of it, the bank is a party to a breach of the precise terms of the order. The *Z Ltd.* case shows that an act by C can be a criminal contempt even if, in terms of strict criminal law, C is not aiding and abetting B to commit the breach. But it is no authority for the proposition that C can be liable for doing or being party to any act which does not constitute a breach of the precise terms of the order.

B Mr. Laws also relied on a recent decision of Henry J. in *United Kingdom Nirex Ltd. v. Barton*, The Times, 14 October 1986 in which, at the end of a judgment in which he varied two injunctions granted against named defendants in a representative capacity so as to exclude such representative capacity, he said that if anyone were knowingly to do the acts which the named defendants were enjoined from doing that would prima facie be a wrongful interference with the administration of justice and would be a contempt. For this proposition he relied on the C *Z Ltd.* case [1982] Q.B. 558. Although this directly supports Mr. Laws's main submissions, those remarks were obiter dicta and, so far as the judgment shows, were made without much argument being directed to the point.

D Certain Canadian authorities were referred to in argument. The guidance they offer is limited and confused. In English law an order should only restrain the defendant, B from doing an act: it should not be framed so as to enjoin any person who is not a party: see *Marengo v. Daily Sketch and Sunday Graphic Ltd.* [1948] 1 All E.R. 406. In Canada the practice is apparently different. In *Bassel's Lunch Ltd. v. Kick (No. 1)* [1936] O.R. 445, an order had been made restraining named defendants "and anyone assisting or aiding them" from picketing. It was E held by the Court of Appeal of Ontario that persons not parties to the proceedings who had picketed were in contempt: it was said, in reliance on *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180, that anyone who knows of an injunction forbidding a person doing a specified act and who himself acts in contravention thereof can be committed for contempt in intermeddling. However in *Bassel's Lunch Ltd. v. Kick (No. 2)* [1937] 1 D.L.R. 235 a differently constituted Court of Appeal of F Ontario apparently reached a different conclusion in relation to alleged contempt by different third parties in acting contrary to the same order. They said, at p. 235:

G "An injunction restraining A from doing some act is not an injunction restraining B or C from doing it. In many instances, also, the fact that B or C do the act prohibited to A, does not amount to any assisting or aiding of A by B or C; the latter may be acting quite independently of A. On the other hand it is sophistry to argue that, because A refrains from doing the act, therefore B or C's doing it in his place is not assisting or aiding him. Where B and C act not independently but because of their interest in A, it may well be held that they are assisting or aiding him; at least they are H intermeddling and so may be found guilty."

This later decision, accepting as it does that the third party may not be liable for contempt even though his actions thwart the effect of the order, is strongly against Mr. Laws's submissions.

In *Tilco Plastics Ltd. v. Skurjat* (1966) 57 D.L.R. (2d) 596 an order had been made restraining the defendants "or person or persons having notice of the order" from industrial picketing. It was held that persons other than the defendants who with knowledge of the order picketed

were in contempt of court. The earlier decisions of the Ontario Court of Appeal were not cited. The judge sitting in the Ontario court at first instance expressly said, at p. 619:

“Any person who is aware of the substance or nature of a court order cannot flout it simply because he is not expressly named in that order.”

This again strongly supports Mr. Laws's argument. That decision was followed, on very similar facts, in *Catkey Construction Ltd. v. Moran* (1969) 8 D.L.R. (3d) 413. The state of the authorities under the law of Canada seems to be confused. However one thing is clear: in every case the act by the third party which was held to be a contempt constituted a breach of the precise terms of the order, albeit the order was made in a form which could not properly be made under English law.

Finally I should notice an Irish case, *Smith-Barry v. Dawson* (1891) 27 L.R.Ir. 558. The plaintiff in that case was entitled to a right of market. He had obtained an order against the defendants restraining them from disturbing it. Certain persons (not the defendants) had with knowledge of the order done acts which, if done by the defendants, would have been breaches of the order. They were held to be in contempt of court. Hedges Chatterton V.-C. based his decision on earlier Irish authorities: none of the English authorities were cited. There was no appearance or argument to those against whom committal was sought. I do not find this a compelling authority.

In my judgment the authorities show the present state of the law to be as follows. (a) In no case (apart from *Smith-Barry v. Dawson*, the Irish case) has a third party, C, been held to be in contempt of an order restraining a named person, B, from doing an act unless C has been privy or party to the doing of an act which is a breach of the precise terms of the order. (b) Under English law an injunction can only properly restrain a party to the proceedings from doing an act, although it may restrain him from doing the act “by himself, his servant or agent.” (c) As a result of (a) and (b) above, there is no English case in which a third party, C, has been held in contempt for doing any act which does not constitute a breach by the defendant enjoined, B, of the precise terms of the order. (d) The plaintiff in the proceedings, A, can apply for the committal of C even though the act of C is a criminal contempt. (e) The principle underlying the law that C is in criminal contempt if he is party to a breach of the order is that the court will not allow its order to be knowingly flouted, thwarted or frustrated by any person even though he be a stranger to the action.

The first four of those propositions support the three newspapers in their defence to these proceedings. They show that the law has never hitherto extended to cover a case such as this where the three newspapers have not aided or abetted “The Guardian” and “Observer” to breach the 1986 injunctions: there has been no breach of the 1986 injunctions since the only parties enjoined, the Guardian and Observer, have done nothing. On the other hand, the final proposition ((e) above) supports the Attorney-General since the underlying principle could be held to cover the present case: the publication by the three newspapers, with knowledge of the 1986 injunctions, may well render those injunctions valueless and thwart the establishment of the Crown's rights against “The Guardian” and “Observer.”

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A On this state of the authorities, it seems to me that the Attorney-General is seeking to widen the application of the law of criminal contempt, albeit in accordance with established principle. The three newspapers submit that it is for Parliament, not the courts, to make any extension to the law of contempt since it is a change in the criminal law. I do not accept this contention. Punishment for contempt of court is the means by which the judges preserve the judicial process. It is essentially a matter on which the judges have to decide, in accordance with principle, whether or not certain types of action (which may well change over the years) are consistent with the maintenance of a fair and proper judicial process. However, I do accept that, in deciding whether to apply the law of contempt in new circumstances, the courts should tread warily bearing in mind that the law of contempt of court is a restriction on freedom of action which a citizen would otherwise enjoy and a breach of the law may lead to the loss of his liberty.

C The strength of Mr. Laws's argument lies primarily in the facts of this case. Publication of the memoirs has been held by the courts in reasoned judgments to be contrary to national security: the 1986 injunctions were made to protect the public interest by preserving national security. Yet the three newspapers have, knowing of that decision, chosen to do what the court has held to be contrary to the public interest and published what was secret. How is the public interest to be protected if that is not a contempt of court? Even if, as is apparently the case, some people do not accept the decision of the court that the publication of the Wright memoirs would jeopardise national security, it is easy to postulate facts where the risks would be unarguable: for example, if newspapers were publishing highly secret information as to the disposition of the Polaris submarines. It is almost uncontroversial that in such a case there ought to be a legal sanction against publication. But the question I have to decide is whether, due to the chance that there is in existence an order of the court preventing "The Guardian" and the "Observer" from publishing, the appropriate sanction is contempt of court.

F I have reached the conclusion that it is not. So to hold would be to subvert the basic principles of our civil law and introduce into it uncertainty and unfairness. English civil courts act in personam, that is to say they adjudicate upon disputes between the parties to an action and make orders against those parties only. In certain instances where the court has assumed the care and administration of a person or property, the court does make orders which, in one sense, operate in rem. Any interference with the person or the property being administered constitutes a contempt of court; for example, acts in relation to a ward of court, a ship subject to attachment or property of which the court has appointed a receiver. But in other cases so far as I am aware injunctions can only properly be made to restrain a defendant to the proceedings, as opposed to a third party, from doing certain acts: see *Marengo v. Daily Sketch and Sunday Graphic Ltd.* [1948] 1 All E.R. 406, and *In re X (A Minor) (Wardship: Injunction)* [1984] 1 W.L.R. 1422. Even a declaration made by a court is not binding on persons who are not parties to the suit. In my judgment this is the basis of the present state of the law that, for a third party, C, to be liable for contempt, the acts complained of must constitute a breach of the actual terms of the order. The Attorney-General's contention, if correct, strikes at the root of this basic principle. An order of the court would, in effect, operate in rem, i.e., be

enforceable against everyone who had notice of it. The practical implications of this in ordinary civil litigation would be far reaching and in many cases unjust.

I will give a number of examples. Say an employer obtained an injunction against an employee restraining that employee from disclosing or using certain trade secrets. All other employees of that employer who knew of the order would be at risk of committal for contempt of court if they used or disclosed information derived from their employment; it is notoriously difficult to distinguish between information which is a true trade secret and therefore protected and other information which an employee is free to use on his own account. It would follow that, by getting an order against one employee, the employer would have imposed an effective muzzle on all his employees and that muzzle might well give protection to information that the employer was not entitled to protect.

Again, take the case of a newspaper, B, publishing an article defamatory of A. A obtains an injunction against B, B lacking the information necessary to justify the libel. Such order would expose any other newspaper which published the libel to proceedings for contempt of court. If newspaper C did have the information necessary to justify the libel and wished to justify, the law of contempt would operate indirectly so as to prevent publication by C in circumstances in which A could not have obtained an injunction directly against C; no injunction can be granted to restrain publication of a libel which the defendant intends to justify. Faced with this example, Mr. Laws suggested that C could apply to the court for leave to publish. This would be a novel type of application. But even assuming that some procedure could be found which enabled C to make it, the need for C to make such application is quite inconsistent with the normal concepts of freedom of the press. Newspapers are free to publish unless restrained by an order; their right hitherto, has not depended on obtaining prior leave of the court. Nor in my judgment should such leave be required.

Again, say there were an industrial dispute and the employer obtained injunctions restraining named employees from picketing. Is that order to be enforceable by committal against all employees and others who have notice of the order thereby preventing anyone from picketing? That would be a grave inroad on private freedom and a power readily open to abuse. In a more commercial sphere, take the case of a takeover battle in which shareholder A is trying to maintain or secure a majority shareholding. A obtains an order restraining shareholder B from disposing of his shares to X, the rival bidder. Are all other shareholders to be at risk of committal for contempt if they sell their shares to X, whether or not A has any legal right to restrain them from selling? Yet the sale by other shareholders will thwart and frustrate the purpose of the injunction against B, i.e. to secure and maintain the majority shareholding for A.

Finally, take the case of a householder, A, whose house enjoys a view of certain trees on adjoining land belonging to B. A obtains an injunction restraining B from cutting down the trees because of some agreement between A and B. Will it be contempt of court if C (in exercise of some right which he has against B) cuts down the trees otherwise than in collusion with B? Yet the felling of the trees by C will wholly frustrate the effect of the order against B. These instances, which

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A are not merely fanciful, to my mind show that the principle contended for by the Attorney-General cannot be right.

There are other equally serious objections. Mr. Laws himself accepted that, in the case of some order against B, it would not be a contempt for C to do the act which B is prohibited from doing. He instanced the case of an injunction granted in a matrimonial dispute which restrained the husband B from assaulting the wife A. Mr. Laws accepts that if C assaults A, he would not be in contempt of court. The reason, says Mr. Laws, is that the order restraining B is plainly personal to B. But the borderline between such "plainly personal" orders and other orders must be very uncertain. All orders are *expressed* as being personal. Is an order restraining an act by B in breach of his contract with A personal? If so, can C safely do an act even if the result of such act will be to frustrate the order? For example, in the case I have given of the felling of the trees, will it not be a contempt of court by C to fell the trees because A's right to prevent B from felling the trees lay in the contract between A and B? In my judgment, the distinction between personal and other orders is unworkable. It would lead to a degree of uncertainty whether or not an act was a contempt which is incompatible with the imposition of a criminal sanction.

D The same vice of uncertainty would arise in a different way. Under the present law, committal for contempt of court is attended by very elaborate procedural safeguards. The order has to be personally served and in some cases carries a penal endorsement. When the proceedings are heard, great care is taken to ensure that the acts alleged do in fact constitute a breach of the express terms of the order; if they do not, then there is no contempt. Yet, if the Attorney-General's contention is correct, a third party will enjoy none of those protections. In particular the alleged contempt will consist of the doing of some act inconsistent, not with the terms but with the purpose of the order. In the present case, it is clear what was the purpose of the 1986 injunctions. But, in most cases it would be far from clear. In my judgment it would be unjust to expose third parties to criminal sanctions for doing an act when it is not clear in advance whether or not the doing of that act is or is not lawful.

If, as I think, the effect of the Attorney-General's contention would be to make enforceable against third parties an order made in their absence, such a result offends the basic principles of natural justice. If such an order were to be made by an inferior court or administrative body, it would be quashed by the High Court. This is again not merely a matter of principle but of substance. On an application by A for an interlocutory injunction against B, the judge has to consider the usual well known factors: viz. has A an arguable claim and B an arguable defence? Will any damages payable by B be an adequate remedy to A and has B the means to pay such damages? Will A's cross-undertaking in damages compensate B for any loss sustained by B if the injunction is not granted at the trial? What is the balance of convenience as between A and B?

H On the making of the interlocutory order restraining B (which C is to be held to have contemptuously thwarted) C's circumstances will not have been known to, or considered by, the judge. C may have a defence where B had none. Damages may be an adequate remedy to A and C may be able to pay them but B not. Most importantly, the giving by A to B of the cross-undertaking in damages is a necessary precondition to

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the grant of any interlocutory injunction. But A will have given no such cross-undertaking to C and C will have no recourse if, for fear of committing a contempt, he has refrained from taking a particular course of action.

For all these reasons, in my judgment, the law of contempt should not be extended, or held to apply, to a case where the only act alleged against the contemnor is the doing of an act which is not a breach of the express terms of the order and where the alleged contemnor has not been a party or privy to a breach of the order by others. I therefore answer the preliminary question "No."

On the facts of this case (which have not been fully investigated before me) I reach the conclusion with some concern. There ought to be some sanction against the publication of matters which prejudice national security and the decision as to what does prejudice national security should not be left to the judgment of the editors of individual newspapers. I had assumed that the Official Secrets Act 1911 provided the necessary sanction. If it does not, then it is for Parliament, if it thinks fit, to provide the necessary sanction by providing a public law remedy linked directly to the protection of public rights. Private rights should not be bolstered by a distortion of the law of contempt in an attempt to produce a judge-made public law protecting official secrets.

*Preliminary point of law
answered in negative.
Motion dismissed.*

Solicitors: Treasury Solicitor; Oswald Hickson Collier & Co.; D. J. Freeman & Co.; Victor Mishcon & Co.

S. W.

APPEAL from Sir Nicolas Browne-Wilkinson V.-C.

By notice of appeal dated 2 June 1987, the Attorney-General appealed against the decision of Sir Nicolas Browne-Wilkinson V.-C. that the preliminary point of law "Whether a publication made in the knowledge of an outstanding injunction against another party, and which if made by that other party would be in breach thereof, constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction," be answered in the negative and the dismissal of the Attorney-General's motion.

The grounds of appeal were that the Vice-Chancellor, having found that the publications by the respondents might well render the injunctions against "The Guardian" and the "Observer" valueless and thwart the establishment of the Crown's rights against those newspapers and having found that the Attorney-General's stance was "in accordance with established principles" (although he was also of the erroneous view that the Attorney-General was seeking to widen the application of the law of criminal contempt), should have found that the publications complained of were, or were capable of being, criminally contemptuous. The Vice-Chancellor wrongly posed the question "Whether, due to the chance that there is in existence an order of the court preventing "The Guardian" and the "Observer" from publishing, the appropriate sanction is contempt of court" and should have posed the question whether the publication complained of thwarted the court's orders and interfered

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A with the process of justice in the proceedings against "The Guardian" and the "Observer," and answered it in the affirmative.

After the hearing of the appeal, Sir John Donaldson M.R. announced that the court allowed the appeal but reserved judgment giving the reasons of the court for doing so.

B *John Laws* and *Philip Havers* for the Attorney-General.

Christopher Clarke Q.C. and *Adrienne Page* for the publisher and editor of "The Independent."

John Mathew Q.C. and *Jonathan Caplan* for the publisher and editor of "The London Evening Standard."

Charles Gray Q.C. and *David Pannick* for the publisher and editor of "The London Daily News."

C SIR JOHN DONALDSON M.R. We propose to give full judgments at a later date but we are all aware that the public may have some difficulty in understanding what are the issues in this appeal, so let me explain.

D In June 1986 the Government sought and were granted orders forbidding "The Guardian" and the "Observer" newspapers from publishing information derived from or attributed to Mr. Peter Maurice Wright concerning the British Security Service. They were not final orders. They were intended to last until the trial of the action unless earlier revoked on the application of "The Guardian" or the "Observer." Those newspapers have in fact made such application, and it will be considered in the near future by Sir Nicolas Browne-Wilkinson V.-C.

E In April 1987 "The Independent," "The London Evening Standard" and "The London Daily News" published information said to have been derived from Mr. Wright. The Attorney-General, acting in his official capacity as the person responsible for ensuring that there is no interference with the administration of justice in this country and *not* as a member of the Government, complained that these publications constituted a contempt of court. The newspapers replied that the court orders did not require them to refrain from publication: they only required "The Guardian" and the "Observer" to do so.

F The matter came before Sir Nicolas Browne-Wilkinson V.C. All concerned thought at the time—although with the benefit of hindsight possibly mistakenly—that the most convenient course was not to inquire into the full facts surrounding these publications, but instead to consider whether the conduct of the newspapers could in any circumstances be held to be a contempt of court. The Vice-Chancellor held that it could not.

G The Attorney-General appealed. Once again, he was *not* acting on behalf of the Government. He was performing his duty to safeguard the administration of justice. This does not mean to say that he was right, but, believing as he did that there had been a serious contempt of court, he was doing no more than his duty in bringing it to the attention of the court. It is this appeal with which we have been concerned.

H On 12 July 1987 "The Sunday Times" published extracts from Mr. Wright's book. On 14 July 1987 the book was published in the United States and some copies were imported in a blaze of publicity. These are not matters which should or can concern us at present. It is for the Government to decide what it wishes to do about its action against "The Guardian" and the "Observer." It is for "The Guardian" and the "Observer" to ask the Vice-Chancellor to expedite their applications to

be released from the injunctions which bind them at present, if that is what they wish. It is for the Attorney-General to decide whether to charge "The Sunday Times" with contempt of court.

Our concern is solely with the appeal from the decision of the Vice-Chancellor. He held that the three newspapers could not be in contempt of court. In our judgment he was wrong. All three newspapers could indeed have been in contempt of court. So could "The Sunday Times" and any other newspaper which published information attributed to Mr. Wright. We say "could be" in contempt of court and not "were" in contempt of court because none has as yet had an opportunity of putting forward a defence. We should also make it clear that if any publisher has been advised that the judgment of the Vice-Chancellor gave them a licence to publish without committing a contempt of court his adviser has made an elementary error of law. In reversing the decision of the Vice-Chancellor we are not changing the law—we are declaring what it has always been. If, for example, the publication by "The Sunday Times" would otherwise have been a contempt of court, the judgment of the Vice-Chancellor did not make it anything else.

The situation which has arisen is completely novel, but it could be repeated in quite different contexts. It is therefore important that we should give guidance on the relevant law. This concerns in particular the intentions of the person said to be in contempt of court. This is a complex problem. Since, subject to the views of the House of Lords, our judgments will determine the law which is to be applied not only in these cases but in any other similar cases, we wish to take time to consider our judgments and put them into writing. I should like to emphasise that the issues with which we are concerned do not depend in any way upon the continuance of the Government's claims against the "Observer" and "The Guardian." They are of permanent importance.

That said, the media need to know where they stand. The answer is that any publication of information derived from or attributed to Mr. Wright *could* be a contempt of court. Whether it will in the event be held to be a contempt of court will depend upon a number of factors upon which we shall seek to give guidance in our judgment. However, no one can be held guilty of being in contempt of court unless and until they have been given an opportunity of putting forward their defence. None of these three newspapers has as yet had that opportunity, which must await a further hearing in the Chancery Division of the High Court. Meanwhile, all we can say is that interference with the course of justice is a very serious matter, and publishers will no doubt wish to consider their duty with care before they do anything which could have this result.

Cur. adv. vult.

17 July. The following judgments were handed down.

SIR JOHN DONALDSON M.R. In this appeal the Attorney-General seeks to reverse the answer given by Sir Nicolas Browne-Wilkinson V.-C. to a preliminary question of law formulated in contempt proceedings brought by the Attorney-General against the respondents. I can well understand the attraction of formulating such a preliminary point but, as so often happens, it can seem less obviously sensible at a later stage in the proceedings. Thus, in the present case, I personally do not think

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A that the question as framed permits of any answer other than "It all depends," which is not very helpful. However, all concerned know that the real issue is whether in the circumstances of this case, which are not substantially in dispute, the defendants *could* be guilty of contempt of court and the question can, if necessary, be rephrased to raise that issue: see *Ismail v. Polish Ocean Lines* [1976] Q.B. 893. The circumstances being all important, I must now advert to the background facts, although they are well known to all.

B Mr. Peter Maurice Wright, who lives in Tasmania, was for many years a servant of the Crown and a member of the British Security Service. He retired on 31 January 1976. Rightly or wrongly, he concluded that the activities of the service whilst he was a member had been unlawful and that this should be investigated and exposed. He therefore submitted a memorandum to the chairman of a select committee of the House of Commons. The result was, in his view, unsatisfactory and he decided to write and publish his memoirs in Australia. This came to the notice of the authorities in this country and in September 1985 the Attorney-General began proceedings in the Supreme Court of New South Wales against Mr. Wright and the proposed publishers, seeking to restrain publication.

D So much has been said about state secrets that I must stress that the basis of the Attorney-General's claim to be entitled to restrain publication was *not* that Mr. Wright might be in breach of the Official Secrets Act 1911. It was that by the terms of his employment with the Security Service he had a duty of confidentiality which would be breached if he published his memoirs. Confidentiality, *not* official secrecy, was and still is the central issue.

E Now, it is a fact of life that a major legal action takes time to prepare and justice cannot be done if it is ill-prepared. Meanwhile, the court does not know which party is right and it must therefore try to preserve the rights of *both* parties until the trial. This is plain common sense and basic justice. How this is done depends very much on the nature of the rights being asserted, the ability of each party to compensate the other if it is held to be in the wrong and the background circumstances of the case. Sometimes the court can allow the defendant, pending the trial, to continue with the action which is said to be unlawful, because it is satisfied that if indeed it is ultimately so held, the complainant, who has had to put up with the continuance of the unlawful action, can be compensated by an award of damages. In others it will decide that the rights of both parties are better preserved by forbidding the continuance of the allegedly unlawful action because, for example, if the action is ultimately held to have been lawful and the defendant has suffered damage by the suspension of his rights pending the trial, the complainant can be made to compensate him by an award of damages. This is not to say that a citizen can dash along to the court and get an order limiting the defendant's freedom of action simply on the basis of his, possibly paranoid, assertion that he will succeed at the trial. Far from it. The courts, whilst carefully refraining from reaching even a tentative conclusion on who is right, still have to make certain that the complainant citizen has a case which is sufficiently plausible to be taken seriously.

H In a word, if there is a genuine dispute which cannot be resolved at once, the court must hold the ring until this can be done. In that waiting period when each party is preparing for the trial, it must give each side

the benefit of any doubts, it must assume that either party may win and it must seek to preserve the rights of both parties. In other words, it must undertake a damage limitation exercise for the benefit of whomsoever it may ultimately concern.

It is at this point that a special consideration arises when the dispute concerns information which is said to be confidential. If the parties are arguing about the ownership of a horse or a car, it may not matter who keeps the horse or car pending the trial. If, as things turn out, the court has given it to the wrong party, it can get it back and give it to the right party after the trial, together with damages to compensate for having been deprived of the horse or car for the time being. Not so with confidential information where, as here, one party says that it is his private property and the other says that he is entitled to publish it to the world. If, pending the trial, the court prohibits publication, the information can still be published after the trial if the defendant succeeds. But if, pending the trial, the court allows publication, there is no point in having a trial since the cloak of confidentiality can never be restored. Confidential information is like an ice cube. Give it to the party who undertakes to keep it in his refrigerator and you still have an ice cube by the time the matter comes to trial. Either party may then succeed in obtaining possession of the cube. Give it to the party who has no refrigerator or will not agree to keep it in one, and by the time of the trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.

All this is totally elementary. So elementary is it that Mr. Wright and his Australian publishers readily undertook to the Australian courts that, pending the trial of the action, neither they nor anyone acting on their behalf would publish Mr. Wright's memoirs. Metaphorically, they would be kept in the refrigerator. Had they not given this undertaking, I do not doubt that the Australian court would have ordered them to refrain from publication.

Some time during the next nine months, the "Observer" and "The Guardian" newspapers obtained some knowledge of the contents of Mr. Wright's memoirs. Rightly or wrongly they came to the conclusion that even if this was confidential information which belonged to the Security Service, the allegations being made by Mr. Wright were so serious and so plausible that the public interest required that every citizen should know about them. The newspapers may or may not have been right, but the English courts became involved when the Attorney-General began an action to prevent them publishing information derived from or attributed to Mr. Wright in his memoirs. This is, of course, a paraphrase of the relief which was sought, but it suffices for present purposes.

What were the courts to do? They did not know whether the Attorney-General was right or whether the newspapers were right. What they did know was that there was a very serious issue to be tried and that if they forbade publication pending the trial there would still be confidential information which could be published after the trial, but that if they did not forbid publication there would no longer be any confidential information and it would be pointless even to have a trial. It was the ice cube problem once again. So the court forbade publication pending the trial.

Unlike Mr. Wright and the Australian publishers, "The Guardian" and the "Observer" did not accept the logic of this approach and

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A resisted the Attorney-General's applications both in the High Court and in the Court of Appeal. This was their right and I make no complaint. They also sought and obtained leave to appeal to the House of Lords. Again, this was their right and, again, I make no complaint, although I do not understand why, having obtained leave to appeal to the House of Lords, they do not appear to have taken any very vigorous steps to have that appeal heard. But what is interesting, and highly relevant, is that in this court, and possibly also in the High Court, the newspapers complained that it was unjust that they should be singled out for an order forbidding further publication of what they had already published, when their competitors in and around Fleet Street were not being subjected to any such order. This, they said, was grossly unfair. It was a fair point.

C The Attorney-General's answer was twofold. First, he said, no other newspaper had shown any inclination to publish this confidential information which, in his submission, was the private property of the state. He therefore had no grounds for obtaining similar orders against them. Second, he asked, how could he be expected to seek an injunction against every newspaper, every radio and television station and every publisher of books and magazines who might obtain this information and take it into their heads to publish it? Again, it was a fair point.

D My own view, which I expressed in my judgment in *Attorney-General v. The Observer Ltd.*, The Times, 26 July 1986; Court of Appeal (Civil Division) Transcript No. 696 of 1986, was that the newspapers' contention was based upon a false premise. If "The Guardian" and the "Observer" were restrained from re-publishing this allegedly confidential information, other publishers were *not* free to do so. But I would be the first to admit that this was to some extent an instinctive reaction and the point was not very fully argued. I am, therefore, quite prepared to accept that I may have been wrong and I think that I am in no way bound by my previous expression of opinion.

F There matters rested until 27 April 1987. By that time the Australian court had concluded the trial of the action in which Mr. Wright and his publishers were defendants and had refused a final injunction against publication. That decision is currently under appeal, but the outcome of those proceedings, whilst possibly relevant to the continuation of the injunctions against the "Observer" and "The Guardian," is quite irrelevant for the purposes of the current proceedings or this appeal. What happened on 27 April was that "The Independent" published extensive extracts and summaries from Mr. Wright's book and was immediately followed by "The London Evening Standard" and "The London Daily News," who appear to have been basing themselves upon "The Independent." "The Independent" itself claims to have received an unsolicited copy of Mr. Wright's manuscript and, after using it, to have destroyed it.

H The Attorney-General thereupon launched the present proceedings against the publishers and editors of "The Independent," "The London Evening Standard" and "The London Daily News," alleging that the publications to which I have referred were

"intended or calculated to impede obstruct or prejudice the administration of justice in that they were severally intended or calculated and in any event likely to thwart orders of the Court of Appeal made on 25 July 1986 in High Court proceedings brought

by the applicant against the Observer Ltd. and others (1986 No. A.2507) and by the applicant against Guardian Newspapers Ltd. and others (1986 No. A.2509)" and claiming that accordingly the defendants were in contempt of court and should be punished.

The matter came before Sir Nicolas Browne-Wilkinson V.-C. on a preliminary point of law:

"Whether a publication made in the knowledge of an outstanding injunction against another party and which if made by that other party would be in breach thereof constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction."

In a judgment of quite outstanding clarity the Vice-Chancellor reviewed the reported authorities both in this country and in Canada and concluded that this question was to be answered in the negative and that to answer it otherwise would be to "subvert the basic principles of our civil law and introduce into it uncertainty and unfairness." However, on the facts of the instant case he expressed concern at the conclusion which he had reached, saying, ante, at p. 958B-D:

"There ought to be some sanction against the publication of matters which prejudice national security and the decision as to what does prejudice national security should not be left to the judgment of the editors of individual newspapers. I had assumed that the Official Secrets Act 1911 provided the necessary sanction. If it does not, then it is for Parliament, if it thinks fit, to provide the necessary sanction by providing a public law remedy linked directly to the protection of public rights. Private rights should not be bolstered by a distortion of the law of contempt in an attempt to produce a judge-made public law protecting official secrets."

Whilst I agree that there ought to be some sanction against the publication of matters which prejudice national security, I should like to re-emphasise with all the power at my command that this case is not primarily about national security or official secrets. It is about the right of private citizens and public authorities to seek and obtain the protection of the courts for confidential information which they claim to be their property. The national security element in the present dispute is peripheral and is no more than one factor which the court had to take into account when deciding whether or not to preserve the confidentiality of the Wright information pending the trial of the Guardian/Observer action. Legislation could well take care of national security as the Vice-Chancellor suggested, but that would leave large numbers of people who claim rights of confidentiality wholly unprotected. Obvious examples are disclosures, sometimes sensational and of great interest to newspapers and their readers, by the personal staff of the famous.

Whilst I am loath to increase the length of this judgment, I do not think that I should do justice to the judgment of the Vice-Chancellor if I attempted to summarise that part in which, having set out the facts and reviewed the authorities, he stated his essential reasoning and conclusions. [His Lordship set out part of the Vice-Chancellor's judgment, ante, at pp. 954D—958B, and continued:] The situation with which we are faced is novel in the sense that there is no reported decision which provides any direct guidance. It is therefore appropriate to start with the first

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A principles of the law of contempt of court and indeed by distancing myself from that phrase itself. As Lord President Clyde pointed out in *Johnson v. Grant*, 1923 S.C. 789, 790:

B “The phrase ‘contempt of court’ does not in the least describe the true nature of the class of offence with which we are here concerned . . . The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice. . . . It is not the dignity of the court which is offended—a petty and misleading view of the issues involved—it is the fundamental supremacy of the law which is challenged.”

According to *Borrie and Lowe’s Law of Contempt*, 2nd ed. (1983), p. 1:

C “It has been well said that the law of contempt is of ancient origin yet of fundamental contemporary importance. Contempt of court certainly has a long history—contemptus curiae is said to have been a recognised phrase in English law since the 12th century, and, as will be evidenced by the rest of this book, the law continues to play a key role in protecting the administration of justice. Essentially a creature of common law, contempt has been and continues to be developed and adapted to meet changing challenges to the ‘supremacy of the law.’ One result of this continuing development and concern to protect the many facets of the administration of justice is that there are many forms of contempt. One commentator has described contempt as ‘the Proteus of the legal world assuming an almost infinite diversity of forms,’ but equally it can be said that contempt of court is as diverse as are the means of interfering with the due course of justice.”

Despite its protean nature, contempt has been classified under two heads, namely, “civil contempt” and “criminal contempt.” Whatever the value of this classification in earlier times, I venture to think that it now tends to mislead rather than assist, because the standard of proof is the same, namely, the criminal standard, and there are now common rights of appeal. Of greater assistance is a re-classification as (a) conduct which involves a breach, or assisting in the breach, of a court order and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or, more generally, as a continuing process, the first category being a special form of the latter, such interference being a characteristic common to all contempts: *per* Lord Diplock in *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440, 449. What distinguishes the two categories is that in general conduct which involves a breach, or assisting in the breach, of a court order is treated as a matter for the parties to raise by complaint to the court, whereas other forms of contempt are in general considered to be a matter for the Attorney-General to raise. In doing so he acts not as a government minister or legal adviser, but as the guardian of the public interest in the due administration of justice. There is a further, but less important, distinction in that in the case of a failure to comply with some court orders, for example those relating to procedural timetables, the appropriate reaction of the court is not punishment in the form of committal, attachment or a fine, but an order striking out all or part of a claim, or refusing to entertain the whole or part of a defence.

Although it happens to be the case that the conduct complained of here is said to impinge upon the trial of an action in which the Attorney-General, acting as a minister and on behalf of the Crown, is the plaintiff, he brings the present proceedings in a quite different capacity independently of the government of the day, namely in that which I have described as "guardian of the public interest in the due administration of justice." In the light of the fact that there has been a change in the holder of the office of Attorney-General during the course of the proceedings, it should perhaps also be pointed out that they are brought not by an individual but by "the Attorney-General." Consistently with acting in this capacity, the Attorney-General's complaint is not that the respondent newspapers and their editors have breached or assisted in the breach of the orders which he obtained in the Guardian and Observer actions, but that the conduct complained of "was intended or calculated to impede, obstruct or prejudice the administration of justice."

This raises two issues. What is the conduct complained of? Can it be said to have been intended or calculated to impede, obstruct or prejudice the administration of justice? The latter is clearly a question which cannot be answered in the abstract, but depends upon the course which the administration of justice has taken and is intended by the court to take. It is for this reason, and this reason alone, that it is necessary to take account of the course which the Guardian and Observer actions had pursued, including the orders made restraining "The Guardian" and the "Observer," but no other newspapers, from publishing what I may describe as "Wright material," i.e. information obtained by Mr. Wright in his capacity as a member of the British Security Service and which was known or reasonably believed to have come or been obtained, whether directly or indirectly, from Mr. Wright or any information concerning the British Security Service which was attributed to Mr. Wright.

The Guardian and Observer actions began on 27 June 1986 with the grant by Macpherson J. of ex parte injunctions addressed to the two defendant newspapers restraining publication of Wright material. The newspapers applied to have them set aside and this application was heard and determined by Millett J. on 11 July 1986. For present purposes the variations which he made in the ex parte order are immaterial. What is material is the judge's reasons which were expressed in a judgment given in open court and were widely reported. It is therefore relevant to recall extracts of what he said:

"It has not been disputed before me that Mr. Wright's proposed book contains information acquired by him as a member of the Security Service, and that the disclosure of such information would constitute a breach of the duty of confidentiality which he owes to the Crown. Nor has this been challenged by Mr. Wright himself in the Australian proceedings. There, his defence is that the information which he seeks to disclose is (i) in the public domain and no longer confidential; and (ii) evidence of unlawful acts or serious misconduct on the part of members of the British Security Service which it is in the public interest should be published. In the application before me, these defences are repeated, but in support of a wider and more fundamental proposition. It is said: 'Where an interim injunction is sought to restrain publication by a newspaper of information which is of public importance and legitimate public

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A concern, only the most exceptional circumstances based upon cogent and compelling evidence will induce the courts to prevent publication. This is because of the fundamental importance of the right to free expression in a democratic society. It is of even greater importance where the party seeking to prevent expression is the state or its agents, and the nature of the information whose publication is sought to be suppressed concerns serious allegations of criminal misconduct and other gravely reprehensible behaviour by agents of the state.' Prior restraint of publication is a serious interference with the freedom of the press and the important constitutional right to freedom of speech. Those freedoms, however, are not absolute. . . .

B "pecuniary compensation to either party would be not merely inadequate but wholly inappropriate. In resolving the conflict, I must take all relevant considerations into account, and in my judgment these must include the facts that this is an interlocutory application and not the trial; that the injunctions sought are only temporary and not permanent; and that a refusal of injunctive relief may cause irreparable harm and effectively deprive the plaintiff of his right. . . .

C "It makes no difference that the claim to suppress publication is made by the government and not by a private litigant; the principles remain the same. Nor does the court abdicate its responsibility to decide where the public interest lies merely because national security is invoked by the Crown. The safeguard in a free society is that the conflict falls to be resolved not by the state itself but by an independent judiciary. . . .

D "the refusal of injunctive relief would permit indirect publication and effectively and permanently deprive the Attorney-General of his rights in advance of the trial."

E On appeal to this court, the same points were made in judgments which again received wide publicity and I need only cite two passages. The first is from my own judgment Court of Appeal (Civil Division) Transcript No. 696 of 1986:

F "Allied to this complaint is a plea that it is unjust that the defendants should be restrained from republishing allegations made by them whilst every other publisher is free to do so. The short answer to this is that if the original publications were unlawful, other publishers are not free to republish. It is true that the consequences of their doing so would be less serious, but that is another matter."

G We were told, and I accept, that this paragraph could be misunderstood by those who did not read it carefully and did not realise that I was speaking of "republishing" as contrasted with a publication of hitherto unpublished Wright material and that it was only republication whose consequences would be less serious than an initial publication. Any further publication by "The Guardian," the "Observer" or other newspapers would quite clearly add to any damage already done and so be more serious. The second is from the judgment of Nourse L.J. Court of Appeal (Civil Division) Transcript No. 696 of 1986:

H "Moreover, for the reasons given by Sir John Donaldson M.R., it is clear to me that confidential information which comes into the hands of a member of the Security Service is information which

prima facie may not in any circumstances be used by the employee, either during or after the employment, except for the benefit of the employer. As for the newspapers and any other third party into whose hands the confidential information comes, an injunction can be granted against them on the simple ground that equity gives relief against all the world, including the innocent, save only a bona fide purchaser for value without notice. It is obvious that nobody could obtain the sort of information which is under consideration in this case without being on notice that it was confidential to the Crown.”

It is against this background that I ask myself whether at the end of July 1986, when the interim injunctive order was made against “The Guardian” and the “Observer,” a publication by “The Independent” of new, and apparently more authentic, Wright material, allegedly based upon possession of a copy of Mr. Wright’s manuscript, which neither “The Guardian” nor the “Observer” ever claimed or admitted having had, would “be calculated to impede obstruct or prejudice the administration of justice,” to quote the words of the Attorney-General’s application or “involve an interference with the due administration of justice,” to quote the words of Lord Diplock in *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440, 449. To that question I think that there can be only one answer, namely that it would. The issue in the Guardian and the Observer actions was not whether the information had been confidential to the Crown, but whether for one reason or another that confidentiality had evaporated or was overridden by a countervailing public interest. Millett J., and this court on appeal, had not only prohibited publication, including republication, by “The Guardian” and the “Observer,” but had held that, to quote Millett J., indirect publication of Mr. Wright’s memoirs, the direct publication of which was prohibited by the Australian courts, would “permanently deprive the Attorney-General of his rights in advance of the trial.” It could not have been made clearer. The court was making an order for the preservation of the confidentiality of the Wright material pending the trial. Publication meanwhile, whether by those defendants or others, would deprive the Attorney-General of his rights in advance of the trial, because information once published, at least on the scale achieved by publication in national newspapers, can never be truly confidential again.

I then ask myself whether this situation had changed in April 1987 when “The Independent,” “The London Evening Standard” and “The London Daily News” in fact published further Wright material. It is true that the Australian trial had concluded by then, and the judge had ruled that Mr. Wright was entitled to publish, but the decision was under appeal and the Guardian and the Observer actions still awaited a full trial. The answer is plain. The publication of Mr. Wright’s memoirs in full at that time would have prevented any effective adjudication upon the Attorney-General’s claim in the Guardian and the Observer actions and the publications complained of, whilst not going to this length, were very far from being of minimal effect. To the extent that they placed Wright material into the public domain, which had not previously been there, they deprived the Attorney-General of a part of the rights which he was asserting in these actions and to this extent made it impossible for the court to do justice between the parties.

I now return to the judgment of Sir Nicolas Browne-Wilkinson V.-C.

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A “(a) *In no case (apart from Smith-Barry v. Dawson, the Irish case) has a third party, C, been held to be in contempt of an order restraining a named person, B, from doing an act unless C has been privy or party to the doing of an act which is a breach of precise terms of the order.*”

B If *Smith-Barry v. Dawson* (1891) 27 L.R.Ir. 558 is accurately reported, there was some confusion between the species of contempt which consists of disobeying, or assisting in the disobedience of, an order of the court and that which consists of interfering with the due administration of justice, and this may have stemmed from the fact that no argument was addressed on behalf of the alleged contemnors. Mr. Smith-Barry had been declared by a final judgment, to which the alleged contemnors were not parties, to be entitled to possession and to quiet enjoyment of his patent rights to hold a market in the Fair Green. The
C alleged contemnors had held a rival market in the Fair Green with knowledge of that decision and of the fact that an injunction had been granted against the defendant in the action prohibiting him from holding such a market. Hedges E. Chatterton said, at pp. 559–560 that the alleged contemnors were:

D “in my opinion, in just the same default as the original defendants would have been if they had done similar acts. [But] the cases cited clearly establish the right to have these attachments issued, and nothing can be more in point than the *Killiney Foreshore* case (unreported). But even without any of these authorities, ordinary common sense would show that persons cannot be allowed to set at defiance the order of the court because they do not happen to be named in the injunction.”

E If in an action between A and B for the possession of a dwelling house, B is ordered to give up possession and to refrain from retaking possession, A’s remedy, if someone, C, subsequently tries to dispossess him, is an action against C, not proceedings for contempt of court in disobeying an order to which C was never a party and in the breach of which he was not assisting. So long as the full importance of Sir Nicolas Browne-Wilkinson V.-C.’s words “contempt of an order” are appreciated,
F I consider that this represents the law. The Attorney-General does not allege that the defendants are in contempt of the orders made in the Guardian and Observer actions or assisted in doing an act which is a “breach of the precise terms of the order,” i.e. terms which restrained conduct by the Guardian and the Observer, their servants, agents, etc.
G He claims that, given the fact that these orders had been made with a view to preserving the subject matter of the dispute, destruction of that subject matter is an interference with the due administration of justice and so a contempt of court.

H “(b) *Under English law an injunction can only properly restrain a party to the proceedings from doing an act, although it may restrain him from doing the act ‘by himself, his servant or agent.’*”

This appears to be a wholly correct statement of the law (*Marengo v. Daily Sketch and Sunday Graphic Ltd.* [1948] 1 All E.R. 406), but it is capable of being misleading. The form of order now usually adopted which enjoins the defendant “by himself, his servant or agent” does not enjoin the servants or agents at all. All that the additional words do is to serve as a warning to such servants and agents that they should not assist in the doing of the prohibited act. If they do so, they will not have

disobeyed the order, but they will have interfered with the due administration of justice and may be liable to be proceeded against on that account.

That this is the position is made even clearer by the two motions *Lord Wellesley v. Earl of Mornington* (1848) 11 Beav. 180, and *Lord Wellesley v. Earl of Mornington (No. 2)* (1848) 11 Beav. 181. There the injunctive order omitted any reference to servants or agents. Lord Langdale M.R. dismissed the first motion to commit Mr. Batley, the earl's land agent, who had cut down some trees which the earl had been forbidden to cut. He did so because the motion was based upon an allegation that Mr. Batley had acted in breach of the order. As Lord Langdale M.R. pointed out, the order was not addressed to Mr. Batley and he was not enjoined thereby. However, the second motion accused Mr. Batley not of breaching the order, but of knowingly assisting in a breach of the order and thereby obstructing the process of the court. As Lord Langdale M.R. put it, at p. 183:

"If the matter had been pressed, I should have found it my duty to commit Mr. Batley for his contempt in intermeddling with these matters; . . ."

"(c) As a result of (a) and (b) above, there is no English case in which a third party, C, has been held in contempt for doing any act which does not constitute a breach by the defendant enjoined, B, of the precise terms of the order."

I am not sure whether this adds anything to (a) and (b). Whilst it certainly records that no one has been able to find a reported decision involving a finding of contempt by C, where the act complained of was intimately related to an order against B but did not involve assisting in doing that precise act, I am not sure of its significance, save that it underlines the fact that this is a novel situation. There is at least one case in the books which, if C had acted differently, would have raised the point. This is *Galaxia Maritime S.A. v. Mineralimportexport* [1982] 1 W.L.R. 539, where A obtained a *Mareva* injunction against B ordering B not to remove his assets from the jurisdiction including, in particular, cargo loaded on C's ship. C for his own purposes—he wished to have the use of his ship and to allow the crew to get home for Christmas—and regardless of the wishes of B wished to remove his ship from the jurisdiction with or without the cargo. C applied successfully for the injunction to be discharged and seems to have assumed, as the court also assumed, that absent permission from the court or the discharge of the injunction, the ship could not sail. I think that C was right, but had the ship sailed with the cargo, it certainly could not have been said that he was in breach of the precise terms of the order which prohibited B exporting the cargo and still less that B would have been in breach.

"(d) The plaintiff in the proceedings, A, can apply for the committal of C even though the act of C is a criminal contempt."

This is an historical anomaly arising out of the classification of contempts as civil and criminal. If, instead, they are classified as contempts involving (a) disobedience or assisting in the disobedience of orders and (b) other conduct interfering with the administration of justice, there is no problem. A can apply in category (a) and the Attorney-General can apply in category (b). In any event it appears to cast no light upon what has to be decided in this appeal.

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A “(e) *The principle underlying the law that C is in criminal contempt if he is party to a breach of the order is that the court will not allow its order to be knowingly flouted, thwarted or frustrated by any person even though he be a stranger to the action.*”

B This is quite correct but, I think, nihil ad rem. The three newspapers were not parties to breaches of the actual orders in the Guardian and Observer actions which prohibited *publication by those newspapers*. In publishing as they did, they were intending to serve their own interests or their view of the public interest and certainly not the interests of the Guardian and Observer.

C Based on these propositions of law, Sir Nicolas Browne-Wilkinson V.-C. said that it seemed to him that the Attorney-General was seeking to widen the application of the law of criminal contempt, albeit in accordance with established principle. This I am unable to accept. The law of contempt is based upon the broadest of principles, namely, that the courts cannot and will not permit interference with the due administration of justice. Its application is universal. The fact that it is applied in novel circumstances, for example to the punishment of a witness *after* he had given evidence (*Attorney-General v. Butterworth* [1963] 1 Q.B. 696), is not a case of *widening* its application. It is merely a new example of its application. In that case, as here, the trial judge, Mocatta J., relied upon the fact that there was no such case in the books, but this court held that that was a distinction of fact, not principle: *per* Donovan L.J. at pp. 724-725.

D Next, and this is really the final stage in his reasoning apart from the practical considerations with which I must deal hereafter, Sir Nicolas Browne-Wilkinson V.-C. said, ante, p. 955E-F:

E “the question which I have to decide is whether, due to the chance that there is in existence an order of the court preventing the Guardian and the Observer from publishing, the appropriate sanction is contempt of court.”

F At the risk of appearing to be a carping critic—and I repeat my tribute to the clarity of his judgment—I think that the Vice-Chancellor misdirected himself in thus formulating the question. Contempt of court is not a sanction. Contempt of court is unlawful conduct, the sanction for which is imprisonment, attachment, a fine or an order to pay costs. So the question should at least be rephrased to read:

G “whether, due to the chance that there is in existence an order of the court preventing the Guardian and the Observer from publishing, the conduct of ‘The Independent,’ ‘The London Evening Standard’ and ‘The London Daily News’ was unlawful as constituting an interference with the due administration of justice.”

H But even this is not correct. “Chance” is not the right word. The existence of the restraining orders against the Guardian and the Observer was a fact. It was only a chance in the sense of being what I believe is known across the Atlantic as a “happenstance”—a past circumstance which was not created by any of the principal actors. So I would substitute “fact” for “chance,” whilst at the same time appreciating that I have to consider whether it is a very material fact, one which made any real difference.

This brings me to the very interesting and, as I think, crucial decision in *In re X (A Minor) (Wardship: Injunction)* [1984] 1 W.L.R. 1422.

There Balcombe J. made an order prohibiting publication of information about the ward by the "News of the World," which was a party, and any other person who should have notice of the order. It was effective in fact and I am wholly satisfied that it was also effective in law. What is interesting is why it was effective in law.

As Sir Nicolas Browne-Wilkinson V.-C. pointed out, English civil courts act in personam. They adjudicate disputes between the parties to an action and make orders against those parties only. This is true even in proceedings under R.S.C., Ord. 113, which permits proceedings against "persons unknown." They become parties. What is not permissible is to make an order against a stranger to the action. In *Iveson v. Harris* (1802) 7 Ves.Jun. 251, 256, Lord Eldon L.C. said:

"I have no conception, that it is competent to this court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause."

Yet that is what Balcombe J. purported to do. To say that the jurisdiction of the court in wardship involves a peculiar parental or administrative responsibility to which the disposal of controverted questions is only incidental, is no explanation. This only means that this jurisdiction is unusual in the extent to which it involves extended judicial supervision throughout the wardship, which may last for years.

I sympathise with the position in which Balcombe J. found himself. The proper discharge of the wardship by the court in the exercise of the ancient duties of *parens patriae* made it essential that there should be no publication and he had to find a way of achieving this result. But had any newspaper, other than the "News of the World," published details of the ward and had the Attorney-General sought to commit it or its editor for contempt consisting of disobedience of the order, the motion would have been dismissed. It would have been a replay of *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180, which would have been indistinguishable. The fact that the order was addressed to the alleged contemnor would rightly have been disregarded as done without jurisdiction. But if the Attorney-General had moved instead upon the ground that the publication interfered with the administration of justice (*Lord Wellesley v. Earl of Mornington* (No. 2), 11 Beav. 181), he would have succeeded and the fact that publication had taken place notwithstanding the warning conveyed by the form of the order would have been an aggravating circumstance.

Now what of the "chance" or "fact" that the court had made an order against the "News of the World?" The court is entitled to administer justice in whatever way it considers appropriate, although this is, of course, governed by precedent and principle. Thus, exceptionally, it can conduct proceedings wholly in camera, including concealing the identity of the parties and the judgment: *Reg. v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] Q.B. 227. In the particular case Balcombe J. decided to administer justice by concealing details concerning the ward and announced this fact because it was unusual. He would have had no need to announce that the court would not permit its ward to be married without its consent, because this is well known. Having once determined how justice was to be administered, any interference with that course of action would be unlawful and punishable as a contempt. The order was thus very material. Without it any newspaper could have said, rightly,

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A that Balcombe J. was not administering justice in a way which involved concealment of information about the ward, otherwise than in the context of particular applications in the wardship.

B The instant case is almost exactly analogous. In fact the ex parte injunction was granted as soon as, or even before, the writ was issued and the proceedings begun. But suppose that there had been an interval of a week between the writ and the injunction, with publication of the Wright material meanwhile. This would not have been a contempt, because the court would not have indicated that it proposed to administer justice between the Attorney-General and "The Guardian" and the "Observer" by preserving the confidentiality of the Wright material pending the trial and no one would have had any reason to know that it did so intend. Knowledge of how the court is administering, or intends to administer, justice is of the essence of the unlawfulness of conduct which interferes with that administration, whether or not that conduct consists of disobedience to an order. Once the court had announced its intention of preserving the confidentiality of the Wright material, the position was quite different. The order itself, reinforced by the statement of Millett J. that:

D "the refusal of injunctive relief would permit indirect publication [of the Wright memoirs] and effectively and permanently deprive the Attorney-General of his rights in advance of the trial"

and by my own statement that other newspapers would not be free to republish, had made it abundantly clear that the court was intending to preserve the confidentiality of the Wright material pending the trial. This was its chosen method of administering justice and "The Independent," "The London Evening Standard" and "The London Daily News" can have been in no doubt that this was the case.

E I now turn to the practical considerations which moved Sir Nicolas Browne-Wilkinson V.-C. or confirmed him in his view.

F *The take-over bid*

It is difficult to comment on this without knowing more of the cause of action being alleged by B, but the short answer is that a sale by C to X could not interfere with the course of justice in any circumstances which I can foresee, because the sale, and everything done in consequence of it, could be reversed by court order if justice so required.

G *Cutting down the trees*

H In the example given, A alleges a right to prevent B from cutting down trees on B's land and C claims a right against B to cut them down. If there was any question of C's right being subject to A's right, as well there might be, this would be a contempt and C should apply to be joined in the action. If C's right was wholly independent, so that, in effect, A's right was admittedly subject to C not exercising his right, there would be no contempt, because the administration of justice between A and B would not be interfered with.

Defamation

Defamation is an assault on reputation analogous to a physical assault on the person. If B is enjoined not to assault A and C then

assaults A, there is no interference with the administration of justice in the action *A v. B*. It is simply a further tort or crime. Similarly with defamation. The court will prohibit a second defamatory statement (or blow) by B, but the subsequent making of the same defamatory statement by C (i.e. an additional blow) will not interfere with the administration of justice as between A and B. It is simply an independent tort if, in the end, it cannot be successfully defended. This is not to say that the publication by C might not constitute a contempt of court, even if C was not enjoined and even if he claimed that he was in a position to justify his defamatory statement. It would all depend upon whether it would in fact interfere with the administration of justice: see *Attorney-General v. News Group Newspapers Ltd.* [1987] Q.B. 1, where this court made it clear that the rule in *Bonnard v. Perryman* [1891] 2 Ch. 269 was subordinate to the rule of law that conduct which interfered with the administration of justice was a contempt of court.

The trade secrets

This is another case upon which it is difficult to comment without knowing more of the facts. The issue would be whether the revelation of trade secrets by C, whether authorised or not, would thwart the administration of justice as between A and B. I can imagine differing scenarios in which different answers might be given and it certainly cannot be said that an injunction restraining B would automatically restrain C. Indeed I should be surprised if it did, if only because A's claim would usually relate to trade secrets entrusted by him to B and not those entrusted by him to C, even if they were the same. In the instant case, what is being asserted by all the newspapers concerned is a similar right to break the confidentiality of the Wright material. This is being determined in the Guardian and the Observer actions and any publication by anyone else meanwhile would frustrate the administration of justice in that action. The element of uncertainty stems only from not knowing the full facts of the hypothetical case.

The industrial dispute

An order restraining B from picketing A's premises would not render picketing by C a contempt of court, because it would not interfere with a determination of whether B was entitled to picket and the giving of remedies to A if it was unjustified. It is only if picketing by C would lead to the irreparable collapse of A's business rendering a resolution of his dispute with B impossible or irrelevant that there would begin to be an analogy with the present situation.

The Vice-Chancellor also expressed the view that if the Attorney-General's submissions were correct, third parties alleged to be in contempt would be deprived of what he described as "very elaborate procedural safeguards" and he instanced personal service of the order, the indorsement of a penal notice on the order and the care which is taken to ensure that the conduct complained of constitutes a breach of the express terms of the order. In particular, he said that if the Attorney-General's contentions were right, the alleged contempt could consist of doing some act inconsistent, not with the terms of the order, but with the purpose of the order. This confuses the category of contempt which consists of disobeying or assisting in the disobedience of an order with the general category of contempt, namely, interfering with

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A the due administration of justice. None of these procedural safeguards
has ever been applied, or could apply, in the latter category. The test of
contempt or no contempt in that category is not inconsistency with the
purpose of the court's order; it is in every case, and whether or not
there is an order, simply whether the alleged contemnor knowingly
interfered with the due administration of justice by the court. In almost
B all cases, given the facts the answer is obvious to anyone, as it is in this
case, and, for my part, I can see nothing in the result which offends the
basic principles of natural justice. What would offend those principles
would be to hold that these newspapers were free to destroy the subject
matter of the action between the Attorney-General and "The Guardian"
and the "Observer" newspapers, incidentally whilst denying the
defendants in that action the same right, thus depriving both the
C Attorney-General and those newspapers of their right to have their
dispute determined in accordance with law.

I am conscious that, despite the length of this judgment, I have not
referred to the Canadian authorities. Suffice it, perhaps, to say that I,
like the Vice-Chancellor, have found the guidance which they offer
limited and confused.

D In general I think that there is force in Mr. Laws's submission that it
would be unwise for courts to spell out in orders addressed to B what
would or would not constitute a contempt by C, lest the failure to do so
lead C to think that he was free to take any action not so specified,
regardless of whether or not it would interfere with the due administration
of justice. In the exceptional circumstances that one or more newspapers
are forbidden to publish confidential information because to do so would
E destroy any rights which the plaintiff may have and that any publication
by other newspapers would have the same effect, it seems, with
hindsight, that this might have been a sensible course to have adopted
and one which, however irregular, would probably in fact have prevented
the present situation arising. However, I am quite clear that the failure
to do so does not render the newspapers' conduct any less capable of
constituting a serious contempt of court.

F In seeking to do justice to the judgment of the Vice-Chancellor I
have strayed, albeit sometimes somewhat tentatively, down a number of
byways. Now I shall return to what actually happened. The first to
publish was "The Independent" which in a leading article dated 27 April
1987 stated:

G "The decision to publish material from the manuscript of Peter
Wright's thus far unpublished book *Spycatcher* was not taken lightly.
The government's determined effort to prevent publication in
Australia of Mr. Wright's memoirs speaks for itself. Our justification
is simple. It is in the public interest that facts about the operation of
M.I.5 become known in order that the debate about the proper
oversight and supervision of the security and intelligence services
can be better informed."

H The other two newspapers presumably were of the same view.

The preliminary question of law does not address itself to the
question of what was the justification for the newspapers' actions or
what were their intentions in publishing. The assumption being made
was that, on the view of the law which was put forward by the
newspapers and accepted by the Vice-Chancellor, these considerations
were irrelevant. With all respect I cannot accept this. Test it this way.

Suppose, contrary to the facts, that the sole intention of the newspapers in publishing was to render nugatory the trial of the action brought by the government against the Guardian and the Observer. In my judgment there could not be a clearer contempt of court but, on the answer given by the Vice-Chancellor, the newspapers could say that no offence had been committed. That cannot be right.

Curiously, this point was never put to the Vice-Chancellor and was never raised in argument before us. It only occurred to us after we had adjourned to consider our judgments and it seemed so fundamental that we thought it right to invite further argument on whether intent "to impede or prejudice the administration of justice" (to quote section 6(c) of the Contempt of Court Act 1981) was or was not a relevant consideration and, if it was, what was the nature of the intention which had to be proved if a contempt of court was to be established.

Mr. Clarke, appearing for "The Independent," submitted that if the conduct of the newspapers does not constitute an *actus reus*, or criminal act, it matters not whether they have the necessary *mens rea*, or criminal intent. This is quite right and perhaps fortunate. If ordinary citizens could be convicted of offences which they intended to commit, but never got round to committing, the prisons would be even fuller than they are at present. But that is not this case. Indeed this is the converse of that case. Here the newspapers without doubt have interfered with the administration of justice by rendering the trial of the government's claims against the Guardian and the Observer less effective. They have therefore committed the *actus reus*. The real question is whether they had the necessary *mens rea* or criminal intent. It is to that question that I now turn.

Mens rea in the law of contempt is something of a minefield. The reason is that it is wholly the creature of the common law and has developed on a case by case basis, as no doubt it will continue to do. The Act of 1981 did not seek to systematise the approach of the courts. It simply defined by section 1 a term of art, namely, "the strict liability rule," as meaning:

"the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings, regardless of intent to do so."

There may well be instances of conduct which would be treated as contempt of court regardless of intent to do so, but which do not fall within this defined term. One example may be *Attorney-General v. Butterworth* [1963] 1 Q.B. 696, because the act complained of—punishing a witness for having given evidence in proceedings after those proceedings had been concluded—was calculated to interfere with future proceedings in general and not "particular legal proceedings." Another would be the offence of marrying a ward of court or taking the ward out of the jurisdiction without in each case first obtaining the court's permission, because the gravamen of the charge is not interfering with the course of justice *in proceedings*.

The contempt alleged against the three newspapers quite clearly falls within the category of contempt to which the Act applies and accordingly the limitations and defences set out in sections 2 to 5 apply. The most important of these is section 2(3) which provides:

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- A "The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication."

The proceedings between the Government and "The Guardian" and the "Observer" newspapers were not active in this sense when the three newspapers published the Wright material and accordingly they cannot be charged with contempt of court on a strict liability basis. This, Mr. Laws, for the Attorney-General, fully accepts. But this does not mean that they cannot be charged on a basis which involves having regard to intent and indeed section 6(c) expressly contemplates and saves such a possibility when it provides:

- C "Nothing in the foregoing provisions of this Act—. . . (c) restricts liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice."

- D This at once raises the question, "What kind of intent?" Mr. Laws contending for a general or basic intent and the newspapers for a specific intent. In the light of the policy of Parliament as evidenced by section 8 of the Criminal Justice Act 1967, and the likelihood that in passing the Act of 1981 Parliament intended to accept the recommendations of the Phillimore Committee (Report of the Committee on Contempt of Court (1974) (Cmnd. 5794)), I am quite satisfied that what is contemplated, and what is "saved," is the power of the court to commit for contempt where the conduct complained of is specifically intended to impede or prejudice the administration of justice. Such an intent need not be expressly avowed or admitted, but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct. Nor need it be the sole intention of the contemnor. An intent is to be distinguished from motive or desire: see *per* Lord Bridge of Harwich in *Reg. v. Moloney* [1985] A.C. 905, 926.

Summary

- F Although it has been necessary to explore this matter in considerable detail and depth, I can summarise the position very shortly. (1) Confidential information, whatever its nature—personal, financial, technical or security—has one essential common characteristic. It is *irremediably* damaged in its confidential character by every publication and the more widespread the publication, the greater the damage. (2) If a *prima facie* claim to confidentiality can be established, but this is opposed by a claim of a right to publish, whether on grounds of the public interest or otherwise, these opposing and wholly inconsistent claims must be evaluated and balanced the one against the other. (3) The public interest in ensuring that disputes are resolved justly and by due process of law may require a different balance to be struck at different stages. Thus, pending the trial of the action, the balance will normally come down in favour of preserving confidentiality, for the very obvious reason that, if this is not done and publication is permitted, there will be nothing left to have a trial about. (4) It is for the courts, and not for either of the opposing parties, to decide where, in the public interest, that balance lies. (5) Third parties—strangers to the action—who know that the court has made orders or accepted undertakings designed to protect the confidentiality of the information pending the trial, commit a serious offence against justice itself if they take action

which will damage or destroy the confidentiality which the court is seeking to protect and so render the due process of law ineffectual. (6) If such third parties, having a legitimate interest in so doing, wish to contest the court's decision to protect the confidentiality of the information on any grounds, including in particular that they have special rights or interests of which account has not been taken, they should apply to the court which will hear them and make any modification of its orders which may be appropriate. This is a well-established procedure which works speedily and well in the context of *ex parte* orders, such as those made in the exercise of the *Mareva* and *Anton Piller* jurisdictions. Similarly they should apply to the court if they have doubts whether the action which they contemplate taking is lawful. (7) It is for the courts, and not for third parties, to decide whether, balancing competing public and private interests including those of the third parties, confidentiality should continue to be preserved at any particular time.

I would answer the question raised on this appeal by holding that the conduct of the respondents could constitute a criminal contempt of court, but that it is impossible to say whether it did or did not do so until they have been given an opportunity of being further heard and the court has determined whether, in so conducting themselves, the respondents intended to impede or prejudice the administration of justice. I would allow the appeal and remit the matter to the High Court.

LLOYD L.J. On 27 April 1987, the day on which "The Independent" published material from the manuscript of Peter Wright's book *Spycatcher*, there appeared in the same paper a leader under the heading "When the Security Service turns to treason." The theme of the leader can be gathered from a single sentence:

"Mr. Wright's first-hand description of illegality and incompetence within the Security Service is deeply shocking and amounts to an unambiguous case for a form of scrutiny which goes beyond the present system of ministerial oversight."

"The Independent's" justification for publishing the material is equally succinct:

"It is in the public interest that facts about the operation of M.I.5 become known in order that the debate about the proper oversight and supervision of the security and intelligence services can be better informed."

It is obvious from these extracts that this case involves issues of the greatest public importance. It is, therefore, all the more important to be clear what this particular appeal is about, and what it is not about.

It is not about the oversight and supervision of the security and intelligence services. Nor, on this appeal, do we have to decide whether the articles in "The Independent," "The London Evening Standard" and "The London Daily News" were in contempt of court. Our sole task is to answer the preliminary question of law formulated by Sir Nicolas Browne-Wilkinson V.-C., namely, whether a person who is not party to an order of the court can nevertheless be in contempt of court if he does something which interferes with the course of justice by frustrating the purpose of that order. The Vice-Chancellor, in a judgment to which I

A too would pay my respectful tribute, has answered the question of law in favour of the respondents. The effect of answering the question that way will be, as I understand it, to bring these contempt proceedings to an end. Thus "The Independent" and the other newspapers would not be liable for contempt even if the facts turned out to show that they intended to interfere with the course of justice by frustrating the purpose of the order in "The Guardian" and the "Observer" cases.

B The grounds of the Vice-Chancellor's judgment can be summarised as follows. (i) In no case other than the Irish case of *Smith-Barry v. Dawson* (1891) 27 L.R.Ir. 558 has a third party, not subject to the order of the court, been held liable for contempt for doing an act which is prohibited by the order, unless he has aided and abetted a breach of the order by the person enjoined. Since there is no question here of "The Independent" having aided or abetted a breach by "The Guardian" or
C the "Observer," it would involve an extension of the law of criminal contempt to apply it in the present case. (ii) While it is open to the court to extend the law, nevertheless the court should be wary of doing so, since the liberty of the subject is involved. (iii) To apply the law of contempt to a person who is not party to the order in question would not only widen the application of the law, but also infringe a fundamental
D principle that the courts do not make orders against all the world. The court acts in personam. Accordingly its orders only operate in personam, never in rem. (iv) To hold that a person who is not party to the order, and not party to the breach of the order as aider and abetter, may nevertheless be liable for contempt on the ground that he has contravened or frustrated the spirit of the order would be to introduce a degree of
E uncertainty which is incompatible with the imposition of a criminal sanction. It would also be contrary to natural justice, since he would be bound by the effect of an order in respect of which he had no opportunity to be heard.

Now I agree entirely with the first two steps in the Vice-Chancellor's reasoning. Although there are dicta in *Seaward v. Paterson* [1897] 1 Ch. 545 and *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180 which may
F be said to support a wider principle, I regard those cases as having decided, and decided only, that a person may be liable in contempt if, with knowledge of the order, he aids and abets a breach of the order by the person enjoined. The same is true of *Z Ltd. v. A-Z and AA-LL* [1982] Q.B. 558. It was held in that case that the bank would be liable for contempt if, with knowledge of the *Mareva* injunction, it enabled its
G customer to act in breach of the terms of the injunction, even though the injunction had not yet been served on the customer. The customer could not, of course, be liable in contempt himself until notice of the injunction had been properly served. But he could breach the injunction as soon as it was granted; and the bank could therefore be liable in contempt for aiding and abetting that breach.

H So the cases are of no help to Mr. Laws. I would only add, before leaving the cases, that it would be an improvement of this branch of the law if aiding and abetting a breach of a court order were re-classified as a civil contempt rather than a criminal contempt. The best course would no doubt be to abolish what remains of the distinction altogether, in accordance with the recommendations of the Phillimore Committee, Report of the Committee on Contempt of Court (Cmd. 5794). But if the distinction is to remain, it does not make sense that a stranger to the order, who aids and abets a breach, should be criminally liable while the

person to whom the order is directed and who himself commits a breach should only be liable for civil contempt. That is the sort of nonsense which does no credit to the law, as was pointed out forcibly enough by Lord Atkinson nearly 75 years ago in *Scott v. Scott* [1913] A.C. 417.

It is when he comes to the third step in his reasoning that I begin with great respect, to part company from Sir Nicolas Browne-Wilkinson V.-C. I accept, of course, that it is a fundamental principle with certain very limited exceptions, of which the best established is wardship, that our courts act in personam. As Lord Eldon L.C. said in *Iveson v. Harris* (1802) 7 Ves.Jun. 251, 256:

“I have no conception, that it is competent to this court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause.”

That dictum was repeated with approval by Lord Uthwatt in *Marengo v. Daily Sketch and Sunday Graphic Ltd.* [1948] 1 All E.R. 406, 407: see, also, *Brydges v. Brydges and Wood* [1909] P. 187, 191.

But the question here is not whether a third party is bound by the injunction, but whether he can be liable for contempt even though he is not bound by the injunction. He cannot be liable in contempt for breach of an order to which he is not a party; nor, on the facts of the present case, could the respondents be liable for aiding and abetting a breach. But it does not follow that they may not be liable for interfering with the course of justice. Thus, to take a wholly improbable example in order to illustrate the point, suppose a party to certain proceedings assaults or abuses the judge; suppose the judge makes an order against him in the proceedings prohibiting him from repeating his abusive conduct. If a stranger comes to court and abuses the judge in like manner, it will surely not be a defence to a charge of contempt that he was not a party to the order. His conduct amounts to a contempt of court independently of any order made in the proceedings. Nor would holding such a man liable for contempt create any undesirable uncertainty or injustice. He is assumed to know that abusing the judge is a contempt of court. Ignorance of the law will afford him no more excuse in this than in any other branch of the criminal law.

It may be said that abusing the judge is an obvious contempt, whereas interfering with the course of justice, in particular proceedings, is much less precise. This is true. Moreover I would accept that not all acts which are calculated to interfere with the course of justice will necessarily ground a charge of contempt. The act must be sufficiently serious and sufficiently closely connected with the particular proceedings. But in the present case the conduct relied on by the Attorney-General is not marginal. It is not a mere prejudging of the issue to be decided in the particular proceedings. It is not a mere usurpation of the court's function. It is the destruction, in whole or in part, of the subject matter of the action itself. The central issue in the Guardian action is whether “The Guardian” should be restrained from publishing confidential information attributable to Mr. Wright. Once the information has been published by another newspaper, the confidentiality evaporates. The point of the action is gone. It is difficult to imagine a more obvious and more serious interference with the course of justice than to destroy the thing in dispute.

That brings me to what I regard as the central difficulty in this case. If the destruction of the subject matter, that is to say the publication of

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A the confidential material, is sufficient ~~to~~ constitute the actus reus of contempt, then the injunction against "The Guardian" becomes irrelevant. "The Independent," and the other newspapers, would be liable for contempt by reason of the destruction of the subject matter of the action, even if the court had never granted an interlocutory injunction against "The Guardian." Mr. Laws was unwilling to take his argument that far, and I can understand why not. To take another example mentioned in the course of the argument, suppose the subject matter of the action—the *res litigiosa*—were the ownership of a racehorse. If a third party, knowing of the litigation, were to shoot the horse for reasons of his own, or for no reason at all, could he be liable for contempt? Mr. Laws shied away from answering that question "Yes." Yet the subject matter of the action would have been destroyed just as surely as in the case of confidential information. So Mr. Laws was driven to accepting that the injunction against the Guardian is indeed an essential plank in the Attorney-General's proceedings for contempt. The injunction is not irrelevant, as in the example of the stranger who abuses the judge.

D But if the injunction is not irrelevant, if it is something more than the fifth wheel of the coach, then Mr. Laws is in the difficulty, which the Vice-Chancellor regarded as insuperable, that the injunction is being given at least *some* legal effect against a stranger who is not party to the proceedings and has not had an opportunity to be heard; the injunction is being treated as having at least *some* validity *contra mundum*.

E I am bound to say that I have not found the solution to this conundrum easy, and my mind has wavered during the course of the argument and since. The reasons marshalled by the Vice-Chancellor in his judgment, and the arguments advanced on behalf of the respondents in this court, are very powerful. But in the end I have come down in favour of the Attorney-General. Before stating my reasons, I wish to quote what I regard as a crucial paragraph from the judgment of the Vice-Chancellor, in which he is dealing with the objections to the principle contended for by the Attorney-General, ante, p. 957A-D:

F "There are other equally serious objections. Mr. Laws himself accepted that, in the case of some orders against B, it would not be a contempt for C to do the act which B is prohibited from doing. He instanced the case of an injunction granted in a matrimonial dispute which restrained the husband B from assaulting the wife A. G Mr. Laws accepts that if C assaults A, he would not be in contempt of court. The reason, says Mr. Laws, is that the order restraining B is plainly personal to B. But the borderline between such 'plainly personal' orders and other orders must be very uncertain. All orders are *expressed* as being personal. Is an order restraining an act by B in breach of his contract with A personal? If so, can C safely do an act even if the result of such act will be to frustrate the order? For example, in the case I have given of the felling of the trees, will it not be a contempt of court by C to fell the trees because A's right to prevent B from felling the trees lay in the contract between A and B? In my judgment, the distinction between personal and other orders is unworkable. It would lead to a degree of uncertainty whether or not an act was a contempt which is incompatible with the imposition of a criminal sanction."

Now I accept that the distinction between “personal” and “other” orders (though I would not adopt the terminology) may be hard to state in theory. But the line is by no means hard to draw in practice, for it corresponds to a difference in real life. “Personal” orders are those which are made, usually at the conclusion of proceedings but often at an interlocutory stage, which affect the person to whom the order is directed, and those who aid and abet him, but nobody else. “Other” orders include orders by which the court regulates its own procedure, and determines how a case is to be tried. “Other” orders will, of course, bind the parties to the proceedings. But I see no reason why such orders should not also be regarded as having a wider effect in shaping, or determining, the way in which justice is to be achieved in the particular case. If a third party with knowledge of such an order does something which disables the court from conducting the case in the intended manner, then I see no reason why that should not be regarded as an ordinary interference with the process of justice. The third party would be liable for contempt, subject to proof of mens rea, not because he is in breach of the order, but because he has prevented the court from conducting the proceedings in accordance with its intention.

Thus if, to return to the example of the racehorse, the court were to make an order under R.S.C., Ord. 29, r. 2, for the interim preservation of the racehorse, pending the outcome of the proceedings, I can see no reason why a stranger who, with knowledge of the order, shoots the racehorse should not be liable for contempt on the ground that he has interfered with the course of justice, even though he may not be bound by the order as such.

There is, I think, a useful analogy to be drawn with the power of a court to order a hearing in camera. Putting aside section 12 of the Administration of Justice Act 1960, publication of proceedings held in camera may be a contempt, not because it is in breach of the order of the court but because it is an interference with the course of justice. In *Arlidge and Eady, The Law of Contempt* (1982) the authors, having discussed *Scott v. Scott* [1913] A.C. 417; *In re F. (or se A.) (A Minor) (Publication of Information)* [1977] Fam. 58 and *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440, conclude at p. 244, para. 4–151:

“Since the test of contempt is not breach of the order but interference with the administration of justice, it follows that *at common law* a contempt may be committed even if no specific order has been made by the court affecting anyone other than those involved in the proceedings. At common law, if the court makes an order regulating its own procedure and the purpose of the order is plainly to protect the administration of justice, then anyone who subverts that order will be guilty of contempt.”

In my judgment that represents an accurate statement of the law.

So my answer to the question of law, in general terms, would be in the affirmative. But in order to avoid any doubt as to what precisely I, for my part, am deciding, I would put it this way: “The publication of confidential information which is the subject matter of a pending action, and which (i) is made in knowledge of an outstanding injunction prohibiting the publication of that information and (ii) would have the effect of destroying the subject matter of that action, in whole or in part, may constitute the *actus reus* of contempt.” I too would allow the

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A appeal. But since the underlying question whether these articles are in contempt of court will now have to be tried, it may be helpful if, like Sir John Donaldson M.R., I say a word or two on the question of mens rea.

Mr. Laws sought to persuade us that the strict liability rule, that is to say, the rule whereby a person may be liable for contempt of court regardless of whether he intends to interfere with the course of justice, never did apply to a case such as the present. I am not sure what Mr. Laws's purpose was in advancing that submission. But whatever his purpose, I was not persuaded. I can see no reason for distinguishing between an interference with the course of justice by, for example, prejudging the issue or bringing unfair pressure to bear on the parties, to which admittedly the strict liability rule always applied, and an interference with the course of justice by destruction of the subject matter. So the strict liability rule would, in my view, have applied to the present case prior to the passing of the Contempt of Court Act 1981.

C The purpose of section 2 of that Act was to confine strict liability as defined within narrow limits. Thus it was common ground that strict liability does not apply to the facts of the present case, because the proceedings against "The Guardian" were not active, within the statutory definition, at the time of publication. But the fact that "The Independent" could not be liable here under the strict liability rule does not mean that "The Independent" cannot be liable at all. Section 6(c) specifically provides that nothing in section 2 shall restrict liability in respect of conduct intended to impede or prejudice the administration of justice. The question is: what is the nature of that intent?

E There are three possibilities. The first is that the contemnor is liable if he intends to do the act in question, in this case publish the article, even though he does not intend to impede or prejudice the administration of justice. It is sufficient if the article in fact impedes or prejudices the administration of justice. The second possibility is that the contemnor is liable if he intends to interfere with the course of justice—I use that phrase for brevity—or is reckless whether or not he interferes with the course of justice. The third possibility is that the contemnor is only

F liable if he intends to interfere with the course of justice.

Mr. Laws did not seek to support the first possibility. But he argued strongly in favour of the second. There was, he says, nothing in the pre-existing law to suggest that contempt of court was ever a crime of specific intent. If therefore it was necessary to show a guilty mind on the part of the contemnor, in other words when the strict liability rule did not apply, it was sufficient to show either that he intended to interfere with the course of justice, or that he was reckless whether he did so or not. This would be in accordance with the ordinary principles of criminal law. Moreover, if it were necessary to show in every case that the contemnor intended to interfere with the course of justice, the protection afforded by the law of contempt to the administration of justice would be undermined. Mr. Laws relied on the following passage from *Arlidge and Eady, The Law of Contempt*, p. 82, para. 2–80:

H "The best view is that contempt of court is a crime of general intent. There is insufficient authority to indicate that it is a crime of specific intent and the purpose of the jurisdiction might be too easily defeated if it were."

He also relied on a later passage, at p. 177, para. 4–46, where the authors sound a less certain note:

“Since this type of offence has hitherto been absolute, there are no authorities which indicate the precise nature of the mens rea required in the case of prejudicial publications which fall outside the Act but which are nevertheless prima facie contempts. On principle the contemnor must know the publication contains matter capable of prejudicing particular proceedings; he must know the proceedings are pending or imminent; and he must intend to prejudice these proceedings. It may be that if he is reckless as to any or all of these requirements he will also be guilty.”

If reckless interference with the course of justice was a ground of liability before the Act, as Mr. Laws submits it was, then there is nothing in the Act itself which restricts that ground of liability. It is true that section 6(c) refers to conduct intended to impede or prejudice the administration of justice, and there is nothing about recklessness. But section 6(c) was enacted for the avoidance of doubt. Since there is nothing in section 1 or 2 to restrict liability based on recklessness, there was no need to refer to recklessness in section 6(c). Alternatively, “intent” in section 1 and “intended to impede etc.,” in section 6(c) must refer to *general* intent, i.e. basic mens rea, which would include recklessness.

Such was Mr. Laws’s argument. I cannot accept it. Mr. Clarke is surely right when he submits that the statutory purpose behind the Contempt of Court Act 1981 was to effect a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech. Such a shift was forced upon the United Kingdom by the decision of the European Court in *The Sunday Times v. United Kingdom* [1979] 2 E.H.R.R. 245, and was in any event foreshadowed by the recommendations of the Phillimore Committee, Report of the Committee on Contempt of Court (1974) (Cmd. 5794). If we were to hold that, where the strict liability rule does not apply (because, for example, the publication does not create a *substantial* risk that the course of justice would be *seriously* impeded, but only some lesser risk, or some minor impediment), the publisher might nevertheless be liable if he is reckless, we would certainly not be furthering the statutory purpose.

But Mr. Clarke has a narrower, and even more compelling, point based on the language of section 1. The strict liability rule is expressed to be a rule whereby a person may be liable “regardless of intent.” Now, whatever else recklessness may or may not mean (and the cases show that the concept is not without its difficulties) it is clear that it is independent of, and frequently contrasted with, intent. Liability based on recklessness is thus a liability regardless of intent. If that is so, then liability based on recklessness is included within the statutory description of the strict liability rule, and is therefore subject to the restrictions imposed by section 2. It must follow that recklessness does not provide the Attorney-General with an avenue of escape from section 2, which is the essence of Mr. Laws’s submission.

Putting the matter another way, section 6(c) of the Act saves from the operation of sections 1 and 2 conduct which is intended to impede or prejudice the administration of justice. If it was the object of Parliament to save also conduct which is reckless, then Parliament would surely have said so. Sections 1, 2 and 6(c) cover the whole ground. In cases covered by the Act to which the strict liability rule does not apply, there

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A is no room for a state of mind which falls short of intention. There is no middle way.

I would therefore hold that the mens rea required in the present case is an intent to interfere with the course of justice. As in other branches of the criminal law, that intent may exist, even though there is no desire to interfere with the course of justice. Nor need it be the sole intent. It may be inferred, even though there is no overt proof. The more obvious the interference with the course of justice, the more readily will the requisite intent be inferred.

BALCOMBE L.J. I have had the advantage of reading in draft the judgments of Sir John Donaldson M.R. and Lloyd L.J., and I gratefully adopt the Master of the Rolls's exposition of the facts relevant to this appeal.

C The question, which Sir Nicolas Browne-Wilkinson V.-C. ordered to be tried as a preliminary point of law, and which he answered in the negative, was:

D "Whether a publication made in the knowledge of an outstanding injunction against another party and which if made by that other party would be in breach thereof constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction."

In the course of the argument before us this preliminary point was refined in two particular respects. (i) It was taken to relate only to a case where the injunction in question is designed to preserve the subject matter of the action—in this case confidential information—pending the trial, and the nature of the subject matter is such that, if the injunction is broken, the subject matter will have ceased to exist, thereby rendering any trial between the parties pointless. (ii) The question was modified so as to ask whether such a publication was capable of constituting a criminal contempt of court, it being accepted by the parties that even if the publication was capable of being contempt of court, it would not be such unless the necessary element of intent were present. If this appeal is to be allowed, the question whether the respondents had the necessary intention to impede or prejudice the administration of justice will have to be decided, on evidence, by the court of first instance. In the event, and with the benefit of hindsight, I think that all parties would now accept that to try and resolve the issues between the parties by the determination of a preliminary point of law was a mistake.

G Contempt of court is generally categorised under two heads. Civil contempt comprises a specific failure to comply with an order of the court by which the contemnor is bound; criminal contempt is constituted by interference with the administration of justice: see *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273, 307–308, *per* Lord Diplock. It is a contempt of the latter class which the Attorney-General contends may have been committed in the present case.

H Undoubtedly an act which interferes with the course of justice is capable of constituting a contempt of court. The books are full of cases about such acts. Some, such as assaulting an officer of the court, interference with witnesses or jurors, or disrupting court proceedings, bear little relation to the present case. Much nearer to the circumstances of the present case are those cases where a person has been held guilty of contempt by "aiding and abetting" the commission of the act

forbidden by the court's order. A good example is the early case of *Lord Wellesley v. Earl of Mornington* (1848) 11 Beav. 180, 181, where the distinction is made very clear. The Earl of Mornington was restrained by injunction from cutting timber. His agent, one Batley, cut the timber in question, knowing that this was forbidden. A motion to commit Batley for breach of the injunction was refused, *Lord Wellesley v. Earl of Mornington* (No. 1), 11 Beav. 180, since he was not enjoined, but a motion to commit him for contempt, in knowingly assisting in a breach of the injunction, would have been granted by Lord Langdale M.R., but for the forbearance of the plaintiff, *Lord Wellesley v. Earl of Mornington* (No. 2), 11 Beav. 181. So also in *Seaward v. Paterson* [1897] 1 Ch. 545, it was held that the court had jurisdiction to commit for contempt a person (one Murray) not bound by an injunction, but who, knowing of the injunction, aided and abetted a defendant in committing a breach of it. In the course of his judgment Lindley L.J. said, at p. 554:

"Now, let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him—he is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction, which was not granted against him any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction, which has a technical meaning. . . . It has always been familiar doctrine to my brother Rigby and myself that the orders of the court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the court, or by assisting those who were bound by its orders."

A modern example is to be found in *Z Ltd. v. A-Z and AA-LL* [1982] Q.B. 558. That case concerned the position of a bank which had notice of the terms of a *Mareva* injunction before the defendant had himself received notice of the injunction. The argument and the effect of the decision is summarised in the following passage from the judgment of Eveleigh L.J., at p. 578:

"As was recognised early in the arguments before us in determining what action is called for by a bank which has notice of the terms of a *Mareva* injunction it is necessary to determine the basis of liability for contempt of court.

"I think that the following propositions may be stated as to the consequences which ensue when there are acts or omissions which are contrary to the terms of an injunction. (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction.

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A "The first proposition is clear enough. As to the second, however, it was submitted that until the defendant had notice of the injunction nothing done by the bank could amount to contempt of court. Also two opposing views were canvassed (I use this expression as the arguments were not strictly contentious) as to the extent to which mens rea was a necessary ingredient in determining the bank's responsibility to the court.

B "I will give my reasons for the second proposition and take first the question of prior notice to the defendant. It was argued that the liability of a third party arose because he was treated as aiding and abetting the defendant (i.e. he was an accessory) and as the defendant could himself not be in breach unless he had notice it followed that there was no offence to which the third party could be an accessory. In my opinion this argument misunderstands the true nature of the liability of the third party. He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted."

E My use of the phrase "aiding and abetting" is intended to include conduct of the kind considered by the court in *Z Ltd. v. A-Z and AA-LL*. But that is the extent of the English cases. There is no English authority which establishes that it is a contempt of court, in the sense of knowingly interfering with the course of justice, for a person who is not prohibited by an order to do something which is forbidden by the order, unless he is "aiding and abetting" the person named in the order. There is, however, an obiter dictum to this effect by Henry J. in *United Kingdom Nirex Ltd. v. Barton*, *The Times*, 14 October 1986.

F We were also referred to one Irish and three Canadian cases. The Irish case, *Smith-Barry v. Dawson*, 27 L.R.Ir. 558, a decision of Hedges E. Chatterton V.-C. at first instance, is undoubtedly authority for the proposition which the Attorney-General seeks to establish. However, the parties against whom attachment for contempt was sought did not appear and were not represented so that there was no argument against the application, and the Vice-Chancellor gave no reasoned judgment but followed an unreported case to the like effect. The persuasive effect of this case is thus extremely limited.

G The Canadian cases were all concerned with injunctions to restrain picketing in the course of a labour dispute. In all cases the order in question was expressed to operate on third parties. Thus in *Bassel's Lunch Ltd. v. Kick (No. 1)* [1936] O.R. 445, the order in question restrained "the defendants . . . or any one assisting or aiding them." In *Tilco Plastics Ltd. v. Skurjat* (1966) 57 D.L.R. (2d) 596, the order restrained the defendants "or person or persons having notice of this order." In *Catkey Construction Ltd. v. Moran* (1969) 8 D.L.R. (3d) 413, the order restrained the defendants "or anyone having notice or knowledge of such order." If the court has jurisdiction to restrain persons who are not parties to the proceedings in which the injunction is granted, then it follows that the court will enforce its orders against those persons who knowingly break them, and this could be the explanation of all these cases. However, it is fair to say that in the *Tilco*

Plastics case, Gale C.J.H.C., expressly disclaimed this as the grounds of his decision. He said, at p. 619: A

"In my opinion, the insertion of those words in the order of King J. did not affect the legal obligations of members of the public, one way or the other. The words may have been inserted to remind the respondent that the order could not be circumvented by any one having knowledge of it, but that is not material. Any person who is aware of the substance or nature of a court order cannot flout it simply because he is not expressly named in that order." B

Further, a second decision of the Ontario Court of Appeal in *Bassel's Lunch Ltd. v. Kick* (No. 2) [1937] 1 D.L.R. 235, and which was not referred to in the *Tilco Plastics* case, is to the opposite effect. In my judgment Sir Nicolas Browne-Wilkinson V.-C. in the present case was fully justified in saying that the state of the authorities under the law of Canada seems to be confused and I derive little or no assistance from these cases. C

Accordingly, I reach the conclusion, as did Sir Nicolas Browne-Wilkinson V.-C., that the particular question we have to decide is not covered by binding authority. The result is that we have to approach the question as a matter of principle. D

I have already stated the principle that criminal contempt is constituted by interference with the administration of justice. Thus it will normally require two elements: (1) conduct which interferes with the administration of justice: the *actus reus*; and (2) the state of mind which accompanies this conduct: the *mens rea*. It was to the question whether the publication by the respondents of material prohibited by the Guardian and the Observer injunctions constituted the *actus reus* that the Vice-Chancellor devoted his attention; the question of *mens rea* was not argued before him. It may have been the absence of any argument as to intent that caused the Vice-Chancellor to fall into error. Certainly for my part, I was much impressed by the arguments of the respondents as to uncertainty and unfairness, which seemed conclusive to the Vice-Chancellor, as is apparent from the passages from his judgment that have been cited by Sir John Donaldson M.R. Nevertheless, once the question of intent was raised, in the circumstances mentioned by Sir John Donaldson M.R., it seemed to me that the answer to the preliminary question of law became reasonably clear. I accept, of course, that wholly different considerations are relevant in considering what conduct may constitute the *actus reus*, and what state of mind may constitute the *mens rea*. Nevertheless, in considering whether or not particular conduct is *capable* of constituting the *actus reus*, it may be appropriate to test it by considering it in relation to a particular state of mind. E F G

In the present case the orders made in the Guardian/Observer proceedings indicated the way in which the court intended those proceedings should be conducted, viz., that the information derived from or attributed to Mr. Wright should remain confidential until the trial of those actions. It cannot seriously be denied that the publications on 27 April 1987 by the present respondents may well have rendered the trial of those actions pointless, at least in relation to those matters which were then disclosed, and thereby prevented the court from conducting those proceedings in accordance with its intention. If one then considers the possibility that those publications by the respondents *might* have H

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A been made with the sole intention of rendering pointless the Guardian/Observer litigation, then it seems to me impossible to say that there would then be no contempt of court: there would be both the necessary *actus reus*—the publications interfering with the prescribed course of justice in the Guardian/Observer actions—and the necessary *mens rea*. I accept that it is highly improbable that it was the respondents' sole intention to interfere with the Guardian/Observer actions, but that is the difficulty of raising a preliminary question of law: the answer to it must be apt to fit all possible hypotheses.

B So for the reasons which have been given more fully by Sir John Donaldson M.R. and Lloyd L.J. I, too, would allow this appeal and would respectfully agree with Lloyd L.J. in his formulation of the precise ambit of the decision at which we have arrived. I would remit the matter to the High Court.

C On the question of the necessary element of *mens rea*, it is sufficient to say that I agree with Sir John Donaldson M.R. and Lloyd L.J. that it will be necessary for the Attorney-General to establish that the respondents "intended to impede or prejudice the administration of justice" within the saving provision of section 6(c) of the Contempt of Court Act 1981 and that such intent does not include recklessness.

D Although I hope I have made it clear in the earlier part of this judgment that the reason why I consider that the publications of the respondents are capable of constituting a criminal contempt of court is because they interfered with the administration of justice, and not because they disobeyed orders made in the Guardian/Observer actions which were not addressed to them, I am conscious that this conclusion is reached by a sophisticated argument which may not be readily apparent to the layman. It seems to me that it would be preferable, in an appropriate case, where it is apparent that the subject matter of an action (e.g. confidential information or a secret process) could be destroyed by its publication by any person, whether a party to the action or not, for the court to make its initial protective order in terms which make it clear to third parties that they, too, must not destroy that subject matter. The question is whether the court has power, in an appropriate case, directly to order third parties not to destroy the subject matter of the action. The general principle was stated by Farwell L.J. in *Brydges v. Brydges and Wood* [1909] P. 187, 191:

G "But the court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties or as persons treated as if they were parties under statutory jurisdiction (e.g., persons served with notice of an administration decree or in the same interest with a defendant appointed to represent them), or persons coming in and submitting to the jurisdiction of their own free will, to the extent to which they so submit (e.g., creditors of a bankrupt executor, who has carried on business under a power in the will, coming in to claim against the testator's estate in order to obtain subrogation to the executor's right of indemnity). But the courts have no jurisdiction to make orders against persons not so before them merely because an order made, or to be made, may or will be ineffectual without it. Even in the case of an injunction Lord Eldon says in *Iveson v. Harris* (1802) 7 Ves.Jun. 251, 256: 'I have no conception, that it is competent to this court to hold a man bound by an injunction, who is not a party in the cause for the

purpose of the cause. The old practice was that he must be brought into court, so as according to the ancient laws and usages of the country to be made a subject of the writ.”

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See also *Ranson v. Platt* [1911] 2 K.B. 291 and *Marengo v. Daily Sketch and Sunday Graphic Ltd.* [1948] 1 All E.R. 406. The last case, being a decision of the House of Lords, is clearly binding on this court, unless there is any relevant exception to the general rule. That there is at least one exception appears from a case of my own at first instance, *In re X (A Minor) (Wardship: Injunction)* [1984] 1 W.L.R. 1422. In that case I held that, in the exercise of the wardship jurisdiction, there was power to make an order (prohibiting the publication of information about the ward) binding on the world at large, when persons who were potentially subject to that order had not been parties to the proceedings in which the order was obtained. With all respect to Sir John Donaldson M.R., that was the ratio of my decision, and I still believe it to have been correct. It is true that I then said that I was satisfied that, if it were not an exercise of the parental jurisdiction in wardship, there would be no such power, but the question whether there might be other exceptions to the general rule was not then before me. I believe that there can be another exception to the general rule which would enable the court to make an order, binding on the world at large, in the circumstances of the present case, where such an order may be appropriate to preserve the subject matter of an action pending trial. The law of contempt is but one example of the court's ability to regulate its own procedures so as to ensure that justice prevails. The rule that courts normally act only in personam is but another example of the same process. If the court needs to ensure that the subject matter of an existing action be preserved against all comers pending the trial of the action, then in my judgment the court can obtain the desired result by introducing another exception to the general rule that the court acts only in personam. I can find nothing in the cases to which I have referred, in which the general rule is stated, to say that the rule is wholly without exception, and it is not without significance that the Canadian courts have felt themselves able to make such orders.

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In this connection the following passage from the speech of Viscount Haldane L.C. in *Scott v. Scott* [1913] A.C. 417, 437, is very much in point:

“While the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done. In the two cases of wards of court and of lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject matter, illustrates a class which stands on a different footing.

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A There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

B

C In my judgment this passage can apply, mutatis mutandis, to the circumstances of the present case. If an interlocutory order to prevent publication of the details of a secret process, where the effect of publicity would be to destroy the subject matter, requires to be made so as to affect third parties, then the inability to make such an order would be just as much a denial of justice as if the litigation had to take place in public.

D The ability to make an order against the world at large would of necessity be extremely limited, to be granted only in the most exceptional cases (of which I concede the present could be one), but this seems to me the more satisfactory way of dealing with the problem thrown up by the facts of this case. What I have said in the last part of this judgment is merely an attempt to suggest how the problem might better be dealt with in the future. This course would also have the advantage that a third party in breach of the terms of the order would be liable for civil, rather than criminal, contempt. There is much to be said for treating all contempt which consists (in effect) of disobedience of the terms of an order of the court in one and the same manner.

E

F *Appeal allowed.*
Proceedings remitted to High Court.
Costs to be costs in motion.
Leave to appeal refused.

Solicitors: Treasury Solicitor; Oswald Hickson Collier & Co.; D. J. Freeman & Co.; Victor Mishcon & Co.

G B. O. A.

H

[1987]

[COURT OF APPEAL]

REGINA v. SECRETARY OF STATE FOR THE HOME
DEPARTMENT, *Ex parte* TURKOGLU

1987 May 19

Sir John Donaldson M.R., Croom-Johnson
and Bingham L.JJ.

*Judicial Review—Bail—Civil proceedings—Dismissal of application in judicial review—Refusal of bail pending appeal—Jurisdiction of court to grant bail—Supreme Court Act 1981 (c. 54), s. 16(1)*¹

The applicant was granted bail by a High Court judge at the same time as being granted leave to apply for judicial review of the decision of an immigration officer refusing him leave to enter the United Kingdom. His application for judicial review was dismissed and the judge, considering that he had no further jurisdiction in the matter, refused bail pending an appeal.

On his appeal against the refusal of bail:—

Held, allowing the appeal, that, unless there was statutory provision or judicial precedent to the contrary, the High Court seized of a civil matter had jurisdiction to grant bail and, accordingly, the judge on refusing judicial review could have made the ancillary order of bail pending the applicant's appeal; that the Court of Appeal had jurisdiction under section 16(1) of the Supreme Court Act 1981 to entertain the appeal against the order refusing bail and, in the circumstances, would grant bail (post, pp. 995A–B, F–G, H—996B).

In re Dhillon, The Times, 28 January 1987, C.A. doubted.

Per curiam. If a High Court judge refuses leave to apply for judicial review, he cannot grant bail because the substantive order is not appealable but, on renewing the application to the Court of Appeal, that court had an inherent jurisdiction to grant bail (post, p. 495E–F, G–H).

The following cases are referred to in the judgment of Sir John Donaldson M.R.:

Dhillon, *In re*, The Times, 28 January 1987, C.A.

Lane v. Esdaile [1891] A.C. 210, H.L.(E.)

Reg. v. Chief Immigration Officer Heathrow Airport, *Ex parte Sureshkumar*, The Times, 22 April 1986; Court of Appeal (Civil Division) Transcript No. 354 of 1986, C.A.

Reg. v. Secretary of State for the Home Department, *Ex parte Swati* [1986] 1 W.L.R. 477; [1986] 1 All E.R. 717, C.A.

No additional cases were cited in argument.

INTERLOCUTORY APPEAL from McCowan J.

The applicant, Yakup Turkoglu, appealed against the refusal of McCowan J. on 19 April 1987 to grant him bail pending an appeal to

¹ Supreme Court Act 1981, s. 16(1): see post, p. 994H.

3 W.L.R.

Reg. v. Home Secretary, Ex p. Turkoglu (C.A.)

A the Court of Appeal against the order of the judge dismissing his application for judicial review of a decision of an immigration officer refusing the applicant leave to enter the United Kingdom.

The facts are set out in the judgment of Sir John Donaldson M.R.

B *Indra Kulatilake* for the applicant.

Alison Foster for the Secretary of State for the Home Department.

C SIR JOHN DONALDSON M.R. We are concerned today with an application on behalf of Mr. Turkoglu for bail pending his appeal to this court from a decision of McCowan J. refusing judicial review in an immigration context. The grant of bail is not opposed on behalf of the Secretary of State. Indeed, the Secretary of State goes further and says that he would like bail to be granted for this reason. He has himself power under the Immigration Act 1971 to grant temporary admission, which means that the applicant for admission to this country is able to move freely about the country subject to surrendering to the immigration authorities on their demand and subject to a power of arrest which they have under the Act of 1971 if he does not surrender. But what the Secretary of State considers he has no power to do is to grant temporary admission subject to a condition that the would-be immigrant provides sureties for his surrendering to the appropriate authorities on demand. On the other hand, it is quite clear that if the court can grant bail, it can impose a condition of sureties. In this case we are invited by the Secretary of State to accede to the application but to impose terms as to sureties.

F That has raised the whole question of the powers of courts to grant bail in immigration cases. Clearly we could grant bail ancillary to or as part of proceedings for habeas corpus, but there is no way that proceedings for habeas corpus can be brought in a case of this nature. The power of the Secretary of State to detain under the Act of 1971 is clear and the only issue which would arise is whether, as a matter of public law, his decision to exercise those powers was a proper one.

G There have been no less than four reported occasions on which the courts have considered the matter thus far. The first was *Reg. v. Secretary of State for the Home Department, Ex parte Swati* [1986] 1 W.L.R. 477. In that case leave to apply for judicial review had been refused by the Divisional Court of the Queen's Bench Division, and there was a renewed application for leave to apply made to this court. In giving a judgment, with which in substance Stephen Brown and Parker L.J.J. agreed, I said (*obiter*) under the heading "Bail," at pp. 485–486:

H "As the applicant was deemed to be in legal custody (paragraph 18(4) of Schedule 2 to the Act of 1971) and as we were agreed that leave to apply for judicial review should be refused, no question of bail arose. I would only say that, for my part, I agree that there is an inherent jurisdiction to grant bail, but that, in agreement with the Divisional Court, I consider that in the light of the statutory powers available to the Secretary of State and to adjudicators, it will only be in exceptional cases that it should be exercised and only if leave to apply for judicial review has been granted."

That case was followed by *Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Sureshkumar*, *The Times*, 22 April 1986. It would appear from that very brief report that Lawton L.J. said:

"It seemed that Parliament had intended that all matters relating to the removal and detention of persons refused entry should be under the control of the Secretary of State for the Home Department, and clearly, he could always grant temporary leave to enter. If that was so, any need for a jurisdiction to grant bail would have to be satisfied in some other way than by calling on the inherent jurisdiction of the court."

For my part, I cannot believe that that is an entirely accurate report of what Lawton L.J. said. It certainly is not a full report and we have not seen the transcript.* At any rate, it is clear that it was not a matter of the decision by this court. Lawton L.J. expressed doubts, but no more. By contrast on this occasion it is a matter for a decision.

That case was followed by *In re Dhillon*, *The Times*, 28 January 1987. It was a decision by myself, Fox and Bingham L.J.J. The headnote reads:

"Where a High Court judge refused to grant an applicant bail pending the conclusion of his adjourned application for leave to apply for judicial review, the Court of Appeal had no jurisdiction itself to grant bail unless it first granted a renewed application for leave to apply for judicial review."

I will come back to that case in a moment.

The fourth case is the present case. In it we are invited to decide whether McCowan J. was correct when, after giving his decision to dismiss the substantive application for judicial review, he acceded to what appeared to be the general view of those present in court that he was functus officio and therefore had no jurisdiction to grant bail.

If I could come back to the general question of jurisdiction, in my judgment bail is to be regarded in civil proceedings—as it is in criminal proceedings—as ancillary to some other proceeding. It is not possible, so far as I know, to apply to any court for bail in vacuo. It is essentially an ancillary form of relief. The problems which have arisen really all stem from the need to find an underlying substantive proceeding to which bail would be ancillary. I said that I would come back to *In re Dhillon*. I am bound to say that I think I was wrong in that case. I was wrong for this reason. I was looking for an underlying proceeding to which the bail appeal to this court could be appended. There was at that time a pending application for leave to apply in the High Court, but there was no proceeding in this court. As I pointed out in the judgment, if on the adjourned hearing of the application for leave to apply before the High Court the judge had dismissed the application, there could be no appeal to this court. There would be a power to renew that application to this court, but no appeal: *Lane v. Esdaile* [1891] A.C. 210.

Since then it has been pointed out to me that we did not consider the effect of section 16(1) of the Supreme Court Act 1981. That provides:

"Subject as otherwise provided by this or any other Act . . . the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court."

* Court of Appeal (Civil Division) Transcript No. 354 of 1986.

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Reg. v. Home Secretary, Ex p. Turkoglu (C.A.)

Sir John
Donaldson M.R.

A It now seems to me that where you have a pending application for leave
to apply for judicial review in the High Court and the judge either
grants or refuses bail, he is making an order in proceedings of which he
is properly seised. It follows that unless the right of appeal against the
B order is excluded either by statute (which almost certainly would be
under section 18 of the Supreme Court Act 1981) or by judicial
precedent binding on us (as in the *Lane v. Esdaile* type of case), there
would be a right of appeal. So I think that we were wrong, and that
where you have an adjourned application for leave to apply and the
judge has refused bail pending the resumption of that application for
leave an application for bail can be made direct to this court by way of
appeal from the judge's order refusing bail.

C I will now try and look at the problem overall, taking, first, the High
Court. In my judgment you cannot apply to the High Court for bail
unless the High Court is seised of some sort of proceeding. It may be
seised of an application for leave to apply for judicial review or it may
be seised of the substantive application. So long as it is seised of either
of those applications, you can apply to the High Court and the court can
D grant or refuse bail. From the order granting or refusing bail an appeal
will lie to this court.

If leave to apply is granted, then that application immediately
becomes merged in the substantive application. So there is a continuous
underlying proceeding of which the High Court is seised and no problem
arises. If the application for leave to apply is adjourned, the High Court
is still seised of the application and it can refuse or grant leave to appeal
E and there would be a right of appeal to this court against that order.
If—and this is the only case where a problem arises—leave to apply is
refused, then at that stage I do not for my part think that the High
Court judge can grant bail. The reason why he cannot grant bail is that
the order refusing leave to apply is not appealable because of the rule of
law contained in *Lane v. Esdaile* [1891] A.C. 210. Where a court has
F finished with a matter and its decision is unappealable then in the truest
and fullest sense of the word the court is functus officio and can do no
more. There is no longer any underlying proceeding to which the
application for bail is ancillary.

As far as the Court of Appeal is concerned, it has jurisdiction to
entertain a direct appeal against any refusal or grant of bail by the High
G Court in whatever proceedings it is made, that right and duty coming
straight from section 16 of the Act of 1981. In addition, it has inherent
jurisdiction to grant bail in proceedings originating in this court, which
in practice means on a renewed application for leave to apply for
judicial review or, of course, if this court went on to hear the substantive
application, although usually it will remit it to the High Court for
H hearing.

I hope that that covers all the cases. This is a case in which
McCowan J. would have had jurisdiction but he did not appreciate that
he had it. It is a case in which there is no opposition to bail and it would
therefore be right that we should grant it.

For those reasons I would allow the appeal—because it is an
interlocutory appeal from McCowan J.'s refusal of bail—and grant

Sir John
Donaldson M.R.

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[1987]

bail. We could alternatively ourselves have granted bail in the substantive appeal proceedings, but it does not matter under which head we grant it.

CROOM-JOHNSON L.J. I agree.

BINGHAM L.J. I also agree.

*Appeal allowed on terms.
No order for costs.
Liberty to apply.*

Solicitors: Graham, Peries & Co.; Treasury Solicitor.

C. T. B.

3 W.L.R.

A

[COURT OF APPEAL]

REGINA v. GREATER MANCHESTER NORTH DISTRICT
CORONER, *Ex parte* WORCH AND ANOTHER

1987 July 21, 22; 31

Slade and Nicholls L.JJ.
and Sir John Megaw

B

Coroner—Inquest—Post mortem—Deceased involved in car crash—Death caused either by natural causes or crash injuries—Post mortem carried out before inquest ordered—Whether coroner acting lawfully—Coroners (Amendment) Act 1926 (16 & 17 Geo. 5, c. 59), s. 21(1)(3)

C

The deceased was found to be dead after the car he was driving left the motorway for no apparent reason and crashed. The coroner, in order to determine whether the deceased had died of natural causes before the car crashed or had died as a result of injuries sustained in the crash, directed a post mortem examination to be made. The post mortem showed that the cause of death was multiple injuries and the coroner ordered an inquest to be held. The applicants, who were the deceased's widow and the president of a Jewish burial society whose duty it was to bury the deceased, applied for judicial review of, inter alia, the coroner's decision to direct a post mortem examination to be made before ordering an inquest. The Divisional Court granted the application on the ground that the coroner had no power to exercise his discretion under section 21 of the Coroners (Amendment) Act 1926¹ to order a post mortem before deciding whether there should be an inquest, where there was reasonable cause to suspect that the death was violent or unnatural.

E

On appeal by the coroner:—

Held, allowing the appeal, that under section 21(1) of the Coroners (Amendment) Act 1926 the coroner had the power to direct a post mortem examination in the case of a sudden death of unknown cause, before deciding whether to hold an inquest, where he considered that its result might prove an inquest to be unnecessary by eliminating as a matter of evidence the possibility that the death was violent or unnatural (post, p. 1006F–G).

Decision of the Divisional Court of the Queen's Bench Division [1987] 2 W.L.R. 1141; [1987] 2 All E.R. 536 reversed.

The following case is referred to in the judgment:

National Assistance Board v. Wilkinson [1952] 2 Q.B. 648; [1952] 2 All E.R. 255, D.C.

G

The following additional cases were cited in argument:

Ealing London Borough Council v. Race Relations Board [1972] A.C. 342; [1972] 2 W.L.R. 71; [1972] 1 All E.R. 105, H.L.(E.)

Reg. v. Central Cleveland Coroner, Ex parte Dent (1986) 150 J.P. 251

Reg. v. Her Majesty's Coroner at Hammersmith, Ex parte Peach (Nos. 1 and 2) [1980] Q.B. 211; [1980] 2 W.L.R. 496; [1980] 2 All E.R. 7, D.C. and C.A.

H

APPEAL from the Divisional Court of the Queen's Bench Division.

The applicants, Sarah Sime Worch, the widow of Colin Worch, and Walter Brunner, the president of Chesed Shel Emess, a Jewish burial

¹ Coroners (Amendment) Act 1926, s. 21: see post, p. 1002C–H.

society, applied, by notice of motion dated 28 October 1986, for judicial review of decisions by the coroner for Greater Manchester North District to (1) direct or request a post mortem examination to be made on the body of Colin Worch, and (2) withhold issuing an order authorising the burial of the body until after the opening of the inquest, the relief sought being declarations that each decision was unlawful. On 14 January 1987 the Divisional Court (Watkins L.J. and Macpherson J.) allowed the motion in part by declaring that decision (1) was unlawful.

By notice of appeal dated 19 January 1987 the coroner appealed on the grounds that the Divisional Court erred (1) in holding that the coroner had no power in law to order a post mortem under section 21(1) of the Coroners (Amendment) Act 1926 in the circumstances; (2) in holding that the effect of section 21(3) was that a coroner had no power to order a post mortem before deciding whether to hold an inquest, if there was reasonable cause to suspect that the dead person had died a violent death, even though there was also reasonable cause to suspect a "sudden death of which the cause is unknown;" (3) in holding that if Parliament had intended a coroner to have such a power, the word "only" would have appeared in section 21(1); (4) in not holding that the coroner had set out in his two affidavits the grounds on which he had exercised his discretion to order a post mortem examination before deciding whether an inquest was necessary and that the contention in his first affidavit referring to another Act was irrelevant and/or clearly an error in the affidavit. By respondents' notice dated 9 March 1987 the applicants gave notice of their intention to contend that the decision of the Divisional Court should be affirmed on the additional grounds that (1) the coroner's belief that the deceased had died a violent death, held on reasonable grounds, made it logically inconsistent for him to hold at the same time a reasonable suspicion that the deceased had died a sudden death of unknown cause; and (2) if the coroner's construction of section 21(3) of the Act of 1926 were correct (a) the subsection was unnecessary and redundant, (b) there had to be imported into the subsection the words "after the carrying out of the said post mortem examination" following the words "there is reasonable cause to suspect," (c) the contingency of death in prison ought not to be included since it was clearly inconsistent with the notion of an exploratory post mortem, (d) there was no provision for the prospect of a post mortem still leaving the coroner with a reasonable suspicion of a sudden death of unknown cause, and (e) Parliament effected a very important change in the law without making its intention clear.

The facts are stated in the judgment of the court.

David Sullivan Q.C. and *Giles Kavanagh* for the coroner.

Richard Gordon for the applicants.

Cur. adv. vult.

31 July. The following judgment of the court was handed down.

SLADE L.J. This is an appeal by the coroner for Greater Manchester North District from a judgment and order of the Divisional Court (Watkins L.J. and Macpherson J.) given on 14 January 1987 whereby Mrs. Sarah Sime Worch and Mr. Walter Brunner, as applicants, were granted a declaration that the decision of the coroner made on 4/5

3 W.L.R.

Reg. v. Gt. Manchester Coroner, Ex p. Worch (C.A.)

A August 1986 directing or requesting that a post mortem examination be made on the body of Colin Worch deceased was unlawful.

For present purposes the facts can be stated quite shortly. On 4 August 1986 the deceased was driving along a motorway. At about 7.30 p.m. he apparently, quite suddenly, lost control of his car. It left the motorway and crashed into some obstruction. Police who were called to the scene found him dead at the wheel.

B His widow, the first applicant Mrs. Worch, was informed. She telephoned the second applicant, Mr. Brunner. He is the president of an organisation known as Chesed Shel Emess, of which the deceased was a member. This organisation is responsible for looking after the body of a Jewish person from death up to and including burial. His evidence is that those who belong to this organisation acknowledge and believe:

C "It is a sacred duty of the Jewish people to look after the body, prepare for burial and carry out the burial in accordance with the appropriate laws and customs. It is considered as such an important thing, that it takes precedence over almost all other Jewish laws and because of its importance and complexity special organisations referred to above, are established in all practising Jewish communities. . . . It is also obligatory to ensure that the burial takes place as quickly as possible and in any case before sunset, only in exceptional circumstances is it permitted for the body to be left overnight. It is very strictly forbidden to tamper with the body in any shape or form, thus a post mortem is absolutely forbidden in accordance with Jewish law."

E At about 10 p.m. Mr. Brunner informed the coroner of the accident and death by telephone. The coroner wished to hear further details from the police and at about 9.30 a.m. the following morning, 5 August, he spoke to the police officer concerned, who gave him brief details of the circumstances surrounding the death. From that conversation he learned that the police were continuing their investigations, but it was thought no other motor vehicle was involved.

F The coroner decided to hold a post mortem. In paragraph 2 of his first affidavit he made both a number of submissions of law and a number of statements of fact relating to this decision. In paragraph 2(2) he said, "I maintain that I exercised my discretion as to the holding of a post mortem under section 21(2) of the Coroners Act 1887 (50 & 51 Vict. c. 71) in a proper manner." In paragraph 2(4) he said, "My discretion was exercised properly to assist myself to establish the cause of death." In paragraph 2(8) he described the reasons for his decision:

G "In the circumstances, I exercised my discretion and decided that a post mortem was necessary in order to determine whether the deceased had died as a result of injuries or had died from a natural cause so producing the injuries when the car crashed. The particular circumstances of the incident indicated that the deceased might have suffered some form of attack which produced the loss of control."

H In paragraph 2 of a later, second affidavit he further explained his reasons as follows:

"The police were continuing their investigations but it was thought at that stage that no other motor vehicle was involved. At this point, from the information given to me, I had reasonable cause to suspect that the deceased had died either a violent or unnatural

death or a sudden death of which the cause was unknown. I formed the opinion that an inquest might be necessary. I then went through the reasoning process as set out at paragraph 2(8) of my earlier affidavit. I then requested a pathologist to hold a post mortem examination. I did feel that when I had the result of the post mortem examination that it would be open to me to dispose of the matter without an inquest if the cause of death were shown to be natural. It was when I was informed that the medical cause of death was multiple injuries, that is unnatural, that I decided to open an inquest."

The coroner in his first affidavit stated, and there is no reason to doubt, that he was well aware of the burial requirements and funeral arrangements for the Jewish community. It has not been suggested that he has been careless of their concern over such matters.

On 5 August 1986 a pathologist was instructed or requested to conduct a post mortem and he did so at 3 p.m. that day. He reported that the medical cause of death was multiple injuries (so that the deceased had not died a natural death). At about 3 p.m. Mr. Brunner arrived at the coroner's office, but the coroner was absent holding inquests and his office had not yet received the report of the post mortem. A short time afterwards the coroner telephoned his office and learned the effect of the pathologist's report. He ordered an inquest to take place on the following day. At about 3.30 p.m., according to his evidence, Mr. Brunner was informed by the coroner's secretary that the coroner had stated that an inquest would have to take place and that the burial order could only be issued after the opening of that inquest. In his first affidavit, the coroner explained the reasons why he considered that he should not issue an immediate burial order. These reasons are not material for the purpose of this appeal.

Mr. Brunner was upset by the information given to him by the coroner's secretary, coupled, as it was, with the statement that an inquest could not take place until the following morning, 6 August 1986. He could not understand why in any event the body could not be released for burial at once, now that the post mortem had taken place. He again spoke to the coroner on the telephone about the urgency for a burial order. The coroner informed him that his deputy was now dealing with the matter and that he would have to contact the deputy to see whether the inquest could be held earlier. Mr. Brunner attempted to contact the deputy, but was unable to do so.

The inquest was opened at 12 noon on 6 August 1986. The pathologist's report was handed to the deputy coroner. Formal evidence of identity of the deceased's body was given. Soon after that the burial order was issued on the same day, 6 August.

On 21 October 1986 Simon Brown J. gave the applicants leave to move for judicial review of the decisions of the coroner (1) to direct or request that a post mortem examination be made on the body of the deceased; and (2) to withhold issuing an order authorising the burial until after the opening of the inquest. The Divisional Court, in its decision of 14 January 1987 [1987] 2 W.L.R. 1141, refused relief under the second of these heads and there is no challenge to that part of its decision. However, it granted relief under the first head, in the terms of the declaration referred to at the beginning of this judgment. From this part of the order the coroner now appeals.

3 W.L.R.

Reg. v. Gt. Manchester Coroner, Ex p. Worch (C.A.)

A Watkins L.J., in the course of his judgment, observed, at p. 1145, that the concern of the applicants was perfectly understandable, having regard to Jewish law and faith and custom and practice with regard to post mortems and burial. The locus standi of the applicants to apply for judicial review has not been challenged on this appeal. However, as Watkins L.J. also observed, a coroner is subject to the law laid down by Parliament and has to obey that law with scrupulous regard to all its provisions.

B We now turn to the relevant statute law. Section 3(1) of the Coroners Act 1887, as amended by section 30 of and Schedule 2 to the Coroners (Amendment) Act 1926, provides for the holding of inquests as follows:

C “Where a coroner is informed that the dead body of a person is lying within his jurisdiction, and there is reasonable cause to suspect that such person has died either a violent or an unnatural death, or that such person has died a sudden death of which the cause is unknown, or that such person has died in prison, or in such place or under such circumstances as to require an inquest in pursuance of any Act, the coroner, whether the cause of death arose within his jurisdiction or not, shall, as soon as practicable, issue his warrant for summoning not less than seven nor more than 11 good and lawful men to appear before him at a specified time and place, there to inquire as jurors touching the death of such person as aforesaid.”

D Mr. Sullivan, on behalf of the coroner, pointed out that the wording of section 3(1) imposes an obligation on a coroner *as soon as practicable* to set in motion arrangements for the holding of an inquest where there is reasonable cause to suspect that the relevant death (A) was violent or unnatural, or (B) was a sudden death of which the cause is unknown, or (C) occurred in prison, or (D) occurred in such place or under such circumstances as to require an inquest in pursuance of any Act. For the sake of brevity and convenience, we will hereafter refer to these four cases respectively as “case A,” “case B,” “case C” and “case D.”

E The operation of section 3(1) of the Act of 1887 does not depend on a coroner’s belief. It depends on the presence or absence of reasonable cause for suspicion. In view of the contents of the coroner’s affidavit quoted above, it must be common ground that, if section 3(1) had stood alone, it would have imposed an obligation on him in the present case as soon as practicable to set in motion arrangements for the holding of an inquest, since there was reasonable cause to suspect that the death fell within case A or case B.

F Section 21 of the Act of 1887, as amended by section 30 of and Schedule 2 to the Act of 1926, confers certain powers on a coroner to summon medical witnesses and to direct a post mortem examination. So far as material, it provides:

G “(1) Where it appears to the coroner that the deceased was attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon such practitioner as a witness; but if it appears to the coroner that the deceased person was not attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon any legally qualified medical practitioner who is at the time in actual practice in or near the place where the death happened, and any such medical witness as is summoned in pursuance of this section, may be asked to give evidence as to how, in his opinion, the deceased came to his

H

death. (2) The coroner may, either in his summons for the attendance of such medical witness or at any time between the issuing of that summons and the end of the inquest, direct such medical witness to make a post mortem examination of the body of the deceased . . ."

However, the power of a coroner to direct a post mortem under sections 21(1) and (2) is not exercisable unless (i) the inquest has already been ordered, and (ii) the doctor in question is already summoned as a witness.

With the clear purpose of effecting an economy of time and effort, the Coroners (Amendment) Act 1926 gave coroners a new power to hold a post mortem examination before an inquest: see section 21. Section 13 also conferred on them a power to hold an inquest without a jury in certain specified cases, reflecting a similar power which had been conferred by section 7 of the Juries Act 1918. On this appeal we are principally concerned with the construction and effect of section 21 of the Act of 1926. In its original form, the section read:

"(1) Where a coroner is informed that the dead body of a person is lying within his jurisdiction and there is reasonable cause to suspect that the person has died a sudden death of which the cause is unknown, if the coroner is of opinion that a post mortem examination may prove an inquest to be unnecessary he may direct any legally qualified medical practitioner whom, if an inquest were held, he would be entitled under section 21 of the Coroners Act 1887 to summon as a medical witness or may request any other legally qualified medical practitioner, to make a post mortem examination of the body of the deceased and to report the result thereof to him in writing, and for the purposes of the examination the coroner and any person directed or requested by him to make the examination shall have the like powers, authorities and immunities as if the examination were a post mortem examination directed by the coroner at an inquest upon the body of the deceased. (2) If as a result of such a post mortem examination as aforesaid the coroner is satisfied that an inquest is unnecessary, he shall send to the registrar of deaths whose duty it is by law to register the death a certificate under his hand stating the cause of death as disclosed by the report, and the registrar shall make an entry in the register or margin thereof accordingly in the form and manner prescribed under the Registration Acts. (3) Nothing in this section shall be construed as authorising the coroner to dispense with an inquest in any case where there is reasonable cause to suspect that the deceased has died either a violent or an unnatural death, or has died in prison, or in such place or in such circumstances as to necessitate the holding of an inquest in accordance with the requirements of any Act other than the Coroners Act 1887."

It is common ground that section 21(1) of the Act of 1926 empowers a coroner to order a post mortem, even before deciding to hold an inquest, when the facts known to him give him reasonable cause to suspect that the case falls within case B and case B alone.

The two principal issues which arise on this appeal are the following.

(1) Does section 21(1) of the Act of 1926 empower a coroner to order a post mortem, before deciding to hold an inquest, when the facts known

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A to him give him reasonable cause to suspect that the death falls *either* within case A *or* within case B? (2) If the answer to this question is in the affirmative, should the applicants still be granted relief by way of judicial review, having regard to the coroner's manifestly inapposite reference to section 21(2) of the Act of 1887 in paragraph 2(2) of his first affidavit?

B *The first issue*

Mr. Gordon, on behalf of the applicants, submitted to the Divisional Court, as he has to us, that the answer to the first issue is in the negative. Watkins L.J. summarised his submissions as follows [1987] 2 W.L.R. 1141, 1147–1148:

C “He says that there is no jurisdiction to order a post mortem for the purpose of deciding whether, with or without a jury, an inquest is necessary, except where a coroner, on being informed that there is a dead body within his jurisdiction, has at that time reasonable cause to suspect nothing else but sudden death, the cause of which is unknown. He says also that this coroner could not have made a valid order under section 21 unless the only thing in his mind was such a suspicion. If he had in his mind any other suspicion, and in particular a suspicion that death was due to violence, he could do no other than to act in accord with the provisions of section 3 of the Act of 1887 which would have obliged him to hold an inquest.”

D

Watkins L.J. continued, at p. 1148:

E “I feel bound to say that my mind for some while wavered as to whether this submission was validly made, having regard to section 21(1) and (3) of the Act of 1926. Counsel for the coroner contended that these two subsections can properly exist together. Thus, if a coroner is of the mind, in the peculiar circumstances of this case, that there could be two suspicions of a different kind as to the cause of death, he could go to the provisions of subsection (1) and use the power there contained to order a post mortem, the result of which might very likely result in the avoidance of an inquest. He says that Parliament was, by the enactment of section 21, bent upon reducing the need for and therefore the number of inquests, and that it would be to defeat the intention of Parliament to come to a conclusion in accordance with the submission of counsel for the applicants.”

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However, the Divisional Court rejected the arguments submitted on behalf of the coroner as to the construction of section 21 of the Act of 1926. Watkins L.J. put the matter succinctly, at p. 1148:

H “I disagree. It seems to me that Parliament intended, by the saving provisions in subsection (3), when there is a reasonable suspicion that death has come about as a result of violence, that there should inevitably be an inquest in accordance with section 3 of the Act of 1887. I do not see how it could be said that Parliament intended otherwise. If it had, I apprehend that the word “only” would have appeared somewhere in subsection (1). It does not find a place there. So much for the primary submission made on behalf of the applicants. That, of course, is sufficient for them to obtain the declaration which they seek with regard to the post mortem. There

was no power in this coroner, in the circumstances and in view of the law and his state of mind at the relevant time, to order a post mortem upon the body of the deceased.”

Macpherson J., in the course of his concurring judgment, said, at p. 1149:

“For a time I, too, was attracted by the argument that section 21(1) of the Act of 1926 gave the coroner power to order a post mortem where there were two competing reasonable suspicions in his mind, namely, that the deceased died a violent death as a result of the accident or that he died by natural causes at the wheel. But in the end, I am persuaded that section 21(1) is limited to cases where there is only a reasonable suspicion that a person has died a sudden death of which the cause is unknown, both because of the wording of section 21(1) and because of the operation and wording of subsection (3). It is, in my judgment, right that where violent death is at the outset a reasonable possibility, then an inquiry by inquest, in the present case without a jury, is required to take place so that the matter can be publicly explored and resolved.”

In his argument in support of the decision of the Divisional Court, Mr. Gordon did not feel able to adopt the point made by Watkins L.J. by reference to the absence of the word “only” in section 21(1) of the Act of 1926. (We will briefly revert to this point later in this judgment.) However, enlarging on the other reasoning of the Divisional Court, he submitted that their decision was correct, broadly for the following reasons.

In his submission, the plain meaning of section 21(1) of the Act of 1926 is that the coroner has no power to order a post mortem once there is reasonable cause to suspect that the death falls within any of the four cases referred to above, other than case B (death of which the cause is unknown). Thus, it is said, if there is reasonable cause to suspect that the death falls *either* within case A (violent or unnatural death) *or* within case B, the power is not exercisable. Mr. Gordon submitted that this conclusion is supported not only by the clear words of section 21(1) of the Act of 1926, but also by section 3(1) of the Act of 1887. He pointed out that section 3(1) begins with more or less the very same words as section 21(1), namely, “Where a coroner is informed that the dead body of a person is lying within his jurisdiction and there is reasonable cause to suspect that [such] [the] person has died . . .” Mr. Gordon submitted that both subsections are directed to the same particular point of time. He submitted that the only inference to be drawn from the omission of any reference in section 21(1) to cases A, C and D (all of which are referred to in section 3(1)) is that the power to order a post mortem conferred by section 21(1) is never to be exercisable in case A or case C or case D.

Furthermore, he contended, this conclusion is supported by the wording of section 21(3) of the Act of 1926. This subsection, in his submission, is directed to the same point of time as section 21(1); in contrast with section 21(1) it makes express reference to cases A, C and D and makes it clear that the coroner’s powers under section 21(1) are not to be exercisable in any of those three cases.

Mr. Gordon submitted that his construction of section 21(1) accords with the thinking behind the legislation, which is that there should be a

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- A public inquiry by inquest in any case where there is reasonable cause to suspect that the death falls within case A or case C or case D. He relied on the observations of Macpherson J. to this effect [1987] 2 W.L.R. 1141, 1149. He pointed out that before 1926 there was no question of dispensing with an inquest in any such case. He reminded us of the principle of construction that “a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion:” see *National Assistance Board v. Wilkinson* [1952] 2 Q.B. 648, 661, *per* Devlin J.
- B

- Nevertheless, there can be no doubt that section 21(1) of the Act of 1926 was intended to confer an entirely new power on coroners to order a post mortem before an inquest, provided that the three conditions specified in the subsection are satisfied, namely, (1) the coroner “is informed that the dead body of a person is lying within his jurisdiction;”
- C (2) “there is reasonable cause to suspect that the person has died a sudden death of which the cause is unknown;” and (3) “the coroner is of opinion that a post mortem examination may prove an inquest to be unnecessary.” As to the second of these conditions, the phrase “a sudden death of which the cause is unknown” must clearly bear the same meaning as that which it bears in section 3(1) of the Act of 1887.
- D In the context of section 3(1), case B must, in our judgment, be intended to cover, and does cover, any case of a sudden death where the cause of death *is not known to be natural*. We did not understand Mr. Gordon to dispute this proposition.

- We can see no reason why, in the context of section 21(1), the phrase “a sudden death of which the cause is unknown” should not be similarly construed as meaning “a sudden death of which the cause is not known to be natural.” If this meaning is attributed to the phrase in the second of the three conditions specified in section 21(1) of the Act of 1926 then, in our judgment, good and consistent sense can be made of all the subsequent provisions of the section. As to the third of the conditions, the only circumstances *ex hypothesi* in which the coroner may be of opinion that “a post mortem examination may prove an inquest to be unnecessary” are if the case is not a case C or case D, and he thinks the post mortem may prove that the deceased died of natural causes, so that the possibility of it being a case A may, perhaps, also be eliminated by the post mortem.
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- The original section 21(2) of the Act of 1926 is no longer law, since it has been replaced by section 23(3) of the Births and Deaths Registration Act 1953. Nevertheless, the original subsection is admissible in construing the section as a whole and, in our judgment, throws light on its construction. It demonstrates that the section as a whole contemplates a two-stage process.
- G

- First, the coroner has to consider whether the three conditions specified in section 21(1) are satisfied. If, but only if, he is so satisfied, he is under no *immediate* obligation to arrange an inquest “as soon as practicable,” as he would otherwise have to do under section 3(1) of the Act of 1887, but may instead order a post mortem. However, section 21(1) itself confers no power whatever to dispense with an inquest.
- H

The second stage of the process arises when the result of the post mortem is known. If, but only if, the case is not a case C or case D, and the post mortem shows that the death was due to natural causes, the coroner may be satisfied that an inquest is unnecessary. If that is so, he can accordingly dispense with an inquest. However, section 21(3) is

there as a reminder so as to make it clear that, after the result of the post mortem is known, the coroner will still be obliged to order an inquest if the case is a case A or case C or case D, as he properly did in the present case when he learned from the post mortem that the death had been caused by multiple injuries.

We cannot accept Mr. Gordon's submission that section 21(1) and (3) are intended to operate at the same point of time. Any such contention disregards the original section 21(2) of the Act of 1926, which is, in our judgment, of some significance. Section 21(2) expressly or by necessary implication demonstrates that the section contemplates three things. First, the coroner is to have the power in certain circumstances to dispense with an inquest. Secondly, however, this power is to be exercisable, if at all, only after the post mortem examination has been held and its result satisfies the coroner that an inquest is unnecessary (by satisfying him that the death has occurred by natural causes). Thirdly, on dispensing with an inquest, he is to send to the registrar of deaths the appropriate certificate. The legislature, in our judgment, thought it right to add section 21(3) as a reminder and warning so as to make it clear that, after the post mortem has been held, the dispensing power must not be exercised if the case remains a case A or case C or case D; in such circumstances the obligation to hold an inquest imposed by section 3(1) of the Act of 1887 will still apply.

The construction of section 21 set out above in all essentials accords with that presented to us by Mr. Sullivan, on behalf of the coroner. Mr. Gordon asserts that this construction will produce a result contrary to the public interest, since it would enable a coroner to dispense with an inquest even in a case where there had initially been reasonable cause to suspect that the relevant death had been a violent or unnatural one. This thinking is reflected in the last sentence of the passage from the judgment of Macpherson J. quoted above.

With all respect, we cannot agree. The obvious purpose of section 21, as we have already pointed out, was to effect an economy of time and effort by eliminating the need for an inquest in certain cases where the legislature thought an inquest would be unnecessary. The section, as so construed above, will never enable a coroner to dispense with an inquest so long as there remains a reasonable cause to suspect that the death was violent or unnatural; and indeed section 21(3) makes this clear. However, we can see no reason why the legislature should have thought it inappropriate to give a coroner the power to direct a post mortem in a case where he considers that its result may eliminate the need to hold an inquest, by eliminating as a matter of evidence the possibility that the death was violent or unnatural, provided only that it is not a case C or case D.

Perhaps we should also emphasise that section 21 will never enable a coroner to dispense with an inquest where it is known, or there is reasonable cause to suspect, that the death occurred in prison. There was some debate before us as to whether, in a case where there is doubt as to whether the death occurred in prison or, on the other hand, in transit to or from prison, the section would empower a coroner to order a post mortem in advance of an inquest for the purpose of possibly rendering an inquest unnecessary. We are inclined to think that the answer to this question is in the negative, bearing in mind that section 21(1) makes no reference to a death of which the place, as distinct from the cause, is unknown. However, it is not necessary to decide this

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A particular point, and an additional reason for expressing no concluded view on it is that there appears to be some question as to whether the words “in prison” in this context may bear the extended meaning of “in prison custody:” see *Thurston’s Coronership: The Law & Practice on Coroners*, 3rd ed. (1985), p. 94, para. 15.04.

B Finally, in the context of the first issue, we should refer to the absence of the word “only” from section 26(1). So far as this point has any significance, in our judgment, it supports Mr. Sullivan’s construction of the subsection, since it could be said that, if the power thereby conferred were intended to be exercisable exclusively in a case B situation, one might have expected the word “only” to be there, to effect the limitation on the power.

C For the reasons which we have given, we answer the first issue in the affirmative. We have felt some hesitation before reaching this conclusion because it differs both from that reached by the Divisional Court and from the apparent views of the editors of two well known text books: see *Jervis on Coroners*, 10th ed. (1986), pp. 63–64, para. 7.9 and *Thurston’s Coronership: The Law & Practice on Coroners*, p. 67, para. 11.11. However, the two textbooks cite no authority on the question and we infer that the Divisional Court did not have the benefit of such full argument as we have had. In particular, we understand that the version of section 21 of the Act of 1926 presented to that court did not include section 21(2) which, though now repealed, throws light on the relationship between section 21(1) and (3). Watkins L.J. described the relevant question as being [1987] 2 W.L.R. 1141, 1147, “whether the effect of subsection (3) is to render impotent the provisions of subsection (1) of section 21 of the Act of 1926.” If section 21(2) had been drawn to his attention, we venture to think that Watkins L.J. might well have concluded that subsection (3) relates to a different point of time from that to which subsection (1) relates.

The second issue

F It follows from our conclusion on the first issue that on 5 August 1986 the coroner had the power to order a post mortem under section 21(1) of the Act of 1926 before ordering an inquest, because all the three conditions of that subsection were satisfied.

G However, Mr. Gordon has submitted that, even if we were to take this view, we should still grant relief by way of judicial review of the coroner’s decision to order a post mortem because of the reference to section 21(2) of the Act of 1887 in paragraph 2 of the coroner’s first affidavit.

In circumstances very different from the present (because he accepted the applicants’ argument on the first issue) Watkins L.J. regarded this point as a further reason for granting the declaration sought in regard to the post mortem, saying, at p. 1148:

H “A further point which has been taken is that the coroner did not apply his mind to section 21 of the Act of 1926. There is some force in that. As I have already stated, in the first of his affidavits the coroner claims to have acted within the provisions of section 21, not of the Act of 1926 but of the Act of 1887. That betrays a misunderstanding of the combined effect of these two Acts. Whether some error has crept into the first affidavit and the numbers 1887 appear there instead of, as might have been intended, 1926, I

cannot tell. But in the absence of that error, there must have been some confusion in the mind of the coroner as to the law which he had to apply in pursuance of his duties relating to post mortem and inquest. That is an additional reason why I would say that the declaration here sought in respect of the order for there to be a post mortem should go.”

Macpherson J. added nothing of his own on this point.

Though it seems a fair inference that the coroner's two affidavits were drafted for him by his legal advisers, there is no evidence before us as to the manner in which the reference to section 21(2) of the Act of 1887 came to be included in paragraph 2(2) of the first affidavit. We refused an application on the part of the coroner to adduce further evidence on this point.

Mr. Gordon, as we understood him, accepted that, provided the coroner had the power under section 21(1) of the Act of 1926 to order a post mortem at the time when he did and, in making such an order, properly directed his mind to the relevant factors specified in section 21(1), the exercise of his discretion in making an order of this nature would not be open to challenge by way of judicial review merely because he thought the relevant statutory power was conferred on him by section 21(2) of the Act of 1887 or because, by an oversight, an erroneous reference to the last mentioned subsection crept into his first affidavit. However, he submitted that the very fact of this erroneous reference by itself indicated that the coroner, in ordering a post mortem, did not have, or may well not have had, the relevant factors in mind.

We do not accept this submission. It seems to us that the passages which, from the coroner's affidavits quoted above, coupled with the rest of his evidence, show that he had the three conditions specified in section 21(1) of the Act of 1926 very well in mind. Assuming that the circumstances were such as to render the power conferred by that subsection exercisable, as we have held, we are not persuaded that his reference to section 21(2) of the Act of 1887 shows that, in exercising his discretion to order a post mortem, he misdirected himself as to any essential matters.

Even apart from this point, however, we do not think that, on any footing, this would be an appropriate case for this court, in the exercise of its discretion, to grant the applicants any relief by way of judicial review on the second subsidiary issue if, as we have held, they fail on the first issue, which is the only issue of principle raised on this appeal.

For these reasons, we allow this appeal. We set aside the order of the Divisional Court and dismiss the application for judicial review.

*Appeal allowed with costs.
Leave to appeal refused.*

Solicitors: Sharpe Pritchard & Co. for Solicitor, Rochdale Borough Council; Price Bieber & Co. for Arran Wacks & Co., Manchester.

C. N.

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A [HOUSE OF LORDS]

ARNOLD RESPONDENT

AND

CENTRAL ELECTRICITY GENERATING BOARD APPELLANT

B

1987 July 21, 22;
Oct. 22Lord Bridge of Harwich, Lord Fraser
of Tullybelton, Lord Brightman, Lord Ackner
and Lord Oliver of Aylmerton

C

Statute—Retroactive effect—Limitation of action—Public authority—12-month period of limitation—Later enactment substituting longer limitation period in certain actions for personal injuries—Whether affecting accrued right of public authority to plead time bar—Limitation Act 1939 (2 & 3 Geo. 6, c. 21), ss. 2(1), 2A(1), 21(1) (as amended by Limitation Act 1975 (c. 54), s. 1)¹—Law Reform (Limitation of Actions, etc.) Act 1954 (2 & 3 Eliz. 2, c. 36), ss. 1, 7(1)²—Limitation Act 1963 (c. 47), s. 1(1)(4)³

D

In October 1981 the plaintiff's husband, who from April 1938 until April 1943 had been employed by a public authority to which the defendant was successor as a boiler cleaner at a power station, was found to be suffering from mesothelioma, of which he died in May 1982. In April 1984 the plaintiff, in her capacities as widow of the deceased and the administratrix of his estate, commenced proceedings in which she claimed damages, for negligence and breach of statutory duty, under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976, alleging that the deceased's mesothelioma had been caused by exposure to asbestos during his employment at the power station. The defendant pleaded, *inter alia*, that any claim was statute-barred by virtue of section 1 of the Public Authorities Protection Act 1893 and section 21 of the Limitation Act 1939, the deceased having brought no proceedings against the authority in respect of his claim within 12 months of the date on which the cause of action accrued. On that plea being tried as a preliminary issue, the deputy judge found in favour of the plaintiff. The Court of Appeal allowed an appeal by the defendant.

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On appeal by the plaintiff on the grounds that (i) the Limitation Act 1963 was retrospective in operation and was intended to deprive defendants of an accrued right to plead a time bar under section 2 and/or section 21 of the Limitation Act 1939; (ii) the Limitation Act 1975 and the Limitation Act 1980 (a consolidating Act) were retrospective in operation and were intended to deprive defendants of an accrued right to plead a

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¹ Limitation Act 1939, s.2A(1): see post, p. 1019E–F.

S. 21(1): "No action shall be brought against any person for any act done in pursuance, or execution . . . of any public duty or authority, or in respect of any neglect or default in the execution of any such . . . duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued: . . ."

² Law Reform (Limitation of Actions, etc.) Act 1954, s. 1: "The following enactments (being enactments providing special periods of limitation for, or other privileges for the defendants in, legal proceedings against public authorities . . .), that is to say—(a) the Public Authorities Protection Act 1893; (b) section 21 of the Limitation Act 1939; (c) . . . section 12 of the Electricity Act 1947 . . . are hereby repealed."

S. 7(1): see post, p. 1013C–D.

³ Limitation Act 1963, s. 1(1)(4): see post, p. 1018C–D.

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time bar under section 2 and/or section 21 of the Limitation Act 1939:—

Held, dismissing the appeal, that just as there was a presumption that a statute which affected substantive rights was not to be construed as having retrospective operation unless it was manifest that that was its intention, so equally there was a presumption that where a statute was clearly intended to have some retrospective operation that was not to extend any further than was necessary to give effect either to its clear language or to its manifest purpose; that on the repeal of section 21 of the Limitation Act 1939 the accrued right to plead a time bar to the deceased's action which the defendant had acquired under that section had been preserved by the express words of section 7 of the Law Reform (Limitation of Actions, etc.) Act 1954 in respect of actions accruing before 4 June 1954; that the right to plead a time bar which had accrued under section 21 of the Act of 1939 was not affected by section 1 of the Limitation Act 1963 and was expressly preserved by section 1(4) of the Act of 1963; that, although in 1975 section 2A of the Act of 1939 had modified in favour of claimants the limitation periods previously applicable to existing causes of action, it did not deprive a defendant of any defence which he could make good without reliance on that section, including the accrued right to rely on a time bar which had been acquired under the repealed provisions of section 21 of the Act of 1939; and that, accordingly, since the Limitation Act 1980 had merely consolidated the relevant law, the plaintiff's claim was barred by the time bar which had accrued under section 21 of the Act of 1939 (post, pp. 1012E-F, 1017H—1018F, 1021D-G, G—1022D).

Yew Bon Tew v. Kenderaan Bas Mara [1983] 1 A.C. 553, P.C. considered.

Per curiam. (i) The defence of an accrued time bar under section 21 of the Limitation Act 1939 is available "by virtue of" an "enactment other than section 2(1) of the Limitation Act 1939" and the defence is expressly preserved by virtue of these words in section 1(4)(a) of the Limitation Act 1963 (post, p. 1018E-F).

(ii) The Limitation Act 1963 does not deprive any defendant of a time bar which has accrued on the expiry of the six year limitation period prescribed by section 2(1) of the Limitation Act 1939 in its original form which, by virtue of section 7 of the Act of 1954, continues to govern any cause of action in a personal injury case accruing before 4 June 1954 (post, p. 1018A-B).

Knipe v. British Railways Board [1972] 1 Q.B. 361, C.A. overruled.

Decision of the Court of Appeal [1987] 2 W.L.R. 245 affirmed.

The following cases are referred to in the opinion of Lord Bridge of Harwich:

Cartledge v. E. Jopling & Sons Ltd. [1963] A.C. 758; [1963] 2 W.L.R. 210; [1963] 1 All E.R. 341, H.L.(E.)

Knipe v. British Railways Board [1972] 1 Q.B. 361; [1972] 2 W.L.R. 127; [1972] 1 All E.R. 673, C.A.

Yew Bon Tew v. Kenderaan Bas Mara [1983] 1 A.C. 553; [1982] 3 W.L.R. 1026; [1982] 3 All E.R. 833, P.C.

The following additional cases were cited in argument:

Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591; [1975] 2 W.L.R. 513; [1975] 1 All E.R. 810, H.L.(E.)

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- A *Smith v. Central Asbestos Co. Ltd.* [1973] A.C. 518; [1972] 3 W.L.R. 333; [1972] 2 All E.R. 1135, H.L.(E.)
Wakefield and District Light Railways Co. v. Wakefield Corporation [1906] 2 K.B. 140

APPEAL from the Court of Appeal.

- B This was an appeal by leave of the House of Lords (Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Oliver of Aylmerton) by the plaintiff, Emma May Arnold, widow and administratrix of the estate of Albert Edward Arnold, deceased, from the judgment dated 17 October 1986 of the Court of Appeal (Sir John Donaldson M.R., Ralph Gibson and Nicholls L.JJ.) allowing an appeal by the defendant, the Central Electricity Generating Board, from the judgment dated 23 January 1986 of Mr. Michael Ogden Q.C., sitting as a deputy judge of the High Court, who had decided the preliminary issue of law in the action, which was whether in the circumstances the plaintiff's claim was time barred, in favour of the plaintiff.

The facts are stated in the opinion of Lord Bridge of Harwich.

- D *Michael Brent Q.C.* and *John Foy* for the plaintiff.
Michael Wright Q.C. and *Anthony Nicholl* for the defendant.

Their Lordships took time for consideration.

- E 22 October. LORD BRIDGE OF HARWICH. My Lords, the appellant plaintiff ("the widow") is the widow of Albert Edward Arnold ("the deceased"). In an action commenced by writ dated 13 April 1984 she claims damages under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 against the respondent defendants ("the board"). The deceased was employed by the Birmingham Corporation at Hams Hall Power Station between April 1938 and April 1943. It is common ground that any liabilities of the Birmingham Corporation arising from the operation of the power station have since devolved upon the board. The widow's statement of claim alleges that the deceased worked under conditions in which the Birmingham Corporation, negligently and in breach of statutory duty, failed to protect him from the inhalation of asbestos dust, as a result of which he contracted mesothelioma. This condition was first diagnosed in October 1981 and was the cause of the death of the deceased on 21 May 1982.

The board's defence pleads, inter alia, by paragraph 10:

- H "The plaintiff's claim is statute-barred by virtue of the provisions of section 1 of the Public Authorities Protection Act 1893 and section 21 of the Limitation Act 1939, the deceased having brought no proceedings against the Birmingham Corporation in respect of the matters alleged in the statement of claim within 12 months of the date on which his cause of action accrued."

The issue raised by this paragraph was ordered to be tried as a preliminary issue. It was tried and decided in favour of the widow by Mr. Michael Ogden Q.C. sitting as a deputy judge of the High Court [1986] 3 W.L.R. 171. That decision was reversed by the Court of Appeal (Sir John Donaldson M.R., Ralph Gibson and Nicholls L.JJ.)

[1987] 2 W.L.R. 245. The widow now appeals by leave of your Lordships' House. A

In 1943 the relevant statute in force was the Limitation Act 1939. This prescribed by section 2(1) a general period of limitation of six years for, inter alia, actions founded on tort. But section 21 prescribed a period of limitation of one year for actions against public authorities to which the Public Authorities Protection Act 1893 applied. The Birmingham Corporation was such an authority. It is to be assumed for the purpose of deciding the preliminary issue that the deceased contracted mesothelioma in the course of his employment by the Birmingham Corporation, i.e. at the latest by April 1943, and that a cause of action against the Birmingham Corporation in respect of that injury then accrued to him. Thus at the latest by April 1944 any cause of action which the deceased had against the Birmingham Corporation in respect of his mesothelioma was statute-barred. B C

The current general law of limitation of actions is found in the Limitation Act 1980, a consolidating statute, which, by section 11(4), prescribes for personal injury actions a period of three years from—" (a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured." D

It is common ground that "the date of knowledge" of the deceased within the meaning of that phrase in section 11(4) as defined by section 14 was not earlier than October 1981. If the deceased had a cause of action subsisting at the date of his death in May 1982, there is nothing in the Act of 1980 which would bar the widow's claims in an action commenced in April 1984.

Paragraph 9(1) of Schedule 2 to the Act of 1980 provides, so far as relevant, that: "Nothing in any provision of this Act shall—(a) enable any action to be brought which was barred . . . by the Limitation Act 1939" before 1 August 1980. E

Thus the critical question to be determined in this appeal is whether anything in the series of statutes dealing with limitation of actions leading up to the 1980 consolidation, each of which was passed to ameliorate aspects of the law believed to operate unjustly, has had the effect of removing retrospectively the bar to the widow's action which accrued to the Birmingham Corporation pursuant to section 21 of the Act of 1939. F

By section 16(1) of the Interpretation Act 1978 (re-enacting section 38(2) of the Interpretation Act 1889) the repeal of an enactment "does not, unless the contrary intention appears . . . (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment; . . ." In *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 A.C. 553 the Privy Council held that, on the expiry of a relevant period of limitation, a potential defendant to an action acquired an "accrued right" within the meaning of an identical provision in the Malaysian Interpretation Act 1967 to rely on the time-bar as giving him immunity from liability, which was not affected by the subsequent repeal of the relevant limitation provision unless the contrary intention appeared. Lord Brightman, delivering the judgment of the Board, went further when he said, at p. 558: G H

"Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should

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A not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used."

The Law Reform (Limitation of Actions, &c.) Act 1954, which came into force on 4 June 1954, repealed the Public Authorities Protection Act 1893 and section 21 of the Act of 1939. It amended section 2(1) of the Act of 1939 by the addition of the following proviso:

B "Provided that, in the case of actions for damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."

C Section 7(1) provided:

"The time for bringing proceedings in respect of a cause of action which arose before the passing of this Act shall, if it has not then already expired, expire at the time when it would have expired apart from the provisions of this Act or at the time when it would have expired if all the provisions of this Act had at all material times been in force, whichever is the later."

Thus, its effect in relation to actions for damages for personal injuries against public authorities was to apply the new limitation period of three years to causes of action which accrued within 12 months before 4 June 1954, but not to revive any cause of action which accrued more than 12 months before that date and which was already time-barred. Its effect in relation to actions for damages for personal injuries against other defendants was to leave causes of action which accrued between 4 June 1948 and 4 June 1954 subject to the limitation period of six years pursuant to the unamended section 2(1) of the Act of 1939 and to apply the limitation period of three years under the subsection as amended by the proviso only to causes of action accruing after 4 June 1954.

F The injustice which rigid periods of limitations are capable of causing in certain classes of personal injury action was thrown into high relief by *Cartledge v. E. Jopling & Sons Ltd.* [1963] A.C. 758. A number of steel dressers had contracted pneumoconiosis by inhaling noxious dust while working at the defendants' factory. As a result of changes at the factory, the plaintiffs could establish no breaches of duty by their employers making any material contribution to the causation of the injuries to their lungs after September 1950. They issued writs on 1 October 1956 commencing actions which were, in due course, consolidated. Thus, any relevant breach of duty responsible for the initial onset of the disease had in each case occurred more than six years before the actions were brought. As the House felt obliged to hold, the plaintiffs' causes of action were statute-barred although they had accrued to the plaintiffs long before they could have known of their condition. As one would expect, all their Lordships deplored this result. It will be sufficient for present purposes to cite two passages from the speeches. Lord Reid said, at pp. 771-772:

"It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the

sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided."

Lord Morris of Borth-y-Gest said, at p. 776:

"The evidence in the present case shows indisputably that there may be lung injury caused by the inhalation of fine particles of silica and that an injured person may, without any kind of fault on his part, be unaware of the fact that he has been caused injury. A result of this, in a case where there has been a breach of duty, is that a limitation period may bar a remedy before there is or could be knowledge of a cause of action. That seems to me to be highly unsatisfactory, and for that reason I share the regret expressed by others of your Lordships that this appeal must fail, and I join in the hope that consideration may be given to an amendment of the law."

It was no doubt the *Cartledge* case, which was decided at first instance by Glyn-Jones J. in 1959, which prompted the setting up in 1961 by the Lord Chancellor and the Secretary of State for Scotland of a distinguished committee under the chairmanship of Edmund Davies J. with terms of reference "to consider and report whether any alteration is desirable in the law relating to limitation of actions in cases of personal injury where the injury or disease giving rise to the claim has not become apparent in sufficient time to enable proceedings to be begun within three years from the inception of such injury or disease." The Report of the Committee on Limitation of Actions in Cases of Personal Injury ((1962) Cmnd. 1829) was presented in September 1962 after the decision of the *Cartledge* case in the Court of Appeal but before the decision in the House of Lords. The report presents a thorough analysis of the problem, an examination of the pros and cons of various solutions and the Committee's recommendations. It was this report which led to the enactment of the Limitation Act 1963. The determination of the present appeal turns primarily on the interpretation of that Act. It is, therefore, entirely legitimate to study the report to ascertain the mischief which the Act was intended to remedy. A substantial part of the able argument for the widow before your Lordships was based on this report and I was much impressed by it. But on mature reflection, I do not believe the report lends any real assistance on the essential question of interpretation which relates to the degree of retroactivity which can be attributed to the Act of 1963. It is true that the report contains passages emphasising the long periods during which insidious diseases may lie dormant. But as against this I cannot overlook paragraph 17 of the report which emphasises the traditional and well recognised grounds on which it has always been thought just and necessary to impose limitations

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A for the protection of defendants on the time within which claims at law must be brought against them. The paragraph concludes as follows:

“We have, therefore, approached our task as one involving a duty to seek a balance between the interests of each litigating party and we appreciate that, whatever solution to the problem may eventually be accepted, there are bound to be hard cases.”

B It is, I think, beyond question that the Act of 1963 operated retrospectively, when the appropriate conditions were satisfied, to deprive a defendant of an accrued time bar in respect of a claim for damages for personal injuries in which the cause of action had accrued since 4 June 1954 and which had, therefore, been subject to the three year period of limitation introduced by the Act of 1954. This is the combined effect of the relevant provisions of sections 1, 6 and 15 as follows:

D “1 (1) Section 2(1) of the Limitation Act 1939 (which, in the case of certain actions, imposes a time-limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which—(a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section, and (b) the requirements of subsection (3) of this section are fulfilled. (2) This section applies to any action for damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person. (3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—(a) either was after the end of the three-year period relating to that cause of action or was not earlier than 12 months before the end of that period, and (b) in either case, was a date not earlier than 12 months before the date on which the action was brought.”

F “6 (1) Subject to the following provisions of this section, the provisions of this Part of this Act . . . shall have effect in relation to causes of action which accrued before, as well as causes of action which accrue after, the passing of this Act, and shall have effect in relation to any cause of action which accrued before the passing of this Act notwithstanding that an action in respect thereof has been commenced and is pending at the passing of this Act. . . . (3) For the purposes of this section an action shall not be taken to be pending at any time after a final order or judgment has been made or given therein, notwithstanding that an appeal is pending or that the time for appealing has not expired; and accordingly section 1 of this Act shall not have effect in relation to a cause of action in respect of which a final order or judgment has been made or given before the passing of this Act.”

H “15 Except in so far as the context otherwise requires, any reference in this Act to an enactment shall be construed as a reference to that enactment as amended or extended by or under any other enactment.”

Hence it is the new three year period of limitation introduced by the amended section 2(1) of the Act of 1939 which is no longer to be available as a defence if the court has granted the appropriate leave and the conditions as to knowledge prescribed by section 1(3) are satisfied. The specific provisions relating to pending actions in section 6, distinguishing between actions awaiting trial and actions subject to appeal after final judgment, would be otiose unless the Act were intended, in any pending action awaiting trial, to deprive the defendant of a time bar which had already accrued on expiry of the three year limitation period at the date of issue of the writ. If that was the intention in the case of pending actions, it must likewise have been the intention where the three year time bar had accrued but no action had yet been started.

In considering what, if any, further retrospective operation in depriving defendants of accrued time bars can be ascribed to any provision in the Act of 1963, I find it quite unrealistic to examine in isolation the special case of the cause of action in a claim for damages for personal injuries which accrued before 1954 against an authority entitled to the protection of section 21 of the Act of 1939 without considering at the same time the case of a pre-1954 cause of action in a personal injury claim accruing against an ordinary defendant and subject therefore to the six year period of limitation prescribed by the unamended section 2(1) of the Act of 1939. The point that most troubled me in the course of the argument was what, as it seemed to me, would be the absurdity of attributing to the legislature an intention to give retrospective effect to the new limitation provisions so as to deprive an ordinary defendant of the right to rely on a time bar accrued under the unamended provisions of the Act of 1939 but at the same time to leave intact the defence of a public authority acquired by virtue of the special position that public authorities previously enjoyed under section 21 of the Act of 1939 in regard to limitation of actions. The philosophy which was once thought to justify the distinction between public and private defendants in this regard had fallen wholly into disrepute when the distinction was swept away in 1954, and, so far as I am aware, has never subsequently regained any reputable currency. Hence, if the distinction was reintroduced in relation to the retrospective operation of the Act of 1963, it surely can only have been by some accident of inadvertent draftsmanship. It is for this reason that I should strive to avoid construing the Act as effecting such a distinction unless plainly compelled by its language to do so.

The Court of Appeal, as is clear from the admirably lucid judgment of Ralph Gibson L.J., with which the other members of the court agreed, were aware of this aspect of the matter, but were embarrassed by the prior Court of Appeal decision in *Knipe v. British Railways Board* [1972] 1 Q.B. 361, which they were free to criticise but not free to overrule, in so far as it decided that the Act of 1963 applied retrospectively to deprive a defendant of an accrued six year time bar under section 2(1) of the Act of 1939 prior to its amendment by the Act of 1954. The plaintiff's cause of action in that case had accrued in March 1948 and thus became time barred in March 1954. The main issue in the case was whether the plaintiff had satisfied the conditions as to knowledge prescribed by section 1(3), as the trial judge and the Court of Appeal held that he had. It does not appear from the report that any point was pleaded or argued for the defendant on the issue of the

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A retrospective action of the statute and the decision in relation to that issue might be said to be per incuriam but for a passage in the judgment of Lord Denning M.R. [1972] 1 Q.B. 361, 368–369, in which he adverts to the point and determines it in the plaintiff's favour. The passage is set out in full in the judgment of Ralph Gibson L.J. [1987] 2 W.L.R. 245, 257, 258, who forcefully criticises the reasoning on which Lord Denning's conclusion rests. I respectfully agree with the criticism and need not repeat it.

In any event, your Lordships are not, of course, bound by the decision in *Knipe's* case. A matter that concerns me is that the point is not directly in issue in the present appeal. But for the reasons I have indicated, it seems to me in the highest degree improbable that the legislature in 1963 could have intended, as a matter of deliberate policy, in giving retrospective effect to the new limitation code in personal injury actions to differentiate between causes of action governed by the six year period under the unamended section 2(1) of the Act of 1939 and those governed by the one year period under the repealed section 21 of the Act of 1939. I am thus persuaded that your Lordships both can and should consider and determine the effect of the Act of 1963 in relation to a pre-1954 six year case as part of the necessary process of reasoning in reaching a conclusion as to its effect in relation to a pre-1954 one year case.

The proposition that the Act of 1963 failed to remove the accrued six year time bar in any personal injury case where the cause of action accrued before 4 June 1954 is, at first blush, a startling one for the simple reason that the *Cartledge* case [1963] A.C. 758 which triggered the change in the law was itself a case where the plaintiffs' causes of action all accrued in or before 1950, and, if the Act of 1963 failed to extend to such cases, it could, in one sense, be said that it failed to remedy the very injustice which prompted its enactment. I was much impressed by this consideration in the course of the argument. But on reflection I believe that this approach involves an over-simplification of the issue. In legislating four years after the *Cartledge* case had come to trial it is not necessarily to be assumed that Parliament's intention was shaped by the particular facts of the *Cartledge* case when considering how far the new statute should operate retrospectively. However that may be, it is in any event from the language of the statute alone, if it is unambiguous, that the extent of the intended retrospection must be determined.

I have already set out the terms of section 1(1) of the Act of 1963. The only time bar of which defendants are in terms deprived of in this subsection is the three year time bar which accrued under section 2(1) of the Act of 1939 as amended in 1954. This is made clear both by the words in parenthesis and by section 15 of the Act. There is certainly no context in section 1 which would permit the reference to section 2(1) of the Act of 1939 to be construed as a reference to that subsection as originally enacted. The words in parenthesis emphasise the contrary. This is perhaps sufficient to lead to the conclusion that there is nothing in section 1 of the Act of 1963 which in any way affects the availability, after 1963 as before, of a defence which had accrued upon the expiry of the six year period applicable to any cause of action in respect of personal injuries accruing before 4 June 1954. But if further support for the conclusion be needed, it is found in section 1(3). The language of paragraph (a) of this subsection is simply incapable of any sensible

application to a case governed by a six year period of limitation. In the result I would hold that the Act of 1963 did not operate to deprive any defendant of a time bar which had accrued on the expiry of the six year limitation period prescribed by section 2(1) of the Act of 1939 in its original form which, by virtue of section 7 of the Act of 1954, continued to govern any cause of action in a personal injury case accruing before 4 June 1954. *Knipe's case* [1972] 1 Q.B. 361 was, therefore, wrongly decided. I would like to acknowledge that I owe this analysis of the effect of section 1 of the Act of 1963 to the able arguments of both leading and junior counsel for the board, the force of which I confess I did not appreciate until I reflected upon them at leisure.

If the Act of 1963 had no effect upon accrued time bars derived from the six year period of limitation under the unamended section 2(1) of the Act of 1939, it is hardly to be expected that it was intended to have any effect on accrued time bars derived from the one year period of limitation under section 21. The operative provision is section 1(4)(a) of the Act of 1963 which reads:

"Nothing in this section shall be construed as excluding or otherwise affecting—(a) any defence which, in any action to which this section applies, may be available by virtue of any enactment other than section 2(1) of the Limitation Act 1939 (whether it is an enactment imposing a period of limitation or not) or by virtue of any rule of law or equity . . ."

The Court of Appeal rejected the argument that section 21 of the Act of 1939 was an "enactment other than section 2(1) of the Act of 1939" within the meaning of this subsection on the ground that the phrase was not apt to apply to a repealed enactment. They nevertheless held that this subsection left the defence of an accrued time bar under section 21 intact on the ground that it was a defence available "by virtue of any rule of law," which included a reference to the rule of law stated in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 A.C. 553. With respect, I would reach the same conclusion as to the effect of this subsection by the simpler and more direct route of holding that the defence of an accrued time bar under section 21 of the Act of 1939 is available "by virtue of" an "enactment other than section 2(1) of the Act of 1939" and that it is by these words that the defence is expressly preserved. As was cogently pointed out in the course of the argument by my noble and learned friend Lord Oliver of Aylmerton, the defence of an accrued statutory time bar can only be regarded as available "by virtue of" the enactment which imposed the relevant period of limitation and remains so available notwithstanding that the enactment has subsequently been repealed.

The Law Reform (Miscellaneous Provisions) Act 1971, section 1(1) had the effect of extending the period allowed to a plaintiff by section 1(3) of the Act of 1963 for commencing an action otherwise statute-barred from one to three years from his date of knowledge of "material facts . . . [which] were or included facts of a decisive character" relating to his cause of action.

The only other statute preceding the 1980 consolidation which it is necessary to consider is the Limitation Act 1975. This was enacted following the presentation in May 1974 of the 20th Report of the Law Reform Committee (Interim Report on Limitation of Actions: In Personal Injury Claims) (1974) (Cmnd. 5630) and substantially

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A implemented its recommendations. Here again certain passages in the report are relied on in argument by counsel for the widow but, save to the limited extent that I shall later indicate, I do not think the report throws any significant light on the problem presently under consideration. It is, however, instructive to note, by reading the Act in conjunction with the summary of the committee's conclusions in paragraph 148 of the report, which the Act clearly sets out to implement, what are the principal objects and effects of the Act. Omitting provisions dealing with persons under a disability, which are not presently relevant, these are as follows. First, the period of three years from the accrual of the cause of action or the plaintiff's "date of knowledge," if later, is retained as the normal period of limitation applicable to personal injury actions. Secondly, to resolve the doubts and difficulties which had arisen on the interpretation of section 1(3) of the Act of 1963, what is to constitute "knowledge" for this purpose is elaborately and precisely defined by the statute. Thirdly, the Act gives the court a discretion to override the normal period of limitation in an appropriate case. Fourthly, the need to obtain the leave of the court to sue out of time is abolished. Finally, as one would expect, the Act contains transitional provisions, the effect of which I do not attempt to summarise as I shall have to examine them in detail later.

The principal machinery adopted to achieve these objects and effects is the elaborate amendment of the Act of 1939. The proviso to section 2(1) of 1939 is removed by the repeal of section 2 of the Act of 1954. By Schedule 1, paragraph 2, a new subsection (8) is added to section 2 of the Act of 1939 which provides: "This section has effect subject to section 2A below."

The Act of 1975 then introduces new sections 2A, 2B, 2C and 2D into the Act of 1939. Section 2A(1) provides:

"This section applies to any action for damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person."

It will be noted that this repeats the language of section 1(2) of the Act of 1963. Section 2A(2) provides: "Section 2 of this Act shall not apply to an action to which this section applies."

The effect of the remaining subsections of section 2A may be summarised. Subsections (3) and (4) provide, subject to section 2D, for the normal time limit of three years from—"(*a*) the date on which the action accrued, or (*b*) the date (if later) of the plaintiff's knowledge" to apply to personal injury actions. Subsections (5), (9) and (10) relate to actions under the Law Reform (Miscellaneous Provisions) Act 1934 and need not be separately considered. Subsections (6) to (8) contain the provisions defining the concept of date of knowledge.

Section 2B applies to actions under the Fatal Accidents Acts. Section 2C is not presently relevant. Section 2D confers the discretion to "disapply" the provisions of section 2A or 2B in the circumstances and subject to the limitations laid down in the section. Finally, section 3 of the Act of 1975 contains the all important transitional provisions which I set out in full:

"(1) The provisions of this Act shall have effect in relation to causes of action which accrued before, as well as causes of action which

accrue after, the commencement of this Act, and shall have effect in relation to any cause of action which accrued before the commencement of this Act notwithstanding that an action in respect thereof has been commenced and is pending at the commencement of this Act. (2) For the purposes of this section an action shall not be taken to be pending at any time if a final order or judgment has been made or given therein, notwithstanding that an appeal is pending or that the time for appealing has not expired. (3) It is hereby declared that a decision taken at any time by a court to grant, or not to grant, leave under Part I of the Limitation Act 1963 (which, so far as it relates to leave, is repealed by this Act) does not affect the determination of any question in proceedings under this Act, but in such proceedings account may be taken of evidence admitted in proceedings under the said provisions repealed by this Act. (4) In this section 'action' includes any proceeding in a court of law, an arbitration and a claim by way of set-off or counterclaim."

Mr. Ogden Q.C. [1986] 3 W.L.R. 171 based his decision on the generality of the opening words of section 2A: "This section applies to any action . . ." He did not refer in terms in his judgment to the transitional provisions in section 3 of the Act of 1975 but he must have had them in mind, because without section 3 the Act of 1975 could not have operated retrospectively at all. Ralph Gibson L.J. [1987] 2 W.L.R. 245 refuted Mr. Ogden's view in a lengthy passage at pp. 260-262 of his judgment, which relied in substantial measure on a comparison of the language of sections 2A and 2B. Whilst I do not dissent from, I do not find it necessary to follow, this somewhat elaborate reasoning, because it seems to me that it is possible to arrive at the same conclusion as that reached by the Court of Appeal by a simpler route, which perhaps may not have been open to the Court of Appeal on account of the effect of *Knipe's* case [1972] 1 Q.B. 361 by which they were bound.

To my mind the key question is to determine the extent to which section 3 of the Act of 1975 was intended to give retrospective effect to the earlier sections embodied by way of amendment of the Act of 1939. It will have been observed that section 3(1) and (2) of the Act of 1975 use the same terms as section 6(1) and (3) of the Act of 1963. This correspondence adopts precisely the Law Reform Committee's recommendation in paragraph 147 of their report. Reliance is placed on this by the counsel for the widow, but, by itself, it seems to me a neutral factor. It is clear that, for the same reasons as I have expressed earlier in relation to section 6 of the Act of 1963, section 3 of the Act of 1975 was intended to have *some* retrospective effect. If the Act of 1975 had been the next relevant statute immediately following the Act of 1954 without the intervening Act of 1963, I should have taken precisely the same view of its effect as that expressed by Mr. Ogden Q.C. In those circumstances, section 21 of the Act of 1939 having already been repealed, there would, as I think, have been no effective counter to the argument that the generality of the language of the new section 2A of the Act of 1939 in the light of the retrospective effect given to it by section 3 of the Act of 1975, had swept away all time bars in personal injury actions previously acquired since 1939, leaving all causes of action accruing since that date to be determined by the application of the new statutory provisions.

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A But it must be legitimate and necessary to construe the Act of 1975
in the light of the preceding legislative history. To give full effect to the
remedies which the Law Reform Committee proposed in order to
correct the defects which they discovered in the operation of the regime
for the limitation of personal injury actions under the Act of 1963 as
amended by the Law Reform Miscellaneous Provisions Act 1971 it was
clearly necessary, for the reasons they explained in paragraphs 137–146
of their report, to embody in the new statute transitional provisions
giving the benefit of the new regime to plaintiffs whose causes of action
had accrued during the period governed by the preceding regime, i.e. at
any time between 1954 and 1975. Thus, plaintiffs whose causes of action
had accrued between those dates would be entitled, where appropriate,
to the exercise of the court's discretion under section 2D of the Act of
1939, they would not require the leave of the court to sue and their date
of knowledge would be determined under the provisions of section
2A(6) to (8). All this was an essential part of curing the defects which
the Law Reform Committee had exposed in the state of the law as they
found it. But there is not the slightest hint in the report that the extent
of the retrospective operation of the Act of 1963 was an aspect of the
law calling for any remedial action. It is in this negative sense that the
report seems to me to give support to the case for the board.

Consistently with the presumption that a statute affecting substantive
rights is not to be construed as having retrospective operation unless it
clearly appears to have been so intended, it seems to me entirely
proper, in a case where some retrospective operation was clearly
intended, equally to presume that the retrospective operation of the
statute extends no further than is necessary to give effect either to its
clear language or to its manifest purpose. Construing sections 2A to 2D
of the Act of 1939 in the light of section 3 of the Act of 1975, I think
that full effect is given both to the language and to the purposes of the
legislation if it is held retrospectively applicable to all personal injury
actions previously governed by the three year limitation period under
the Act of 1954, whether as then enacted or as amended by the Act of
1963. Conversely, I can find nothing in the language or discernible
purposes of the statute which leads clearly, let alone unavoidably, to the
conclusion that defendants previously entitled to rely on the accrued six
year and one year time bars under the original Act of 1939 which the
Act of 1963 left intact were intended to be deprived of those accrued
rights by the Act of 1975.

Not being bound by *Knipe's* case [1972] 1 Q.B. 361, your Lordships
are able to take a broader view of the effect of the legislation as a whole
than was open to the Court of Appeal. But this does not prevent me
from echoing and endorsing the sentiments expressed by Ralph Gibson
L.J. [1987] 2 W.L.R. 245 at the conclusion of his examination of the Act
of 1975 where he said, at p. 262:

“For my part, I was content to reach this conclusion because it
would, I think, have been a surprising consequence of the Act of
1975 if it had deprived this defendant of an accrued right which, on
my view of the true effect of the Acts of 1954 and 1963, had
remained unimpaired for the 31 years from 1944 to 1975.”

Accordingly, I would dismiss the appeal.

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LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons explained in it I would dismiss this appeal.

LORD BRIGHTMAN. My Lords, I agree with the speech of my noble and learned friend Lord Bridge of Harwich and for the reasons given by him would dismiss this appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree that the appeal should be dismissed for the reasons which he has given.

LORD OLIVER OF AYLMEYTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree that the appeal should be dismissed for the reasons which he has given.

Appeal dismissed.

Solicitors: Lawford & Co.; Berryman for Godfrey Diggins & McKay, Birmingham.

J. A. G.

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A

[COURT OF APPEAL]

DEUTSCHE SCHACHTBAU-UND TIEFBOHRGESELLSCHAFT
m.b.H. v. R'AS al-KHAIMAH NATIONAL OIL CO.

SAME v. SAME
(SHELL INTERNATIONAL PETROLEUM CO. LTD.
INTERVENING)

B

[1986 D No. 2196]
[1987 R No. 273]

1987 March 9, 10, 11, 12; 24

Sir John Donaldson M.R.,
Woolf and Russell L.JJ.

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Arbitration—Award—Enforcement—Award made abroad—Proper law applicable to arbitration left to determination of arbitrators—Arbitrators selecting internationally accepted principles of law governing contractual relations as proper law applicable—Arbitrators making award in favour of plaintiffs—Whether award enforceable—Whether enforcement of award contrary to public policy

D

Injunction—Interlocutory—Asset within jurisdiction—Injunction restraining removal of assets from jurisdiction—Debt payable outside jurisdiction by company resident within jurisdiction—Whether debt asset within jurisdiction

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In 1976 the plaintiffs and the defendants, both foreign companies, entered into an agreement for the exploration of oil in the state of R'As al-Khaimah. The agreement contained a clause providing for the settlement of all disputes by three arbitrators appointed in Geneva under the rules of the International Chamber of Commerce, to whom was left the determination of the proper law to be applied. In March 1979, the plaintiffs referred a dispute to arbitration in Geneva in accordance with the clause. The arbitrators chose as the proper law of the contract what they described without further definition as "internationally accepted principles of law governing contractual relations" and made a substantial award in favour of the plaintiffs. But in April 1979 the defendants instituted proceedings in a court in R'As al-Khaimah and obtained rescission of the whole agreement and damages on the ground of misrepresentation. Neither party took any part in the proceedings instituted by the other, and neither the award nor the judgment was enforced. In June 1986, the plaintiffs discovered that an English company, S. Ltd., had been buying petroleum from and therefore owed money to the defendants. With the intention of satisfying the arbitration award out of payments due to the defendants from S. Ltd., the plaintiffs thereupon applied for and were granted leave to enforce the award in England as a judgment. They also obtained an injunction restraining the defendants from removing any assets from the jurisdiction. The defendants meanwhile obtained leave to serve a writ out of the jurisdiction on the plaintiffs, claiming enforcement of the R'As al-Khaimah court judgment. The defendants' applications to discharge the injunction and to set aside the leave granted to the plaintiffs to enforce their arbitration award were refused, while the plaintiffs' application to set aside the leave granted to the defendants to serve their writ out of the jurisdiction was granted. The defendants appealed, objecting to the choice of proper law in the arbitration. S. Ltd. intervened to support the defendants' opposition to

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continuation of the injunction, on the ground that as the debt owed by S. Ltd. to the defendants was payable in New York it was not an asset susceptible to such an injunction and was not enforceable by the English courts.

On the appeals:—

Held, dismissing the appeals, (1) that in considering whether to enforce an arbitration award made pursuant to an agreement which purported to provide that the rights of the parties should be governed by a system of law which was not that of England or of any other state or was a serious modification of such a law, the court had to be satisfied that the parties intended to create legally enforceable rights and obligations, that the resulting agreement was sufficiently certain to constitute a legally enforceable contract and that it would not be contrary to public policy to use the coercive powers of the state to enforce the award; that, on the facts, the parties had intended, and the agreement was sufficiently certain, to constitute a legally enforceable contract; and that since the Swiss arbitrators' choice for the proper law of the arbitration, being a common denominator of principles underlying the law of contract of various nations, was within the scope of the decision left to them by the parties, their award could not be regarded as unenforceable on the ground of public policy (post, pp. 1035E—1036A, 1041B,).

(2) That a debt which was enforceable within the jurisdiction by garnishment or the appointment of a receiver constituted an asset within the jurisdiction; that since the debt owed by S. Ltd. to the defendants, albeit payable outside the jurisdiction, could be enforced within the jurisdiction if S. Ltd. were to default on its obligation to pay, and since the indebtedness of S. Ltd. would be completely discharged if the debt were to be made the subject of a garnishee order which was then made absolute and payment made to the plaintiffs thereunder, that debt constituted an asset within the jurisdiction which could properly be made the subject of an injunction to restrain its disposal or removal from the jurisdiction (post, pp. 1038D—E, 1039B—C, 1040E—1041B).

Orders of Bingham and Leggatt JJ. affirmed.

The following cases are referred to in the judgments:

Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1981] 2 Lloyd's Rep. 446

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.)

Bullus v. Bullus (1910) 102 L.T. 399

Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A. [1971] A.C. 572; [1970] 3 W.L.R. 389 [1970] 3 All E.R. 71, H.L.(E.)

Czarnikow v. Roth Schmidt & Co. [1922] 2 K.B. 478, C.A.

Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd. [1978] 1 Lloyd's Rep. 357, C.A.

Hamlyn & Co. v. Talisker Distillery [1894] A.C. 202, H.L.(E.)

Hillas & Co. Ltd. v. Arcos Ltd. (1932) 147 L.T. 503, H.L.(E.)

Intraco Ltd. v. Notis Shipping Corporation [1981] 2 Lloyd's Rep. 256

Lister & Co. v. Stubbs (1890) 45 Ch.D. 1, C.A.

Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1975] 2 Lloyd's Rep. 509; [1980] 1 All E.R. 213n, C.A.

Nippon Yusen Kaisha v. Karageorgis [1975] 1 W.L.R. 1093; [1975] 3 All E.R. 282, C.A.

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- A *Orion Compania Espanola de Seguros v. Belfort Maatschappij voor Algemene Verzekering* [1962] 2 Lloyd's Rep. 257
- Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj and the Bank for Russian Trade Ltd.* [1933] 1 K.B. 47, C.A.
- Richardson v. Mellish* (1824) 2 Bing. 229
- S.C.F. Finance Co. Ltd. v. Masri (No. 3)* [1987] 2 W.L.R. 81; [1987] 1 All E.R. 194, C.A.
- B *Swiss Bank Corporation v. Boehmische Industrial Bank* [1923] 1 K.B. 673
- Z Ltd. v. A-Z and AA-LL* [1982] Q.B. 558; [1982] 2 W.L.R. 288; [1982] 1 All E.R. 556, C.A.

The following additional cases were cited in argument:

- C *A v. B (X intervening)* [1983] 2 Lloyd's Rep. 532
- Ashtiani v. Kashi* [1986] 3 W.L.R. 647; [1986] 2 All E.R. 970, C.A.
- Avant Petroleum Inc. v. Gatoil Overseas Inc.* [1986] 2 Lloyd's Rep. 236, C.A.
- Bankers and Shippers Insurance Co. of New York v. Liverpool Marine and General Insurance Co. Ltd.* (1926) 24 Ll.L.Rep. 85
- Galaxia Maritime S.A. v. Mineralimportexport (The Eleftherios)* [1982] 1 W.L.R. 539; [1982] 1 All E.R. 796, C.A.
- D *Helbert Wagg & Co. Ltd., In re* [1956] Ch. 323; [1956] 1 All E.R. 129
- Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A. (The Angel Bell)* [1981] Q.B. 65; [1980] 2 W.L.R. 488; [1980] 1 All E.R. 480
- Martin v. Nadel (Dresdner Bank Garnishees)* [1906] 2 K.B. 26, C.A.
- New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101
- Ninemaria Maritime Corpn. v. Trave Schiffahrtsgesellschaft mbH & Co. K.G.* [1983] 1 W.L.R. 1412; [1984] 1 All E.R. 398, C.A.
- E *Orwell Steel (Erection & Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd.* [1984] 1 W.L.R. 1097; [1985] 3 All E.R. 747
- Power Curber International Ltd. v. National Bank of Kuwait S.A.K.* [1981] 1 W.L.R. 1233; [1981] 3 All E.R. 607
- Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of The Republic of Indonesia intervening)* [1978] Q.B. 644; [1977] 3 W.L.R. 518; [1977] 3 All E.R. 324, C.A.
- F *Searose Ltd. v. Seatrain (U.K.) Ltd.* [1981] 1 W.L.R. 894; [1981] 1 All E.R. 806
- Stewart Chartering Ltd. v. C. & O. Managements S.A.* [1980] 1 W.L.R. 460; [1980] 1 All E.R. 718
- Tramountana Armadora S.A. v. Atlantic Shipping Co. S.A.* [1978] 2 All E.R. 870
- Union Nationale des Co-operatives Agricoles de Cereales v. Robert Catterall & Co. Ltd.* [1959] 2 Q.B. 44; [1959] 1 All E.R. 721, C.A.
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APPEALS from Leggatt and Bingham JJ.

In the first appeal, the defendants, R'As al-Khaimah National Oil Co., appealed against orders made by Leggatt J. on 26 February 1987 whereby he (i) refused to discharge an order made by Bingham J. on 2 July 1986 granting the plaintiffs, Deutsche Schachtbau-und Tiefbohr-gesellschaft m.b.H., leave to enforce as a judgment an award made on 4 July 1980 by an arbitral tribunal in Geneva who held that the defendants should pay the sum of U.S.\$4,635,664 to the plaintiffs, and (ii) set aside an order made by Staughton J. on 22 January 1987 granting the defendants leave to issue and serve without the jurisdiction a writ claiming from the plaintiffs sums allegedly due to the defendants under a judgment of the court of R'As al-Khaimah dated 3 December 1979. In the second appeal, the defendants and the interveners, Shell International

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Petroleum Co. Ltd., appealed against an order made by Bingham J. on 8 August 1979 whereby he refused to discharge an injunction, granted by him on the ex parte application of the plaintiffs on 2 July 1986 and amended on 25 July 1986, restraining the defendants from accepting payment of a debt owed to them by the interveners and payable in New York, pending the outcome of the plaintiffs' application to enforce the Geneva arbitration award.

The facts are set out in the judgment of Sir John Donaldson M.R.

Andrew Longmore Q.C., Alan Pardoe and Adrian Hughes for the defendants.

David Johnson Q.C. and Mark Havelock-Allan for Shell.

Stewart Boyd Q.C. and Ian Glick for the plaintiffs.

Cur. adv. vult.

24 March. The following judgments were handed down.

SIR JOHN DONALDSON M.R. Disputes arose between Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. ("D.S.T.") and R'As al-Khaimah National Oil Co. ("Rakoil") under an oil exploration agreement dated 1 September 1976. The agreement contained an International Chamber of Commerce ("I.C.C.") arbitration clause and, in March 1979, D.S.T. referred its claims to an arbitral tribunal sitting in Geneva. In April 1979 Rakoil instituted proceedings in the court of R'As al-Khaimah for the rescission of the agreement upon the ground that it had been obtained by misrepresentation and also for damages. Neither party took any part in the proceedings instituted by the other. D.S.T. succeeded in the arbitration, the award dated 4 July 1980 being for U.S.\$4,635,664. Rakoil succeeded in the litigation, judgment being given on 3 December 1979 whereby the agreement, or perhaps more accurately an earlier underlying agreement, was rescinded and D.S.T. were held liable to Rakoil in the sum of U.S.\$1,424,891.23 and Dirhams 110,687,839.61.

At this stage honour, but little else, was satisfied, since neither party could find a way of enforcing these decisions. That situation might have continued indefinitely, but for the fact that in about June 1986 rumours reached D.S.T. that Shell International Petroleum Co. Ltd. ("Shell") had been buying oil from Rakoil and would, presumably, be paying for that oil. Shell was an English subsidiary of the Anglo-Dutch group and D.S.T. set about trying to satisfy the award out of Shell's payments to Rakoil.

On 2 July 1986, on the ex parte application of D.S.T., Bingham J. made orders: (i) pursuant to R.S.C., Ord. 73, r.10 and section 3(1)(a) of the Arbitration Act 1975, granting leave to D.S.T. to enforce the Geneva arbitration award in the same manner as a judgment for the sum awarded, together with interest thereon amounting to a further sum of U.S.\$3,778,366.49; and (ii) restraining Rakoil from

"removing outside the jurisdiction, disposing of, charging or otherwise dealing with any moneys owned by them or deposited by them within the jurisdiction, or any debts due or to become due to them within, or from any person within the jurisdiction [and in particular from directing, accepting or receiving payment of the

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A debt or debts due or to become due to them from Shell International Petroleum Co. Ltd. or any other company or corporation resident in England and Wales] up to the amount of U.S.\$8,500,000."

The words in square brackets were added by a further order of Bingham J. made on 24 July 1986, again on the ex parte application of D.S.T.

B On 8 August 1986 Bingham J. refused an application to discharge this injunction, noting that there was a pending application to set aside that part of his order dated 2 July 1986, which had given D.S.T. leave to enforce the arbitration award as a judgment. That application to set aside was heard by Leggatt J. on 25 February 1987.

C Meanwhile, on 22 January 1987, Rakoil applied for and obtained the leave of Staughton J. to issue a writ for service on D.S.T. in Germany claiming to enforce the R'As al-Khaimah judgment. The intention was to found a counterclaim to that based upon the award. An application to set aside that leave and all subsequent proceedings came before Leggatt J. at the same time as the application to set aside the leave to enforce the award as a judgment.

D Leggatt J. refused to set aside the leave granted to D.S.T. to enforce the award and set aside the leave to serve the writ issued by Rakoil against D.S.T. However he imposed a stay on execution of the award until after the hearing of an appeal to this court against the refusal of Bingham J. to discharge the injunction. That appeal was due to be heard on 9 March 1987.

E The reality was, and is, that D.S.T. has to uphold the validity of the orders both of Bingham J. and Leggatt J. if they are to enjoy any fruits of this litigation. If the leave to enforce the award is set aside, cadit quaestio. If the injunction is set aside, any assets of Rakoil in this country will disappear overseas in the twinkling of a telex.

Accordingly arrangements were made for the appeal from the judgment of Leggatt J. to be heard at the same time as that from the judgment of Bingham J.

F Meanwhile Shell were subjected to substantial commercial pressure to pay Rakoil in New York and, on their application, were given leave to intervene in the appeal against the grant and continuance of the injunction, which was inhibiting them from so doing. Thus the scene was set for an appeal which has raised issues of some general importance and which has been argued with great skill by all concerned.

G The logical starting point for a consideration of those issues must be the order giving leave to enforce the award and the refusal to set it aside.

Enforcement of the award

H The Geneva award is a "Convention award" within the meaning of the Arbitration Act 1975, being an award made in pursuance of an arbitration agreement in the territory of a state, other than the United Kingdom, namely Switzerland, which is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It follows that it is enforceable in England either by action or under section 26 of the Arbitration Act 1950 and that such enforcement is mandatory, save in the exceptional cases listed in section 5 of the Arbitration Act 1975. Section 5 provides, so far as is material:

"Refusal of enforcement.

"5(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section. (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves . . . (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or (d) (subject to subsection (4) of this section) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; . . . (3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award. (4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted."

Section 26 of the Act of 1950 provides:

"An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

The machinery for applying for leave to enforce such an award is regulated by R.S.C., Ord. 73, r. 10. Suffice it to say that the application may be made *ex parte*, although the court can direct that a summons be issued, and that "the debtor" may apply to set the order aside within a specified time, in this case 23 days, of the order giving leave being served upon him and that

"the award shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the order, until after the application is finally disposed of." (Ord. 73, r. 10(6)).

D.S.T. complied with all the formalities and, subject to the result of this appeal, is, and has since 2 July 1986 been, entitled "to enforce the award in the same manner as a judgment or order to the same effect" and to enter judgment in the terms of the award, which D.S.T. has in fact done, but subject always to a continuing inability to proceed to immediate enforcement initially because of the terms of Ord. 73, r. 10(6) and latterly because of the stay granted by Leggatt J.

Mr. Longmore, for Rakoil, takes a number of points which can be consolidated under five heads: (a) Is the arbitration agreement subject to the law of R'As al-Khaimah and void under that law? (b) Can Rakoil rely upon the decision of the court of R'As al-Khaimah without regard to English rules on the recognition of foreign judgments? (c) Did the award exceed the scope of the submission and, if so, can enforcement be refused in whole or in part (section 5(2)(d) and (4) of the Arbitration Act 1975)? (d) Would it be contrary to public policy to enforce the award? (e) Are the answers to these questions so clear that there ought to be summary judgment, as contrasted with leaving D.S.T. to sue on the award?

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Donaldson M.R.A *The proper law of the arbitration agreement*

It is common ground that this falls to be ascertained by the application of the English rules for the resolution of conflict of laws, since the instant proceedings are in the English courts. The agreement to arbitrate is contained in article XXI of the contract and is in the following terms:

B “XXI.1 All disputes arising in connection with the interpretation or application of this agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the Rules. XXI.2 The arbitration shall be held in Geneva, Switzerland and shall be conducted in the English language.”

C Mr. Longmore submits that the proper law of this agreement to arbitrate is that which applies to the wider (substantive) agreement in which it is contained and that, applying the rule that, in the absence of indications of some different choice by the parties, the proper law of a contract is that system of law with which the transaction has the closest and most real connection, the relevant law is that of R’As al-Khaimah: *Compagnie Tunisienne de Navigation S.A. v. Compagnie d’Armement Maritime S.A.* [1971] A.C. 572.

D Mr. Boyd, appearing for D.S.T., rightly points out, however, that an arbitration agreement constitutes a self-contained contract collateral or ancillary to the substantive agreement (*Bremer Vulkan Schiffbau und Maschinenfabrik S.A. v. South India Shipping Corporation Ltd.* [1981] A.C. 909) and that it need not be governed by the same law as that agreement (*Hamlyn & Co. v. Talisker Distillery* [1894] A.C. 202, and *Black Clawson International Ltd. v. Papierwerke Waldhof Aschaffenburg A.G.* [1981] 2 Lloyd’s Rep. 446). Furthermore the rules for the I.C.C. court of arbitration, of which the parties must be deemed to have been aware, contemplate by article 8.4 that the arbitrator:

F “shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate their claims and pleas.”

G The intention of the parties that the agreement to arbitrate shall be an independent and collateral contract could not be more clearly indicated.

H Looking at the arbitration agreement in isolation, there can only be one answer, namely, that it is governed by Swiss law. Of course it is not permissible to do this and regard must be had to all the surrounding circumstances, including the proper law governing the substantive contract and to the fact that the contract was to be performed in R’As al-Khaimah. However, in view of the international character of the enterprise, it is far from self-evident that the substantive contract is governed by the law of R’As al-Khaimah. As is not unusual in the oil industry, it involved parties of differing nationalities, using United States dollars as the money of account, who have chosen a neutral forum for the resolution of disputes and may well be thought to have chosen a neutral law to govern their rights and liabilities. This probability becomes all the stronger when reference is made to article 13.3 of the I.C.C. Rules which provides:

"The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate."

This suggests that the parties intended to delegate to the arbitrators the choice of law governing the substantive contract, applying what they considered to be appropriate principles and, in the event, the arbitrators did not hold that the contract was governed by the law of R'As al-Khaimah.

Giving the fullest possible weight to any argument favouring the law of R'As al-Khaimah as the proper law of the substantive contract and to the fact that it was undoubtedly the law of the place of performance, I find myself in complete agreement with Leggatt J. that the proper law of the arbitration is Swiss.

Effect of the judgment of the court of R'As al-Khaimah

Once it is decided that the agreement to arbitrate is governed by Swiss law, the judgment becomes irrelevant to the validity of that agreement, whether the judgment is viewed as a judgment of a court of competent jurisdiction or as an expert opinion upon the law of R'As al-Khaimah. In terms of Swiss law, which is the only relevant law in the context of the validity of the arbitration agreement, the affidavit evidence of Professor Pierre Lalive is that the arbitration agreement is valid and that this validity is unaffected by any question as to the validity of the contract of which it forms part. This evidence stands uncontradicted. Furthermore no application was made to cross-examine him on his affidavit.

The judgment has, however, to be considered in the context of the decision by Leggatt J. to set aside the leave to serve the writ outside the jurisdiction seeking to enforce it by way of counterclaim. At this point it becomes necessary to look, albeit briefly, at section 32 of the Civil Jurisdiction and Judgments Act 1982. This, so far as is material, provides:

"(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if (a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and (b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and (c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court. (2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given. (3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2)."

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A The bringing of proceedings by Rakoil in the court of R'As al-Khaimah was a breach of the arbitration agreement, whose scope was amply wide enough to cover all matters in dispute in those proceedings, and accordingly the judgment cannot be recognised or enforced. It follows that Leggatt J. was right to set aside the leave to serve the writ out of the jurisdiction and the R'As al-Khaimah judgment disappears from the scene.

B

The scope of the award and of the arbitration agreement

C Mr. Longmore submits that the award deals with a difference or differences not contemplated by, or not falling within, the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration and that it is not possible to separate such matters from those falling within the true scope of the agreement. Accordingly enforcement should be refused (section 5(2)(d) and (4) of the Arbitration Act 1975) or at the very least there should not be summary enforcement.

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The claim in the arbitration was made by D.S.T. on its own behalf and as agent for and representative of a group of companies including a German company to which I will refer as "Deminex." Deminex, unlike the other companies in the group, does not appear to have been a party to the arbitration agreement. The award also mentioned a company called "Sea & Land" and notes that it had a contract with the Government of R'As al-Khaimah which had not been submitted to arbitration. It appears from the award that both Deminex and Sea & Land were members of a consortium of which D.S.T. was the leader.

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The interest of Deminex was challenged in a letter to the Secretary General of the I.C.C. dated 5 April 1979 from the English solicitors of Rakoil. That letter was brought to the attention of the arbitrators and is mentioned in the award. They were also aware that Sea & Land was not a party to the dispute and it is not apparent to me that D.S.T. was ever claiming on behalf of Sea & Land.

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G Rakoil has never denied the fact that D.S.T. was a party to the arbitration agreement and the award determines only the rights of D.S.T. and Rakoil inter se. It makes no award in favour of Deminex or Sea & Land and makes no determination of the rights of Deminex or Sea & Land against D.S.T. If the arbitrators have erred in the amount awarded to D.S.T., because they have wrongly taken account of the interests of Deminex or Sea & Land, that is a matter which should have been the subject of a claim to relief from the Swiss court. No such application has been made. The burden of proving any excess of jurisdiction lies on the person seeking to resist the enforcement of the award. In the light of the failure to apply to the Swiss courts, of the evidence of Professor Pierre Lalive as to the wide powers of arbitrators under Swiss law, of the fact that the award is made solely in favour of D.S.T. and of the terms of the award itself from which it seems that the arbitrators have held that D.S.T. had independent rights as "the operator," I am not satisfied that there has been any excess of jurisdiction. This objection therefore fails.

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Public policy in relation to the enforcement of the award

In pursuance of their duty under article 13.3 of the I.C.C. rules, the arbitrators determined that the proper law governing the substantive

obligations of the parties was “internationally accepted principles of law governing contractual relations.” The arbitrators prefaced this decision with the following statement:

“The arbitration tribunal holds that: The Concession Agreement, the Assignment Agreement and the 1976 Operating Agreement are contracts between, on one hand, a number of companies organised under various laws, and, on the other hand, a state respectively a company which is actually an agency of such state. Reference either to the law of any one of the companies, or of such state, or of the state on whose territory one or several of these contracts were entered into, may seem inappropriate, for several reasons. The arbitration tribunal will refer to what has become common practice in international arbitrations particularly in the field of oil drilling concessions, and especially to arbitrations located in Switzerland. Indeed, this practice, which must have been known to the parties, should be regarded as representing their implicit will. Reference is made in particular to the leading cases of *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* (1967) 35 Int'l.L.Rep. 136 and *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic* (1979) Int'l.L.Rep. 389. See also Lalive, *Les Règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse, L'arbitrage international privé et la Suisse* (1977); see also Derains, *L'application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige*, in *Revue de l'arbitrage* (1972), p. 100.”

Mr. Longmore submits that it would be contrary to English public policy to enforce an award which holds that the rights and obligations of the parties are to be determined, not on the basis of any particular national law, but upon some unspecified, and possibly ill defined, internationally accepted principles of law.

In *Orion Compania Espanola de Seguros v. Belfort Maatschappij voor Algemere Verzekering* [1962] 2 Lloyd's Rep. 257 Megaw J. was confronted with an arbitration agreement whereby:

“The arbitrators and umpire are relieved from all judicial formalities and may abstain from following the strict rules of the law. They shall settle any dispute under this agreement according to an equitable rather than a strictly legal interpretation of its terms and their decision shall be final and not subject to appeal.”

The umpire had refused to state his award in the form of a special case and the respondents to an application that he be ordered to do so submitted that no substantial or defined question of law arose. Megaw J. referred to the classic decision of this court in *Czarnikow v. Roth Schmidt & Co.* [1922] 2 K.B. 478 and, in the tradition of that decision and indeed of the English courts throughout the ages, roundly declared [1962] 2 Lloyd's Rep. 257, 265:

“so long as there is supervisory jurisdiction by the courts, the parties cannot make a question of law any less a question of law, whether for the purpose of the exercise of the courts' discretion or otherwise, by purporting to agree that it shall be decided by some extra-legal criterion.”

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A However, Megaw J. also considered the clause in a different context, namely, whether the courts would give effect to such a clause. Referring again to the *Czarnikow* case he said, at p. 264:

B “The conclusion which I draw from those judgments is that it is the policy of the law in this country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognizable system of law, which primarily and normally would be the law of England, and that they cannot be allowed to apply some different criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles, which, of course, does not mean ‘equity’ in the legal sense of the word at all. This conclusion is, I think, supported by the judgment of Goddard J. in the case of *Maritime Insurance Co. Ltd. v. Assecuranz-Union von 1865* (1935) 52 Ll.L.Rep. 16. I am not going to go into that case in detail. The arbitration clause there contained words very similar to the words in the present article 17, and they were as follows: ‘The arbitrators or umpire, as the case may be, shall interpret this treaty rather as an honourable engagement than as a merely legal obligation, and shall be relieved from all judicial formalities, and may abstain from following the strict rule of the law.’ At p. 20 of the report, Goddard J. deals with the effects of that part of the arbitration clause, and, as I read his judgment, he is saying there that the effect of it is not in any way to alter the requirement that English law shall be applied in the decision of disputes by an English arbitration tribunal. I agree with Mr. Evans’s submission that parties can validly provide for some other system of law to be applied to an arbitration tribunal. Thus, it may be, though perhaps it would be unusual, that the parties could validly agree that a part, or the whole, of their legal relations should be decided by the arbitral tribunal on the basis of a foreign system of law, or perhaps on the basis of principles of international law; for example, in a contract to which a sovereign state was a party. It may well be that the arbitral tribunal could properly give effect to such an agreement, and the court in its supervisory jurisdiction would also give effect to it, just as it would give effect to a contractual provision in the body of the contract that the proper law of the contract should be some system of foreign law. Indeed, it might be another way of achieving the same result, and I see no reason why an arbitral tribunal in England should not, in a proper case, where the parties have so agreed, apply foreign law or international law. Of course, also, as Mr. Evans again suggested, the parties can by their contract, either in the arbitration clause itself or in the rest of the contract, provide that certain incidents of law which would otherwise attach should not attach, such as the exclusion or alteration of the statutory period of limitation, or the exclusion of the implied terms of section 14 of the Sale of Goods Act 1893, or suchlike matters. There is no possible objection to that, so long as there is nothing contrary to public policy in the exclusion or alteration of the provisions which, in the absence of agreement, would attach. But this is not such a case. If the parties choose to provide in their contract that the rights and obligations shall not be decided in accordance with law but in accordance with some other criterion, such as what the arbitrators consider to be fair and reasonable, whether or not in accordance

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with law, then, if that provision has any effect at all, its effect, as I see it, would be that there would be no contract, because the parties did not intend the contract to have legal effect—to affect their legal relations. If there were no contract, there would be no legally binding arbitration clause, and an ‘award’ would not be an award which the law would recognise.”

A clause in the same terms was considered in this court in *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Lloyd’s Rep. 357, where Lord Denning M.R., with the agreement of Goff L.J. and Shaw L.J. said, at p. 362:

“I do not believe that the presence of such a clause makes the whole contract void or a nullity. It is a perfectly good contract. If there is anything wrong with the provision, it can only be on the ground that it is contrary to public policy for parties so to agree. I must say that I cannot see anything in public policy to make this clause void. On the contrary the clause seems to me to be entirely reasonable. It does not oust the jurisdiction of the courts. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do today under such a clause as this. Even under an ordinary arbitration submission, it was a mistake for the courts in the beginning to upset awards simply for errors of law. See what Williams J. and Willes J. said in *Hodgkinson v. Fernie* (1857) 3 C.B.N.S. 189, 202, 205. That mistake can be avoided by such a clause as this: for, as Scrutton L.J. said in *Czarnikow v. Roth Schmidt & Co.* [1922] 2 K.B. 478, the parties can, by express provision, authorise arbitrators to depart from the strictnesses of the law. So I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation. I realise, of course, that this lessens the points on which one party or the other can ask for a case stated. But that is no bad thing. Cases stated have been carried too far. It would be to the advantage of the commercial community that they should be reduced: and a claim (sic. ?clause) of this kind would go far to ensure this.”

In my judgment there are three questions which the court has to ask itself when confronted with a clause which purports to provide that the rights of the parties shall be governed by some system of “law” which is not of England or any other state or is a serious modification of such a law.

1. *Did the parties intend to create legally enforceable rights and obligations?*

If they did not, there is no basis for the intervention of the coercive power of the state to give effect to those “rights and obligations.” An intention not to create legally enforceable rights and obligations may be expressed—“this agreement is binding in honour only”—or it may be implied from the relationship between the parties or from the fact that the agreed criteria for the determination of the parties’ rights and obligations are too vague or idiosyncratic to have been intended as a basis for the creation of such rights and obligations.

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- A 2. *Is the resulting agreement sufficiently certain to constitute a legally enforceable contract?*

This question assumes that the parties *intended* to create a legally enforceable relationship, but is addressed to the problem of whether the terms of their agreement are too uncertain to produce such a result. However, given that this was the intention of the parties, the courts will not be “too astute or too subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*: *per* Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 L.T. 503, 514. In this context another maxim is relevant—*id certum est quod certum reddi potest*—and there is a vital distinction between an agreement to agree in future and an agreement to accept terms to be determined by a third party. The former cannot and the latter can form the basis for a legally enforceable agreement.

- C 3. *Would it be contrary to public policy to enforce the award, using the coercive powers of the state?*

- D Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J. remarked in *Richardson v. Mellish* (1824) 2 Bing. 229, 252, “It is never argued at all, but when other points fail.” It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.

- E Asking myself these questions, I am left in no doubt that the parties intended to create legally enforceable rights and liabilities and that the enforcement of the award would not be contrary to public policy. That only leaves the question of whether the agreement has the requisite degree of certainty. By choosing to arbitrate under the rules of the I.C.C. and, in particular, article 13.3, the parties have left proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I can see no basis for concluding that the arbitrators’ choice of proper law—a common denominator of principles underlying the laws of the various nations governing contractual relations—is outwith the scope of the choice which the parties left to the arbitrators.

- G I have dealt with the matter in general terms, because Mr. Boyd told us that this was a matter of considerable importance to those engaged in international commerce. But it would appear that in the instant case the decision of the arbitrators rested primarily, if not exclusively, on findings of fact including a finding that there was no such mis-representation as was alleged by Rakoil as a ground for its contention that both the substantive agreement and the arbitration agreement were voidable.

Summary enforcement

Should the award be enforced summarily or should D.S.T. be left to sue on the award? The remedy under section 26 of the Arbitration Act 1950 is indeed a summary remedy and if there were matters which

required a further investigation which could only appropriately be undertaken by proceedings begun by writ, I would have been in favour of allowing the appeal, but I have been unable to detect any such matters.

For these reasons I would dismiss the appeal from the judgment of Leggatt J.

The injunction

On 22 May 1975 in *Nippon Yusen Kaisha v. Karageorgis* [1975] 1 W.L.R. 1093, a Court of Appeal consisting of Lord Denning M.R., Browne L.J. and Geoffrey Lane L.J. granted the first *Mareva* injunction, Lord Denning M.R. saying, at p. 1094:

"We are told that an injunction of this kind has never been granted before. It has never been the practice of the English courts to seize assets of a defendant *in advance of judgment* or to restrain the disposal of them . . . It seems to me that the time has come when we should revise our practice." (My emphasis)

On 23 June 1975 in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, a Court of Appeal consisting of Lord Denning M.R., Roskill L.J. and Ormrod L.J. had its attention drawn to *Lister & Co. v. Stubbs* (1890) 45 Ch.D. 1 in which Cotton L.J. had said, at p. 13:

"I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree."

Lord Denning M.R. adverted to his earlier decision, saying [1975] 2 Lloyd's Rep. 509, 510:

"If it *appears* that the debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it *before judgment*—the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets." (My emphasis again).

I mention this at the outset because, although it was convenient to refer to the order made by Bingham J. as a *Mareva* injunction, and it was so referred to throughout the argument, it is at least doubtful whether it falls into that category. The *Mareva* innovation, which time has shown to be one of the most imaginative, important and, on the whole, most beneficent of modern times, lay in giving a plaintiff some degree of protection *before* he became a judgment creditor and in anticipation that he would become one. Judgment creditors had little need of new protection since they were usually adequately protected by their right to levy execution by a writ of *fi fa*, attachment of debts or the appointment of a receiver. And where they were not, the court has intervened by injunction to prevent the payment to and receipt by the judgment debtor of an asset in circumstances in which it would not otherwise have been available to the judgment creditor in satisfaction of the judgment debt: *Bullus v. Bullus* (1910) 102 L.T. 399.

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A Once Bingham J. had given D.S.T. leave to enforce the award as a judgment, as he did in the same order as that granting the injunction, D.S.T. became judgment creditors of Rakoil, albeit subject to a suspension of their right to levy execution and subject to the possibility that the order giving them this status might be set aside on the application of Rakoil. It was not the case that D.S.T. would become judgment creditors if and when Rakoil failed to set the order aside.

B Once the order was made, D.S.T. were in precisely the same position as any plaintiff who has obtained judgment, subject to a stay pending an application to the Court of Appeal to set the judgment aside.

C Bingham J. did not rest his decision on this point, but it has been raised by the respondent's notice of D.S.T. and could be material to the exercise of discretion. On the approach adopted by the judge, namely that he was concerned with an application for a *Mareva* injunction and that the claim of D.S.T. was based upon an award which would not necessarily be enforceable as a judgment, the first question to be considered was whether Rakoil had any assets within the jurisdiction, either when the injunction was granted on 2 July, when it was varied on 25 July or when it was affirmed on 8 August 1986. The only asset which

D has ever been suggested was the trading debt owed by Shell to which I referred at the outset of this judgment. On 2 July the evidence about this was "somewhat vague," taking more definite shape by 25 July. However it was only on 8 August that the real point emerged. This was that, whilst the trading debt was very much an asset—it was worth U.S.\$4,843,051.10—it was not, according to Rakoil, an asset within the

E jurisdiction. There was also a subsidiary point, more fully deployed in this court, that only part of the debt, U.S.\$662,751.54, was an asset of Rakoil, the remainder being assets of the government of R'As al-Khaimah or of the R'As al-Khaimah Gas Commission.

F The advent of Shell as an intervener in the appeal has further clarified the facts and we now know that there were two shipments of oil at the Hulaylah Terminal, R'As al-Khaimah, one on board the *Euro Pride* covered by two bills of lading dated 16 June 1986 and the other on board the *Nichitima Maru* covered by two bills of lading dated 29 June 1986. The sales were f.o.b. under a contract governed by English law and the payment term was:

G "Due within 30 days of bill of lading date against receipt of telexed invoice, documents of title and other shipping documents as agreed or in the absence of these documents, buyer to accept seller's debt of indemnity in a form acceptable to buyer. Payment to be made by telegraphic transfer to seller's nominated account."

H We also now know, from an affidavit of Mr. D. S. S. Reid, Shell's Vice-President of Products Trading:

"[Shell] do not maintain bank accounts for oil trading within the jurisdiction. All of their trading is conducted in US dollars and the funds which they use for this purpose are located in bank accounts in New York. In the normal course of business [Shell] would have given instructions from their London office for [Rakoil's] invoices to be paid by telegraphic transfer from [Shell's] New York bank

accounts to the bank accounts in New York nominated by [Rakoil] in each invoice, as and when the date for payment fell due.”

There were four invoices addressed by Rakoil to Shell, the two which related to the *Euro Pride* shipments being dated 18 June 1986 and the two which related to the *Nichitima Maru* shipments being dated 29 June 1986. All four invoices called for payment

“30 days from bill of lading by telegraphic transfer to Account No. 6051395 with Brown Brothers Harriman & Co., 59 Wall Street, New York, account The National Bank of R’As al-Khaimah, favouring . . .”

the favoured one being named as Rakoil in the case of one invoice, the government of R’As al-Khaimah in the case of two other invoices and the R’As al-Khaimah Gas Commission in the case of the fourth invoice.

I can dispose at once of the submission that this was or may not have been an asset of Rakoil. Shell say that the supply agreement under which they took the oil was between them and Rakoil and the invoices were raised by Rakoil. There may indeed be contractual arrangements between Rakoil on the one hand and the government of R’As al-Khaimah and the R’As al-Khaimah Gas Commission on the other, whereby Rakoil is accountable to the government and to the commission for part of the receipts from Shell, but the evidence does not give rise to any doubt but that Shell’s indebtedness was to Rakoil as a principle.

The issue, however, remains of whether this indebtedness constituted an asset of Rakoil situated within the jurisdiction. This falls to be considered as a matter of the English law governing conflicts of law and is intimately bound up with the allied question of whether the debt could be taken in execution of an English judgment in favour of D.S.T. by garnishment or the appointment of a receiver, since it would not be right to maintain an injunction if the debt could not be so taken.

So far as the law of garnishment is concerned, Mr. Boyd submitted, and I would accept, that the only relevant jurisdictional requirements are that the garnishee shall be “within the jurisdiction” and that the subject matter should be a “debt due or accruing due to the judgment debtor from the garnishee”: see R.S.C., Ord. 49, r. 1(1). However, as a matter of discretion, a garnishee order will not be made against such a person if it would not operate to discharge the garnishee in whole or pro tanto from his liability in respect of the debt. Such a situation can arise where the garnishee, although himself within the jurisdiction, is not indebted within that jurisdiction: *S.C.F. Finance v. Masri (No. 3)* [1987] 2 W.L.R. 81, 95–96 and *Swiss Bank Corporation v. Boehmische Industrial Bank* [1923] 1 K.B. 637, 680–681.

This problem of double jeopardy is much less serious than it might otherwise be, because garnishment is a process which is recognised internationally and most nations will give effect to a rule similar to that of English law, namely, that “the validity and effect of an attachment or garnishment of a debt are governed by the *lex situs* of the debt” (*Dicey & Morris, The Conflict of Laws*, 10th ed., r. 84) and that debts “generally are situate in the country where, they are properly recoverable or can be enforced” (*Dicey & Morris*, r. 76(1)). A complication and exception arises where the debtor carries on business in more than one jurisdiction. In such a case, if the creditor has expressly or impliedly

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A stipulated for payment at one of those places, the debt will be held to be there situate. Happily that complication does not arise in the instant appeal, since Shell asserts, with all the emphasis born no doubt of a desire to avoid adverse consequences under United States fiscal and other laws, that it does not carry on business in New York. It is simply owed money by New York bankers.

B If, perish the thought, Shell were to default upon its obligation to pay Rakoil for the oil which it has bought and received, its liability could certainly be enforced in this country and possibly only in this country. Certainly there is no suggestion that it could be enforced in New York. It follows that, but for the stay of execution, the debt could have been the subject of a garnishee order in this country and that if the order were made absolute and payment was made to D.S.T. thereunder, the indebtedness of Shell would be discharged for all purposes.

C Mr. Johnson, appearing for Shell, reserves the right to challenge the correctness of this analysis which rests upon authority which is not binding upon the House of Lords. However, he also submits that even if this debt is technically an asset of Rakoil situated within the jurisdiction, this is too narrow and legalistic an approach to apply to a commercial transaction. Shell will not default and would indeed have paid in July 1986, but for the fact that it was prevented from doing so by the injunction. A chose in action or even a debt is only of commercial value to the extent that it produces money or a credit and this debt would never have produced either in England. Rakoil would have received this benefit in New York.

E He then referred us to the decisions of this court in *Z Ltd. v. A-Z and AA-LL* [1982] Q.B. 558 and *Intraco Ltd. v. Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256 as indicating that *Mareva* injunctions should be drawn in terms which leave banks free to honour their obligations under letters of credit and bank guarantees, whilst restricting the use which beneficiaries can make of payments received by them from the banks. By a parity of reasoning, the court should not interfere with the performance by Shell of its commercial obligations and should only concern itself with the payment for the oil when it had come into the hands of Rakoil—in New York.

The ratio of the decision in *Intraco Ltd.*'s case is set out at p. 257:

G "Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable letter of credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand."

H I could have added that it is not only the beneficiary of the credit who relies upon the bank's engagement not to revoke it. Third parties may, and often do, deal with the beneficiary on the faith of the fact that, come what may, he will be paid under the letter of credit. The decision in *Z Ltd. v. A-Z* adds nothing to this, save to extend the principle, obiter, to bank credit cards.

The obligation undertaken by Shell towards Rakoil was not of this character. Indeed Mr. Boyd illustrated this neatly by taking an imaginary scenario in which a *Mareva* injunction is granted restraining Mr. X,

resident in the United Arab Emirates, from removing his assets from the jurisdiction. He has given his London bank a standing order requiring the making of monthly payments in U.S. dollars to Mr. Z in New York. Such an order is revocable and the effect of the injunction is to revoke it: *Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj and the Bank for Russian Trade Ltd.* [1933] 1 K.B. 47. The fact that the bank would, in the ordinary course of events, have complied with the order by making payments out of an account with another bank which it maintained in New York for the purpose of making such payments, is irrelevant. Assuming in favour of Rakoil that others had an interest in the New York account to which payments were to be made, those others can be substituted for Mr. Z, Rakoil for Mr. X and Shell for the bank. There is nothing special about the relationship between Shell and Rakoil. Like that of the bank and Mr. X, it is simply one of debtor and creditor.

Some argument was addressed to us on the basis that on 2 July 1986, when the injunction was imposed, the debt had not yet arisen and so, it was said, there was no subject matter for the injunction which, accordingly, should not have been granted. It would also follow, although this was not stressed on behalf of Rakoil, that when the time for payment arrived and there was a debt, Shell would at once pay that debt and extinguish it. The interval of time between the debt arising and its extinction would be so short that no injunction could effectively be imposed.

The fallacy of this line of argument is that it confuses indebtedness with a right to payment and ignores the fact that a debt is a debt whether it is due or merely accruing due. If the customer of a bank is in credit, the bank is indebted to him even if there is no obligation to pay until the customer demands payment. Shell was indebted to Rakoil from the moment when, on or about 18 and 29 June 1986, it took delivery of the oil f.o.b.

There remains only the exercise of discretion. Shell did not seek to intervene in the court below and Bingham J. did not therefore have to consider their representations. For my part I accept that they are under commercial pressure to pay, but not that any court to whose jurisdiction they may be subject would fail to recognise the jurisdiction of the English courts to extinguish their indebtedness to Rakoil by a garnishee order and to restrain payment by Shell meanwhile. Commercial pressure is to be distinguished from double jeopardy by legal process and does not, in my judgment, provide any reason to refrain from upholding the injunction.

In administering the *Mareva* jurisdiction, the courts have rightly been mindful that the object of the exercise has been to prevent "cheating" by defendants—dissipating assets, causing them to "disappear" into the pockets of others, removing them from the jurisdiction and so on. It has not been to provide advance security for the satisfaction of a judgment debt which has not yet arisen. Accordingly, in appropriate cases injunctive orders have been drawn so as to permit ordinary trading debts to be incurred and discharged and the use of assets for living expenses. However it is for the defendant to apply for such exceptions to the generality of the injunctive order and Rakoil has made no such application.

The case for imposing an injunction was much stronger than Bingham J. thought that it was, because D.S.T. were actual and not

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A potential judgment creditors. The purpose of the injunction was thus to maintain the status quo during the period covered by the stay of execution and not to preserve assets against the probability that D.S.T. might at some later date be able to establish its claim—the ordinary *Mareva* situation.

Accordingly I would dismiss this further appeal.

B WOOLF L.J. I agree.

RUSSELL L.J. I also agree.

Appeal dismissed.
Leave to appeal refused.

C 6 May. Shell adduced further evidence showing that judgment had been obtained against them by the government of R'As al-Khaimah in that country's local courts in respect of the debt owed by them. The Court of Appeal granted Shell's application for leave to appeal to the House of Lords and lifted the stay of execution in respect of the injunction of 24 March 1987 to allow the commencement of garnishee proceedings. Such proceedings were to be commenced expeditiously before a single judge in the Commercial Court and any appeal therefrom was to be similarly expedited. The Court of Appeal would grant leave to appeal to the House of Lords thus enabling the garnishee proceedings to be determined by the House of Lords at the same time as the appeal on the injunction. Enforcement of any garnishee order absolute which might be granted would be stayed pending determination in the House of Lords of any appeal in respect thereof.

E *Solicitors: William A. Crump & Son; Middleton Potts & Co; Herbert Smith.*

P. M.

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[COURT OF APPEAL]

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INTERPOOL LTD. v. GALANI

1987 June 10; 23

Lloyd and Balcombe L.JJ.

Execution—Examination of judgment debtor—Jurisdiction—Registration of foreign judgment—Obligation on judgment debtor to answer questions relating to foreign assets—R.S.C., Ord. 48, r. 1(1)

B

In 1985, the plaintiff obtained judgment in the High Court of Paris in the sum of U.S. \$8,196,000 against the defendant, then living in France. In 1986, when the defendant was living in England, the judgment was registered in the Queen's Bench Division pursuant to section 2(1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933.¹ On a reference by the deputy master, the judge ruled that the defendant was obliged, during his oral examination under R.S.C., Ord. 48, r. 1(1),² to answer any questions, or to produce any books or other documents in his possession, relating to his property or other means outside the jurisdiction.

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On the defendant's appeal:—

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Held, dismissing the appeal, that the court's jurisdiction to enforce a judgment debt was not limited to debts incurred within the jurisdiction and the provisions of Order 48 were not limited to assets, and debts incurred, within the jurisdiction; and that, accordingly, the judgment debtor was obliged, on his examination under Order 48, to answer questions intended to discover his assets outside as well as within the jurisdiction (post, pp. 1044G, H, 1045H, H—1046A, F).

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Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation [1986] Ch. 482 considered.

Decision of Sir Neil Lawson, sitting as a judge of the Queen's Bench Division, affirmed.

The following cases are referred to in the judgment of the court:

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Ashtiani v. Kashi [1986] 3 W.L.R. 647; [1986] 2 All E.R. 970, C.A.

Deutsche Schachtbau-Und Tiefbohrgesellschaft m.b.H. v. R'As al-Khaimah National Oil Co. [1987] 3 W.L.R. 1023; [1987] 2 All E.R. 769, C.A.

Harman v. Glencross [1986] Fam. 81; [1986] 2 W.L.R. 637; [1986] 1 All E.R. 545, C.A.

Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation [1986] Ch. 482; [1986] 2 W.L.R. 453; [1986] 1 All E.R. 653

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Richardson v. Richardson [1927] P. 228

S.C.F. Finance Co. Ltd. v. Masri (No. 3) [1987] 2 W.L.R. 81; [1987] 1 All E.R. 194, C.A.

The following additional cases were cited in argument:

Hamlin v. Hamlin [1986] Fam. 11; [1985] 3 W.L.R. 629; [1985] 2 All E.R. 1037, C.A.

H

Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (No. 2), In re [1978] A.C. 547; [1978] 2 W.L.R. 81; [1978] 1 All E.R. 434, H.L.(E.)

¹ Foreign Judgments (Reciprocal Enforcement) Act 1933, s. 2: "(1) A person, being a judgment creditor under a judgment to which this Part of this Act applies, may apply to the High Court . . . to have the judgment registered in the High Court . . ."

² R.S.C., Ord. 48, r. 1(1): see post, p. 1044D-F.

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Interpool Ltd. v. Galani (C.A.)

A INTERLOCUTORY APPEAL from Sir Neil Lawson sitting as a judge of the Queen's Bench Division.

B By an order dated 24 April 1986, a judgment obtained by the plaintiff, Interpool Ltd., in the High Court of Paris against the defendant, Anthony John Galani, was registered in the Queen's Bench Division pursuant to the Foreign Judgments (Reciprocal Enforcement) Act 1933. On a reference by the deputy master, the judge ruled that the judgment debtor was obliged to answer any questions concerning any assets of the judgment debtor which were not within the jurisdiction.

C The defendant appealed on the ground that the judge erred in law in holding that R.S.C., Ord. 48 on its true construction obliged the judgment debtor to answer questions as to whether and if so what debts were owing to him and whether the judgment debtor has any and if so what other property and means of satisfying the judgment within the jurisdiction of the court and was required to produce books and documents in his possession relevant to such questions.

The facts are stated in the judgment of the court.

Michael E. Jones for the defendant.

Jeffrey Gruder for the plaintiff.

Cur. adv. vult.

23 June. The following judgment of the court was handed down.

E BALCOMBE L.J. On 11 August 1978 Mr. Galani, who is a Greek citizen and was then living in France, entered into written personal guarantees for all moneys due to Interpool Ltd. by three shipping and transportation companies in which he had interests: they were Liberian, Greek and French companies. Interpool Ltd. is a company incorporated in one of the states of the United States of America. On 21 October 1985 Interpool Ltd. obtained judgment on the guarantees against Mr. Galani in the High Court of Paris in the sum of U.S. \$8,196,000 with interest at 9 per cent. from 9 March 1979. The basis of the jurisdiction of the Paris court was that that was the court of Mr. Galani's domicile. However, in 1985 Mr. Galani came to live in north London and he still lives there with his wife and children.

G On 9 May 1986 the judgment of the High Court of Paris was registered as a judgment in the Queen's Bench Division of the High Court of Justice pursuant to section 2(1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933. The total amount for which the judgment was entered was U.S. \$13,742,909.64, including interest up to 24 April 1986; the sterling equivalent is £9,161,939.30. Mr. Galani did not contest the registration or validity of the judgment. In the remainder of this judgment we refer to Interpool Ltd. as the judgment creditor and to Mr. Galani as the judgment debtor.

H On 30 July 1986 Master Grant made an order for the oral examination of the judgment debtor under R.S.C., Ord. 48, and that order was served on the judgment debtor on 25 September 1986. A charging order nisi was made in respect of the property in north London where the judgment debtor lives.

The examination of the judgment debtor began on 16 October 1986 before Deputy Master Rose, and in the course of his examination the judgment debtor objected to answering questions save such as related to

any assets he might have within the jurisdiction of this court. In the result the deputy master directed an issue to be referred to the judge in chambers pursuant to R.S.C., Ord. 32, r. 12 in the following terms:

"Is the judgment debtor obliged to answer any questions as to whether any and if so what debts are owing to the judgment debtor and whether the judgment debtor has any and if so what other property or means of satisfying the judgment which are not within the jurisdiction of this honourable court or to produce any books or documents in his possession relevant to such questions?"

The examination was to continue as to debts and other property or means of the judgment debtor within the jurisdiction, but otherwise was adjourned generally.

The issue came before Sir Neil Lawson, sitting as a judge of the Queen's Bench Division in chambers, on 22 January 1987 and he answered the questions raised by the issue in the affirmative, i.e. in favour of the judgment creditor. From that decision the judgment debtor has, with the leave of the judge, appealed to this court.

Order 48 is part of a group of Orders, comprising Orders 45 to 52 inclusive, prefaced by the general words "Enforcement of Judgments and Orders." Ord. 48, r. 1(1) is, so far as material, in the following terms:

"Where a person has obtained a judgment or order for the payment by some other person (hereinafter referred to as 'the judgment debtor') of money, the court may, on an application made ex parte by the person entitled to enforce the judgment or order, order the judgment debtor . . . to attend before such master, registrar or nominated officer as the court may appoint and be orally examined on the questions—(a) whether any and, if so, what debts are owing to the judgment debtor, and (b) whether the judgment debtor has any and, if so, what other property or means of satisfying the judgment or order; and the court may also order the judgment debtor . . . to produce any books or documents in the possession of the judgment debtor relevant to the questions aforesaid at the time and place appointed for the examination."

It is to be noted that Order 48 contains no express reference to the locality of the debts, property and other means. In contradistinction Order 49, which deals with attachment of debts due to the judgment debtor, expressly provides by rule 1(1) that the person whose debt is to be attached ("the garnishee") must be within the jurisdiction.

The argument for the judgment debtor, ably put by Mr. Jones, has the merit of simplicity. It proceeds: (1) the court does not exercise extra-territorial jurisdiction; (2) the court will not enforce its judgments by the process of execution save as to assets which are within the jurisdiction; (3) Order 48 is merely part of the machinery for the enforcement of judgments. Accordingly any examination under Order 48 is limited to assets within the jurisdiction. Although the argument has the attraction of simplicity, in our view it is wrong. While the first proposition is true as a general proposition, the second requires careful examination, especially in so far as it relates to garnishee proceedings and charging orders.

Garnishee proceedings are governed by Order 49, and we have already referred to the provisions of Ord. 49, r. 1(1) that the garnishee

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- A must be within the jurisdiction. There ~~is~~ no similar limitation that the garnished debt must be properly recoverable within the jurisdiction. The decision at first instance of *Richardson v. Richardson* [1927] P. 228, that there is no *jurisdiction* to garnish a debt which is not recoverable within the jurisdiction is no longer good law: see the decisions of this court in *S.C.F. Finance Co. Ltd. v. Masri (No. 3)* [1987] 2 W.L.R. 81, 95–96 and *Deutsche Shachtbau-Und Tiefbohrgesellschaft m.b.H. v. R'As al-Khaimah National Oil Co.* [1987] 3 W.L.R. 1023, 1038D–G. It is true that, as a matter of discretion, the court will not garnish a debt where the garnishee, although within the jurisdiction, is not indebted within the jurisdiction, if to do so might expose the garnishee to the risk of having to pay the debt or part of it twice over. It may also be true, as Mr. Jones submitted, that there is no reported case where this discretion has been exercised so as to garnish a debt which is only recoverable outside the jurisdiction. Nevertheless, if the court has jurisdiction to garnish a debt recoverable outside the jurisdiction, even though as a matter of discretion it is unlikely to exercise that jurisdiction, it seems to us that there must be power under Order 48 to discover the existence of such debts.

- D The jurisdiction to make a charging order is conferred by the Charging Orders Act 1979, and section 2(1)(a)(ii) of that Act provides that a charge may be imposed by a charging order on any interest held by the debtor beneficially under any trust. In any particular case it may not be easy to state whether an interest under a trust is enforceable under English law (see generally *Dicey and Morris, The Conflict of Laws*, 11th ed. (1987), pp. 1078–1079) and no authority relevant to this question was cited to us, but it is difficult to see why a more restrictive limitation should apply to this type of asset than applies to a debt liable to execution under Order 49, so that there should be jurisdiction to charge an interest under a “foreign” trust, although as a matter of discretion the court will not exercise the jurisdiction where it could expose the trustees to a risk of double jeopardy. In any event it may well be necessary to have an examination of the judgment debtor to find out the nature and extent of his interest under a trust, both to see whether it is a “foreign” trust and, if so, whether nonetheless it is a case where the court should in its discretion make a charging order.

- G One further provision of the Charging Orders Act 1979 is relevant in this connection. Section 1(5) provides that in deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to the personal circumstances of the debtor. It is difficult to see how the court could properly discharge its duties under this provision without having proper knowledge of all relevant facts. Thus while the court might be hesitant to make a charging order relating to the judgment debtor's interest in his matrimonial home in England (cf. *Harman v. Glencross* [1986] Fam. 81, 92–94) it might have much less hesitation if it knew that the judgment debtor had one or more homes available in other countries.

H Thus far we have been considering whether there is any justification for limiting the operation of Order 48 as the judgment debtor submitted. Far from there being any such justification, in our judgment there is every reason for giving it the wider meaning for which the judgment creditor contended. The provisions for the reciprocal enforcement of judgments between states are continuously expanding—see, for example, the Civil Jurisdiction and Judgments Act 1982, much of which was

brought into force on 1 January 1987—and we accept Mr. Gruder's submission that it is entirely consistent with this pattern of legislation that the judgment creditor should have available to him a procedure, under Order 48, which he can utilise to find out whether, in default of any English assets, there are foreign assets available to satisfy his judgment. The use of Order 48 for this purpose is not regulating the conduct of the judgment debtor abroad so as to be contrary to the principle considered by Hoffmann J. in *Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch. 482.

Both sides attempted to bolster their arguments by drawing analogies with other procedures. The judgment debtor drew an analogy with *Mareva* injunctions and referred us to the decision of this court in *Ashtiani v. Kashi* [1986] 3 W.L.R. 647, which is undoubtedly authority for the proposition that a *Mareva* injunction should be limited to assets within the jurisdiction and that any ancillary order for discovery should be similarly restricted. The judgment creditor drew his analogy with the power of the court to order a party to an English action to give discovery of documents abroad. We do not derive any real assistance from consideration of these analogies.

Finally, Mr. Jones referred us to article 16(5) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, set out in Schedule 1 to the Civil Jurisdiction and Judgments Act 1982, and having the force of law in this country by virtue of section 2(1) of that Act. Article 16(5) provides that, in proceedings concerned with the enforcement of judgments, the courts of the contracting state in which the judgment has been or is to be enforced shall have exclusive jurisdiction, regardless of domicile. But this provision must be read in the light of the fact that it is possible, as Mr. Jones conceded, for the same debt to be simultaneously enforced by judgments obtained, or registered, in more than one country. So this provision can only relate to the enforcement proceedings in a particular state. The use of Order 48, in English enforcement proceedings, in order to discover the *existence* of foreign assets, does not confer, or purport to confer, jurisdiction on the English court in relation to enforcement proceedings in any other country in which those assets may be situate.

In our judgment the judge came to the correct decision and this appeal must be dismissed.

*Appeal dismissed with costs.
Leave to appeal refused.*

Solicitors: Clifford Chance; Birkbeck Montagu's.

B. O. A.

3 W.L.R.

A

[COURT OF APPEAL]

REGINA v. SECRETARY OF STATE FOR THE
HOME DEPARTMENT, *Ex parte* SIVAKUMARAN

B

REGINA v. SECRETARY OF STATE FOR THE
HOME DEPARTMENT, *Ex parte* VAITHIALINGAM

REGINA v. SECRETARY OF STATE FOR THE
HOME DEPARTMENT, *Ex parte* VILVARAJAH

REGINA v. SECRETARY OF STATE FOR THE
HOME DEPARTMENT, *Ex parte* VATHANAN

C

REGINA v. SECRETARY OF STATE FOR THE
HOME DEPARTMENT, *Ex parte* RASALINGAM

REGINA v. SECRETARY OF STATE FOR THE
HOME DEPARTMENT, *Ex parte* NAVARATNAM

1987 Oct. 5, 6; 12

Sir John Donaldson M.R., Neill L.J. and
Sir Roualeyn Cumming-Bruce

D

*Immigration—Refusal of entry—Refugee, intention to stay as—
Application for asylum—Applicant claiming fear of persecution
on ground of race—Whether “well-founded fear of being
persecuted”—Whether subjective test—Statement of Changes in
Immigration Rules (1983) (H.C. 169), paras. 16, 73*

E

The applicants, six Sri Lankan Tamils, all sought political asylum in the United Kingdom under the provisions of paragraph 73 of the Statement of Changes in Immigration Rules (1983) (H.C. 169) on the ground that they had a well-founded fear of being persecuted for reasons of race if they were returned to Sri Lanka. The Secretary of State interpreted the provisions of paragraphs 16 and 73 of the Immigration Rules (which required full account to be taken of the Convention and Protocol Relating to the Status of Refugees (Cmd. 9171 and Cmd. 3096) as meaning that an applicant for refugee status had to establish not only fear of persecution but also that such fear was objectively justified, and he refused to grant the applicants refugee status on the ground that their fears were not well-founded within the terms of the convention. The applicants sought judicial review of the Secretary of State's decision. On 25 September McCowan J. refused the applications.

F

G

On appeal by the applicants:—

Held, allowing the appeals, that in order to demonstrate a well-founded fear of persecution an applicant for refugee status had to show actual fear and good reason for it, viewing the applicant's situation from the point of view of one of reasonable courage; that “well-founded” qualified the subjective nature of the fear to be demonstrated so as to exclude paranoid fears, but it did not transform it so as to exclude fears which could be shown objectively to have been misconceived; and that, accordingly the Secretary of State had erred in law and the decisions would be quashed (post, p. 1052G–H).

H

Decisions of McCowan J. reversed.

The following case is referred to in the judgment of the court:

Immigration and Naturalization Service v. Cardoza-Fonseca (1987) 107 S. Ct. 1207

Reg. v. Home Secretary, Ex p. Sivakumaran (C.A.)**[1987]**

The following additional cases were cited in argument:

Musisi, In re [1987] A.C. 514; [1987] 2 W.L.R. 606; [1987] 1 All E.R. 940, H.L.(E.)

Reg. v. Governor of Ashford Remand Centre, Ex parte Postlethwaite [1987] 3 W.L.R. 365; [1987] 2 All E.R. 985, H.L.(E.)

Reg. v. Lancashire County Council, Ex parte Huddleston [1986] 2 All E.R. 941, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Coomaraswamy (unreported), 28 June 1985, Taylor J.

Reg. v. Secretary of State for the Home Department, Ex parte Gurmeet Singh (unreported), 22 May 1987, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Jeyakumaran (unreported), 28 June 1985, Taylor J.

Reg. v. Secretary of State for the Home Department, Ex parte R., The Times, 8 June 1987, C.A.

REGINA V. SECRETARY OF STATE FOR THE HOME DEPARTMENT,
Ex parte SIVAKUMARAN

REGINA V. SECRETARY OF STATE FOR THE HOME DEPARTMENT,
Ex parte VAITHIALINGAM

REGINA V. SECRETARY OF STATE FOR THE HOME DEPARTMENT,
Ex parte VILVARAJAH

APPEALS from McCowan J.

By applications dated 21 April 1987 the applicants, Saravamuthu Sivakumaran, Skandarajah Vaithialingam and Nadarajah Vilvarajah, sought judicial review by way of orders of certiorari to quash decisions of the Secretary of State for the Home Department made on 20 April whereby the Secretary of State had refused to grant the applicants political asylum and had made directions for their removal from the United Kingdom. On 25 September 1987 McCowan J. refused the applications. The applicants appealed on the grounds, inter alia, that the judge erred in law (1) in the construction he placed on the words "well-founded fear of being persecuted for reasons of race, religion, nationality . . ." in article 1(A)(2) of the Convention Relating to the Status of Refugees 1951 (Cmd. 9171) and paragraph 73 of the Statement of Changes in Immigration Rules (1983) (H.C. 169) and in rejecting the submission that the proper test to be applied in determining whether the persecution feared was for a Convention reason was that of the perception of the victim judged from an objective standpoint; (2) in holding that the approach of the Secretary of State was in substance different from that deprecated in *Reg. v. Secretary of State for the Home Department, Ex parte Jeyakumaran* (unreported), 28 June 1987, Taylor J. and by the Court of Appeal in *Reg. v. Secretary of State for the Home Department, Ex parte R.* (unreported), 3 June 1987; Court of Appeal (Civil Division) Transcript No. 695 of 1987, C.A.

REGINA V. SECRETARY OF STATE FOR THE HOME DEPARTMENT,
Ex parte VATHANAN

REGINA V. SECRETARY OF STATE FOR THE HOME DEPARTMENT,
Ex parte RASALINGAN

APPEALS from McCowan J.

By applications dated 3 September 1987 the applicants, Navaratnasingham Vathanan (by his next friend Jeganathan Asokan) and

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- A Vinasithamby Rasalingan, sought judicial review by way of orders of certiorari to quash decisions of the Secretary of State for the Home Department made on 1 September whereby the Secretary of State had refused to grant the applicants political asylum and had made directions for their removal from the United Kingdom. On 25 September 1987 McCowan J. refused the applications. The applicants appealed on the grounds, inter alia, that the judge erred (1) in rejecting the submission that the requirements of paragraph 73 of the Statement of Changes in Immigration Rules (1983) were satisfied where the applicants could show (a) a well-founded fear of injurious action at the hands of the Sri Lankan army, (b) a fear that the actions of the army were directed against Tamil civilians in general and against young males of the region in particular, rather than against particular persons suspected of terrorist activities, and (c) that the fear set out in (b) was a reasonable one; (2) in determining that it was incumbent on the applicants to prove what the intentions of the Sri Lankan army were in acting against Tamil civilians it was sufficient if the applicants' fear of persecution might be true; (3) in deciding that the Secretary of State was entitled to take the view that the applicants' fears were not of persecution but of force inflicted in the course of measures taken against civil disorder.
- B
- C
- D

REGINA V. SECRETARY OF STATE FOR THE HOME DEPARTMENT,
Ex parte NAVARATNAM

APPEAL from McCowan J.

- E By an application dated 3 September 1987 the applicant, Kandiah Navaratnam, sought judicial review by way of, inter alia, an order of certiorari to quash a decision of the Secretary of State for the Home Department made on 1 September whereby the Secretary of State had refused to grant the applicant political asylum and had made directions for his removal from the United Kingdom. On 25 September 1987 McCowan J. refused the application. The applicant appealed on the grounds, inter alia, that (1) the judge erred in law in holding that the Secretary of State had not applied the test criticised by Taylor J. in *Reg. v. Secretary of State for the Home Department, Ex parte Jeyakumaran* (unreported), 28 June 1985; and (2) it being accepted expressly or by implication that the applicant had a genuine fear of returning to Sri Lanka, on the facts that was a well-founded fear of persecution within the meaning of the Convention Relating to the Status of Refugees 1951 and the Protocol of 1967, and no reasonable Secretary of State could have decided otherwise.
- F
- G

K. S. Nathan Q.C. and George Warr for Navaratnam.

Andrew Collins Q.C. and Nicholas Blake for Vathanan and Rasalingan.

Alper Riza for Sivakumaran, Vilvarajah and Vaithialingam.

Roger Ter Haar for the Secretary of State.

Cur. adv. vult.

12 October. The following judgment of the court was handed down.

SIR JOHN DONALDSON M.R. On 25 September 1987 McCowan J. dismissed applications for judicial review by six Tamils who are nationals of Sri Lanka. The decisions sought to be reviewed were that their applications for asylum in the United Kingdom be dismissed and that arrangements be made for their removal to Sri Lanka.

Every such application is entitled to individual consideration and the circumstances affecting each were not identical. However, the immigration policy framework is the same in each case and it is conceded that if the Secretary of State has misdirected himself in his application of that policy, the orders should be set aside in order to give him an opportunity to re-examine each case afresh in the light of our judgment. We therefore turn at once to that issue.

The relevant policy is set out in the Statement of Changes in Immigration Rules (1983) (H.C. 169). There are parallel rules applying to "Control on Entry" and "Control after Entry" contained respectively in section 1 and section 2. Since all the applicants sought asylum upon entry, we are concerned only with section 1, the relevant rules being contained in paragraphs 16 and 73:

"Refugees"

"16. Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmd. 9171 and Cmnd. 3096). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments.

"Part VII: Asylum"

"73. Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal of leave to enter. Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol relating to the Status of Refugees."

The United Kingdom is a signatory to the Convention and Protocol ("The Convention"), but it forms no part of the domestic law of this country. Nevertheless, as one would expect, the immigration rules are framed on the basis that the Secretary of State will give effect to its provisions.

Subject to certain exceptions which are immaterial for present purposes, article 1 defines a "refugee" as being one who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

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Reg. v. Home Secretary, Ex p. Sivakumaran (C.A.)

A In succeeding articles the Convention provides something in the nature of a "Bill of Rights" for those who have refugee status, but nowhere does it in terms grant them a right of asylum. What it does do is to limit the freedom of a contracting state to expel a refugee lawfully in its territory (article 32) and to prohibit his expulsion to return

B "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion": article 33.

C There is a clear contrast between the pre-conditions for acquiring the status of refugee, which require a well-founded fear of *persecution* and for the application of article 33 which requires a *threat to the life or freedom* of the person concerned. "Persecution" is not defined in the Convention. It clearly includes a threat to life or freedom, but is much wider and, depending upon its nature and degree, could perhaps be defined as "serious harassment." However, there may be another distinction, which turns upon the true meaning of "well-founded fear" in the definition of refugee. The Secretary of State interprets this expression as meaning that the applicant for refugee status must establish not only that he in fact fears persecution

D upon one or more of the specified grounds, but also that these fears are objectively justified. The applicants contend that they need only establish the genuineness of their expressed fears on one or more of the specified grounds and that, in their particular circumstances, such fears are not unreasonable.

E This conflict of interpretation lies at the heart of these appeals, since the Secretary of State, applying his interpretation, has said that in none of these cases is he satisfied that the applicant has a well-founded fear of persecution in Sri Lanka within the terms of the Convention. This involves a refusal to grant the applicants refugee status, thus requiring them to justify their claims to be allowed to enter the country under other specific immigration rules, e.g. as a visitor or a student, which they cannot do. If he had applied the interpretation contended for by the applicants, he *might* have accorded them refugee status. If he had done so, the Secretary of State would have had a general discretion whether to permit them to enter which might or might not have been fettered by article 33, according to how he found the facts in each individual case. But there is a real distinction between denying entry to one who is not a refugee within the meaning of the Convention and taking the same course in relation to one who is. Even if article 33 did not apply, the policy considerations applicable in the case of a bona fide refugee, which would of course be matters for the Secretary of State and not for the court, might well be quite different.

G

H This is not a matter which has ever before been considered by the courts of this country, at least in this acute form, and we doubt whether it was fully developed before McCowan J. due, perhaps, to the speed with which some of these applications were brought before the court. At all events McCowan J. simply said:

"Whereas the question of whether an applicant has a fear of being persecuted on the ground of race is a subjective matter, the question of whether that fear is well-founded has to be tested objectively. Mr Riza, who has appeared for three of the applicants, says that it

has to be the objective perception of the victim. I see no reason to add that gloss, for which I find no justification in the authorities, and I do not do so.”

The same point was, however, considered by the Supreme Court of the United States in *Immigration and Naturalization Service v. Cardoza-Fonseca* (1987) 107 S.Ct. 1207. The majority decision of the court, delivered by Stevens J. (Rehnquist C.J., Powell and White JJ. dissenting) is of high persuasive authority, not only because of its status as a supreme common law court, but also because the Convention should, if possible, be applied consistently in all jurisdictions.

Under United States law a finding that an alien is a refugee, as defined in the Convention, creates eligibility for asylum at the discretion of the Attorney-General of the United States: section 208(a) of the Immigration and Nationality Act 1952 as amended. By section 243(h) of the Act, an alien has a right to resist deportation where he is threatened with persecution in the country to which he would be deported. Whilst the right is not apparently absolute in terms, the court assumed that the Attorney-General would apply article 33 of the Convention where the alien could bring himself within the terms of the section. The authorities established that in the context of section 343(h) the test of whether there was a threat of persecution was objective—the applicant had to show on a balance of probabilities that he would be subject to such a threat. The issue facing the Supreme Court was whether the same approach was to be adopted in deciding refugee status and consequential discretionary eligibility for asylum under section 208(a).

Whilst it will be seen that the legislative context is different in detail, the fundamental issue was the same as that which faces this court in these appeals.

The court quite clearly rejected the argument that “a well-founded fear” needed to be established on the balance of probabilities, view objectively, and would, accordingly, have rejected the interpretation put forward by the Secretary of State in these appeals. Where we have greater difficulty, bred no doubt of our lack of familiarity with United States jurisprudence, is in divining precisely what interpretation the court was putting on this phrase. Clearly it was importing a subjective element into the equation, but beyond that we are left in some doubt. However we note that the court referred, with apparent approval, to the explanation of the international drafting committee that the phrase “well-founded fear of being the victim of persecution” meant “that a person has either been actually a victim of persecution or can show good reason why he fears persecution.”

Authority apart, we would accept that “well-founded fear” is demonstrated by proving (a) actual fear and (b) good reason for this fear, looking at the situation from the point of view of one of reasonable courage circumstanced as was the applicant for refugee status. Fear is clearly an entirely subjective state experienced by the person who is afraid. The adjectival phrase “well-founded” qualifies, but cannot transform, the subjective nature of the emotion. The qualification will exclude fears which can be dismissed as paranoid, but we do not understand why it should exclude those which, although fully justified on the face of the situation as it presented itself to the person who was afraid, can be shown objectively to have been misconceived. A simple, but graphic, example will illustrate our point. A bank cashier confronted

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Reg. v. Home Secretary, Ex p. Sivakumaran (C.A.)

A with a masked man who points a revolver at him and demands the contents of the till could without doubt claim to have experienced "a well-founded fear." His fears would have been no less well-founded if, one minute later, it emerged that the revolver was a plastic replica or a water pistol.

B In our judgment the Secretary of State applied the wrong test and therefore erred in law. It follows that all six decisions should be quashed, thus leaving it open to him to reconsider each on the correct basis. It therefore becomes unnecessary to deal with the further submissions that on the facts the decisions were untenable. Nevertheless the Secretary of State may wish to take note of some of the criticisms. For example, some of the applicants have expressed fears for their lives as a result of the indiscriminate shelling by the forces of law and order of villages believed to contain insurgents. Under the terms of the Convention this would not form a basis for claiming refugee status. But it might well be different if it appeared that these forces would not have resorted to indiscriminate shelling, but for the fact that all the villagers, whether insurgents or not, were of a particular race.

D For the avoidance of doubt, we should make it clear that the reconsideration should be in two stages. First the Secretary of State should consider whether the applicants are refugees within the meaning of that word in the Immigration Rules and the Convention. This involves, inter alia, subjective considerations such as the age and personal experiences of the applicant and of those known to him. If he decides that they are not refugees, that is the end of the matter, unless he is prepared to admit them in the exercise of his overriding residual discretion to depart from the Immigration Rules. If, however, he decides that any applicant is a refugee as so defined, he has then to decide whether article 33, which involves an objective test, prohibits a return of that applicant to Sri Lanka. If article 33 applies, the applicant has to be allowed to enter or be sent to some other country which will accept him and to which the same considerations do not apply. If article 33 does not apply, the Secretary of State has a complete discretion whether or not to permit the applicant to enter.

F The appeals will be allowed accordingly.

*Appeals allowed.
Leave to appeal.*

G *Solicitors: Chatwani & Co., Southall, Winstanley-Burgess; Winstanley-Burgess; Treasury Solicitor.*

R. C. W.

H

[QUEEN'S BENCH DIVISION]

REGINA v. SNARES BROOK CROWN COURT, *Ex parte*
DIRECTOR OF PUBLIC PROSECUTIONS

1987 July 3; 10

Glidewell L.J. and McNeill J.

Police—Powers—Special procedure material—Access to legal aid application form—Police investigating criminal offence—Police suspecting that application form to bring civil proceedings contained false statements—Whether application form item subject to legal privilege—Whether application form held with intention of furthering criminal purpose—Police and Criminal Evidence Act 1984 (c. 60), s. 10¹

On 8 November 1984 A. was arrested and charged with, inter alia, assault. He subsequently pleaded guilty to that charge at Stratford Magistrates' Court and was fined. On 14 June 1985 A. complained through his solicitors that at the time of his arrest he had been assaulted by a named police officer. When the complaint was investigated A. alleged that his nose had been broken during the assault. A. made an application for legal aid in order to bring an action for assault against the police. Subsequent police inquiries revealed that his nose had been broken two days before the incident of 8 November. A. was charged with attempting to pervert the course of justice, and the prosecution requested production by the area office of The Law Society of A.'s legal aid application form. The office declined to produce the form, and the Director of Public Prosecutions sought an order under section 9 of, and Schedule 1 to, the Police and Criminal Evidence Act 1984 on the ground that the form was special procedure material. The circuit judge at the Crown Court held that the form was privileged within the meaning of section 10(1) of the Act,¹ and that it was not held by The Law Society with the intention of furthering a criminal purpose within the meaning of section 10(2), and he declined to order production.

On an application by the Director of Public Prosecutions for judicial review:—

Held, dismissing the application, that since A. was the client of a professional legal adviser and the legal aid application form was a communication between him and the area office of The Law Society made in contemplation of and for the purpose of legal proceedings, it was within the definition of items subject to legal privilege in section 10(1) of the Act of 1984; that The Law Society held the form for the purpose of deciding whether to grant legal aid to pursue a civil claim, and not with the intention of furthering a criminal purpose and that the legal privilege was not, therefore, removed by section 10(2) of the Act; and that, accordingly, the form was not "special procedure material" within the meaning of the Act (post, pp. 1058E–G, 1059D–F, 1060B, E–G).

Reg. v. Cox and Railton (1884) 14 Q.B.D. 153, C.C.R. and *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1986] 1 Lloyd's Rep. 336, C.A. distinguished.

¹ Police and Criminal Evidence Act 1984, s. 10: see post, p. 1056D–E.

3 W.L.R. Reg. v. Snaresbrook Crown Court, Ex p. D.P.P. (D.C.)

A The following cases are referred to in the judgment of Glidewell L.J.:
Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd. [1986] 1
 Lloyd's Rep. 336, C.A.
Reg. v. Cox and Railton (1884) 14 Q.B.D. 153, C.C.R.

The following additional case was cited in argument:

B *Reg. v. Peterborough Justice, Ex parte Hicks* [1977] 1 W.L.R. 1371; [1978] 1
 All E.R. 225, D.C.

APPLICATION for judicial review.

By an application dated 25 May 1987 the applicant, the Director of
 Public Prosecutions, sought judicial review of a decision of Judge Halnan
 at Snaresbrook Crown Court on 15 May 1987 whereby he had refused
 C an application by P.C. Stratton under section 9 of and Schedule 1 to the
 Police and Criminal Evidence Act 1984 for access to special procedure
 material, namely, a legal aid application form completed by Mushtaq
 Mohammed Akhoonjee in connection with an application for legal aid
 to bring an action against the Commissioner of Police of the Metropolis.
 Judge Halnan held that the form was not special procedure material
 D because it was subject to legal privilege within section 10(1)(b) of the
 Act of 1984, and was not held "with the intention of furthering a
 criminal purpose" within section 10(2). The applicant sought a declaration
 that the form was special procedure material as defined by sections 10
 and 14 of the Act and mandamus directing the judge to reconsider the
 decision.

E The grounds on which relief was sought were, inter alia, (1) that the
 judge erred in holding that the legal aid application form was subject to
 legal privilege; (2) that the judge was wrong in holding that the form
 was not held "with the intention of furthering a criminal purpose" within
 section 10(2); and (3) that the judge erred in holding that the intention
 of The Law Society was material to the question whether the form was
 held with the intention of furthering a criminal purpose.

F The facts are stated in the judgment of Glidewell L.J.

Clive Nicholls Q.C. and *John Nutting* for the Director of Public
 Prosecutions.

Duncan Matheson for The Law Society.

Anthony Shaw for Mushtaq Mohammed Akhoonjee.

G *Cur. adv. vult.*

10 July. GLIDEWELL L.J. read the following judgment. This is an
 application for judicial review: that is to say, an order of certiorari to
 quash a decision of Judge Halnan sitting in the Crown Court at
 Snaresbrook on 15 May 1987 to the effect that the material the subject
 H matter of an application by the Director of Public Prosecutions is not
 "special procedure material" as defined in the Police and Criminal
 Evidence Act 1984; or, alternatively, for a declaration that it is such
 material and an order of mandamus to require the judge to reconsider
 his decision on the ground that it is in the public interest for the
 material to be produced.

The Police and Criminal Evidence Act 1984 introduced a new
 procedure by which a prosecuting authority may gain access to

documentary and other material for the purposes of investigation well before any question of trial. By section 9(1) of the Act it is provided that a constable may gain access to special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 to that Act and in accordance with that Schedule.

Special procedure material is defined in section 14. The part of the section which here applies is subsection (2), which defines it as follows:

“material, other than items subject to legal privilege . . . in the possession of a person who (a) acquired or created it in the course of any trade, business, profession or other occupation . . . and (b) holds it subject (i) to an express or implied undertaking to hold it in confidence; or (ii) to a restriction or obligation such as is mentioned in section 11(2)(b) above.”

One then goes back to section 11(2)(b) and one finds a reference to holding material subject “to a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment contained in an Act passed after this Act.”

Finally, by section 10 it is provided:

“(1) Subject to subsection (2) below, in this Act ‘items subject to legal privilege’ means— . . . (b) communications between a professional legal adviser . . . or his client . . . and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; . . . (2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.”

Before I come to deal with the matters which are in issue in this application there is one matter which was not raised but which, in my view, ought to be mentioned at least briefly. That is the question of jurisdiction. Does this court have jurisdiction to hear an application for judicial review in these circumstances? Mr. Matheson for The Law Society certainly does not say that we do not and we have heard no argument about it. I would only say this. There have now been a number of applications to this court to quash decisions made by circuit judges relating to applications for material of this kind under this Act. Nobody to my knowledge has so far raised any question of lack of jurisdiction, and in at least two of those cases, again to my knowledge, the application has been granted in whole or in part. If the point is to be raised the time must soon be coming when it will be said that it is really too late, after the decisions have already been made. We are dealing with this matter on the basis that it is accepted on all sides that we have the jurisdiction to do so.

The facts disclosed can be summarised as follows. On 8 November 1984 a Mr. Akhoonjee was charged with offences which included assaults occasioning actual bodily harm, an offence against section 47 of the Offences against the Person Act 1861. On 15 March 1985 at Stratford Magistrates’ Court Mr. Akhoonjee pleaded guilty to that charge and was fined. On 14 June 1985 solicitors acting on his behalf complained in a letter that on 8 November 1984, at the time of his arrest, he was assaulted by a named police officer and suffered a severe injury to his nose. The police investigated the complaint.

3 W.L.R. Reg. v. Snaresbrook Crown Court, Ex p. D.P.P. (D.C.) Glidewell L.J.

A On 12 December 1985 Mr. Akhoonjee made a statement to the investigating officers. In it he said that his nose had been broken during the course of the incident of 8 November 1984. He, or his solicitors on his behalf, then applied for legal aid to assist him to sue the Commissioner of Metropolitan Police for damages for the alleged assault. Police inquiries showed that although his nose was broken it was broken
B two days before the incident of 8 November 1984 during a totally separate matter, in a fight between a number of Sikhs and a group of people which included Mr. Akhoonjee, following the death of Mrs. Gandhi.

C On 8 September 1986 Mr. Akhoonjee was charged with attempting to pervert the course of public justice by making a false allegation of assault by a police officer on 8 November 1984. He denies that charge and it has not yet been heard.

D The material which the Director of Public Prosecutions seeks is Mr. Akhoonjee's application for legal aid. The prosecution say that they suspect, and indeed are quite confident, that it must contain untrue statements, and that production of it will support the prosecution for attempting to pervert the course of public justice. In January and February 1987 the Crown Prosecution Service requested the area office of The Law Society to supply a copy of Mr. Akhoonjee's application form. That office declined to do so and, in doing so, The Law Society referred to section 22 of the Legal Aid Act 1974. That section, so far as is material, provides:

E "(1) Subject to subsection (2) below, no information furnished for the purposes of this Part of this Act to The Law Society, or to any committee or person on their behalf, in connection with the case of a person seeking or receiving advice or assistance or legal aid shall be disclosed otherwise than . . . (b) for the purpose of any criminal proceedings for an offence under it or of any report of such proceedings."

F Subsection (2), to which reference is made, relates to disclosure of information where the person whom the case is against consents. By subsection (3) it is provided:

G "A person who, in contravention of this section, discloses any information obtained by him when employed by or acting on behalf of The Law Society shall be liable on summary conviction to a fine not exceeding £100."

H Section 23 of the Legal Aid Act 1974 makes it an offence for a person seeking or receiving advice, assistance or legal aid knowingly to make a false statement or false representation when furnishing any information required from him. The phrase "an offence under it" in section 22(1) must mean "an offence under this Act," so it is the earlier part of the subsection which is referred to.

By section 23, as I have said, it is an offence under the Act knowingly to make a false statement for the purpose of obtaining legal aid. If the police allegations are correct, and if the legal aid application does contain false statements, then it seems that Mr. Akhoonjee must be guilty of an offence under section 23 of the Legal Aid Act 1974 and

it would be proper and in accordance with section 22 for the legal aid application form to be disclosed for the purpose of a prosecution under section 23 of that Act. But The Law Society's case is that it cannot be disclosed for the purpose of any other criminal proceedings. That is, they say, precisely what section 22 of the Legal Aid Act 1974 provides.

I go back to section 14(2) of the Police and Criminal Evidence Act 1984. The Law Society clearly holds Mr. Akhoojee's application for legal aid subject to the restriction or obligation contained in an Act of Parliament, namely, the restriction imposed by section 22 of the Legal Aid Act requiring them not to disclose it, so that part of the definition of "special procedure material" is satisfied. But the question is whether the material is an item subject to legal privilege because, if it is, then it is not special procedure material at all and the conditions to which I have not so far referred, set out in Schedule 1 to the Act of 1984, for the making of an order for production are not satisfied. The question comes down to this: is this material subject to legal privilege or not? All are agreed that the other criteria in paragraph 2(a) and (b) of Schedule 1 are satisfied. There is however another issue which may arise under paragraph 2(c) of Schedule 1: that is to say, whether it is in the public interest that the material should be produced or access to it should be given. The main issue is whether the material is subject to legal privilege. If I may re-read the definition of "items subject to legal privilege" within section 10(1):

"(b) communications between a professional legal adviser . . . or his client . . . and any other person made in connection with or in contemplation of legal proceedings and for the purpose of such proceedings; . . ."

Mr. Akhoojee is the client of a professional legal adviser. The application for legal aid, on the face of it, is a communication between him and another person, namely, the area officer of The Law Society. Clearly it was made in contemplation of and for the purpose of legal proceedings. On the face of it the material does come within the definition of items subject to legal privilege in section 10(1) of the Act. But Mr. Nicholls, for the Director of Public Prosecutions, argues two points. First, he argues that properly understood section 10(1) does not apply and, secondly, that section 10(2) does apply because the material is held with the intention of furthering a criminal purpose, which specifically excludes it from being subject to legal privilege.

In extension of those submissions in relation to section 10(1) Mr. Nicholls submits that instructions to a solicitor to put forward a fraudulent and false claim are not privileged. Those instructions are made in furtherance of a criminal purpose and that cannot be privileged. He refers us to the well-known case of *Reg. v. Cox and Railton* (1884) 14 Q.B.D. 153, a decision of a full Court for Crown Cases Reserved. The second sentence of the headnote reads:

"Communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure."

That was a case in which two persons had sought advice from a solicitor as to how they could best defeat a bill of sale which had been

3 W.L.R. Reg. v. Snaresbrook Crown Court, Ex p. D.P.P. (D.C.) Glidewell L.J.

A executed, and whether they could in effect ante-date a memorandum to
a date before the bill of sale. The solicitor advised them that they could
not do that which they had set out to do and they thereupon went away.
They were charged with aiming to defraud the person who was the
beneficiary to the bill of sale and at their trial the solicitor was called by
the prosecution to give evidence that they had consulted him with a view
B to seeking advice as to how to do what would be the carrying out of a
fraud. It was held that the evidence of the solicitor was admissible and
not subject to legal privilege. In the course of his judgment Stephen J.
said, at p. 167:

C “The reason on which the rule is said to rest cannot include the case
of communications, criminal in themselves, or intended to further
any criminal purpose, for the protection of such communications
cannot possibly be otherwise than injurious to the interests of
justice, and to those of the administration of justice. Nor do such
communications fall within the terms of the rule. A communication
in furtherance of a criminal purpose does not ‘come into the
ordinary scope of professional employment.’”

D No doubt that applies, and certainly the circumstances of that case
were that the object of the communication to the solicitor was to obtain
advice on how to commit a criminal offence. That is what it comes down
to. But here what is alleged is that Mr. Akhoojee, by making his
complaint to the police complaints body, has attempted to pervert the
course of public justice and has, as it were, sought to bolster it up by
E bringing an action against the Commissioner of the Metropolitan Police.
For the purposes of that he was applying for legal aid. But if it is to be
said that his application for legal aid was, again to use the words of the
headnote in *Reg. v. Cox and Railton*, a communication made for the
purpose of being guided or helped in the commission of a crime, then it
seems to me that practically every time somebody makes an untrue
F statement for the purpose of obtaining legal aid in order to make a civil
claim he is equally liable to have it held that the communication is made
for that purpose. I cannot think that that is correct. Obviously, not
infrequently persons allege that accidents have happened in ways other
than the ways in which they in fact happened, or that they were on the
correct side of the road when driving when actually they were on the
G wrong side of the road, and matters of that sort. Again, litigants in civil
litigation may not be believed when their cases come to trial, but that is
not to say that the statements they had made to their solicitors pending
the trial, much less the applications which they made if they applied for
legal aid, are not subject to legal privilege. The principle to be derived
from *Reg. v. Cox and Railton*, applies in my view to circumstances
H which do not cover the ordinary run of case such as this is.

Another much more recent authority to which Mr. Nicholls refers is
Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.
[1986] 1 Lloyd's Rep. 336. That was a decision of the Court of Appeal
which held that a fraudulent party who communicated with his solicitor
for the purpose of the furtherance of fraud or crime was communicating
with his solicitor otherwise than in the ordinary course of professional
communications, and that it would be monstrous for the court to afford

protection from production in respect of communications which were made for the purposes of fraud or crime. When it was sought to contend against a wholly innocent party that privilege did not exist, whether as assignees in a fraud or not, it was not in accordance with the law to breach the lay power and there was no ground on which the existing fraud exception could be extended.

Again, the purpose there was to put forward a claim which in itself amounted to the commission of a criminal offence. In my judgment, Mr. Nicholl's submissions do nothing to displace the *prima facie* meaning of the wording of section 10(1) which, as I have already said, are sufficient to render the material in this case an item subject to legal privilege.

I turn therefore to Mr. Nicholls's second submission, that the material is held with the intention of furthering a criminal purpose within section 10(2) and thus, as that subsection makes clear, not subject to legal privilege. This I regard as being the crux of this case. The judge said about that part of the argument:

"It was further alternatively argued on behalf of the applicant that subsection 10(2) applied namely that the legal aid application was 'held with the intention of furthering a criminal purpose.' While the defendant may well have applied for legal aid in order to be enabled to institute civil proceedings, and, may well have done so to further a criminal purpose, section 10(2) requires the item to be 'held' with such an intention. The Law Society 'holds' the application and it cannot be suggested that The Law Society can hold any applications for legal aid for furthering a criminal purpose. I therefore hold that the application for legal aid is an 'item subject to legal privilege' and, consequently the access condition set out in paragraph 2(a)(ii) that it is 'specified procedure material' cannot be fulfilled."

The judge therefore refused the application. Put a little more extensively, The Law Society holds the legal aid application to enable it to decide whether to grant legal aid for pursuing a civil claim which may prove to be false, as indeed some are. But it does not, I entirely agree with the judge, hold it with the intention of furthering a criminal purpose. No intention could be further from its thoughts. If the statement is false, as I have said, it is clear that an offence is committed under section 23 of the Legal Aid Act 1974. The Law Society itself could no doubt institute a prosecution in those circumstances. The statement would then be admissible evidence and disclosable in such a prosecution. But for other forms of criminal offence not under the legal aid legislation, in my judgment this material falls fairly and squarely within the meaning of section 10(1) as being an item subject to legal privilege and is not held by The Law Society with the intention of furthering a criminal purpose.

I therefore conclude that the judge was entirely correct in deciding that this part of paragraph 2 of Schedule 1 was not satisfied.

I add this shortly. Having reached that conclusion, the judge went on to consider, should he be held to be wrong, whether it would or would not be in the public interest to grant the application. He concluded that it would not be in the public interest for a legal aid application to be disclosed under section 9 of the Police and Criminal Evidence Act 1984 and said that on that ground he would have refused the application if he had not already decided to refuse it on the first ground.

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- A For my part, without indicating any view one way or another, I would leave that question entirely open to be decided, if necessary, at some future time. It seems to me in the end to be largely a matter of discretion for the judge who has to make the decision as to whether the disclosure of a particular document in particular circumstances is or is not in the public interest. I am certainly not indicating Judge Halnan was wrong. I merely do not wish to express any opinion about it at all.
- B For the reasons which I sought to express in the first and major part of this judgment it is my view that the judge was entirely in the right and I would therefore dismiss the application.

McNEILL J. I agree.

- C *Appeal dismissed.*
Costs out of central funds.
Certificate under section 1(2) of the
Administration of Justice Act 1960
that point of law of general public
importance involved in the decision,
namely: "Whether upon the true
construction of section 10(2) of the
Police and Criminal Evidence Act
1984 items which would otherwise
fall within the definition of 'items
subject to legal privilege' in sections
9(2)(a) and 10(2) of the said Act
are excluded from that definition
by the said section 10(2) only if the
person holding those items himself
has the intention of furthering a
criminal purpose."
Leave to appeal refused.
- D
- E

- F *Solicitors: Director of Public Prosecutions; The Law Society; Dean & Co.*

[Reported by KULDIP SINGH CHAGGAR, Esq., Barrister-at-Law]

G

H

[QUEEN'S BENCH DIVISION]

REGINA v. READING CROWN COURT, *Ex parte* HUTCHINSON
AND ANOTHER

REGINA v. DEVIZES JUSTICES, *Ex parte* LEE

1987 July 22, 23, 24; 31

Lloyd L.J. and Mann J.

Local Government—Byelaws—Validity—Prosecution for offence against byelaws—Challenge to validity of byelaws—Hearing adjourned for validity to be determined on judicial review—Whether correct procedure—Whether justices and Crown Court having jurisdiction to determine validity of byelaws

Justices had authority, and were bound, to inquire into the validity of byelaws if raised by way of defence to a charge of contravening such byelaws; the procedure for judicial review introduced by section 31 of the Supreme Court Act 1981 and R.S.C., Ord. 53 had not removed the right of a defendant to raise the question of the validity of the byelaw under which he was being prosecuted, nor was it an abuse of process or contrary to public policy for him to do so (post, pp. 1066c–d, f–g, 1067f–g, 1070f–g, 1071e).

Where, therefore, in one case the Crown Court, and in another, justices, had refused to determine the question of the validity of byelaws under which the applicants had been charged with offences:—

Held, granting judicial review by way of mandamus to quash the decisions, that the Crown Court and the justices had erred in ruling that they had no jurisdiction to determine the question of the validity of byelaws.

Wandsworth London Borough Council v. Winder [1985] A.C. 461, H.L.(E.) applied.

O'Reilly v. Mackman [1983] 2 A.C. 237, H.L.(E.) and *Quietlynn Ltd. v. Plymouth City Council* [1987] 3 W.L.R. 189, D.C. distinguished.

Per Lloyd L.J. In order to obtain a decision of the Divisional Court on the validity of byelaws which would be binding on all inferior courts the Crown Prosecution Service should wait until a decision goes against them and appeal by way of case stated. Judicial review is not to be used as a means for obtaining a decision on a question of law in advance of the hearing (post, pp. 1070h—1071a).

The following cases are referred to in the judgment:

Director of Public Prosecutions v. Bugg (John) (unreported), 19 December 1986, D.C.

Kruse v. Johnson [1898] 2 Q.B. 91

London & Clydeside Estates Ltd. v. Aberdeen District Council [1980] 1 W.L.R. 182; [1979] 3 All E.R. 876, H.L.(Sc.)

O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)

Quietlynn Ltd. v. Plymouth City Council [1987] 3 W.L.R. 189; [1987] 2 All E.R. 1040, D.C.

Reg. v. Rose, Ex parte Mary Wood (1855) 19 J.P. 676

Wandsworth London Borough Council v. Winder [1985] A.C. 461; [1984] 3 W.L.R. 1254; [1984] 3 All E.R. 976, H.L.(E.)

The following additional cases were cited in argument:

Friend v. Brehout (1914) 79 J.P. 25

Imperial Tobacco Ltd. v. Attorney-General [1981] A.C. 718; [1980] 2 W.L.R. 466; [1980] 1 All E.R. 866, H.L.(E.)

3 W.L.R. **Reg. v. Reading Crown Court, Ex p. Hutchinson (D.C.)**

- A *Regina v. Horseferry Road Justices, Ex parte Independent Broadcasting Authority* [1987] Q.B. 54; [1986] 3 W.L.R. 132; [1986] 2 All E.R. 666, D.C.
- Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.)
- Reg. v. Jenner* [1983] 1 W.L.R. 873; [1983] 2 All E.R. 46, C.A.
- B *Reg. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299; [1972] 2 W.L.R. 1262; [1972] 2 All E.R. 589, C.A.
- Reg. v. Rochford Justices, Ex parte Buck* (1978) 68 Cr.App.R. 114, D.C.

REGINA V. READING CROWN COURT, *Ex parte HUTCHINSON AND ANOTHER*

APPLICATION for judicial review.

- C By notice of application dated 15 July 1987, the applicants, Jean Emily Hutchinson and Georgina Smith, applied for judicial review in respect of a decision of Judge Lait and two justices sitting at the Crown Court at Reading on 18 June 1987, by which the court refused to determine the validity of the byelaws for R.A.F. Greenham Common, under which the applicants had been convicted, and adjourned the applicants' appeals against conviction so that the validity of the byelaws
- D could be determined by the Divisional Court in judicial review proceedings. The applicants sought an order of mandamus requiring Reading Crown Court to hear and determine the question of the validity of the byelaws. The grounds of the application were (1) that it was well established that the validity of byelaws could be challenged in criminal proceedings; (2) that as a matter of general principle it should be open
- E to any defendant in a criminal court to challenge the validity of a statute or statutory instrument under which he was charged; (3) that it would be unjust and against public policy for a defendant to be convicted under an invalid provision which he was debarred from challenging; and (4) that it was wrong as a matter of law and principle for a Crown Court, on hearing an appeal from the justices, to adjourn the appeal part heard
- F to enable the Divisional Court to adjudicate upon the issue of law which was to be determined in the criminal appeal.

The facts are stated in the judgment.

REGINA V. DEVIZES JUSTICES, *Ex parte LEE*

APPLICATION for judicial review.

- G By notice of motion dated 15 July 1987, the applicant, Ian Louis Ross Lee, applied for judicial review of a decision of the Devizes Justices on 15 July 1985, by which they heard extensive preliminary legal argument over their jurisdiction as to an aspect of the defence case, adjourned the case after the preliminary argument and decided that they had no jurisdiction to hear a defence involving a challenge to the validity of the Bulford Ranges Byelaws, under which the applicant was
- H charged with an offence. The applicant sought an order of mandamus directing that the justices did have jurisdiction to hear a defence involving argument as to the validity of the byelaws and a duty so to do and directing that the justices resume the proceedings. The grounds on which relief was sought were (1) that the justices acted improperly in entering into preliminary legal argument with regard to an aspect of the defence case, before first determining that the prosecution case was made out; and (2) that a defendant to a charge under a byelaw had a

common law right to defend the charge by challenging the validity of the byelaw.

The facts are stated in the judgment.

Beverley Lang for the applicant Hutchinson.

Georgina Smith in person.

Nigel Hamilton Q.C. and *Anthony Dalglish* for Reading Crown Court.

Nigel Fleming for the applicant Lee.

Nigel Hamilton Q.C. and *Paul Darlow* for the justices.

Roger Ter Haar as amicus curiae.

Cur. adv. vult.

31 July. LLOYD L.J. read the following judgment.

These two cases raise the same point. When a defendant in summary proceedings wishes to challenge the validity of a byelaw under which he has been charged, is it open to the justices to decide the issue of validity, or must the defendant proceed first by way of judicial review?

I venture to think that until a few years ago the answer to that question would have been regarded as obvious. But the prosecution submit, and Judge Lait, sitting with two justices in the Crown Court at Reading have held, that they have no jurisdiction to inquire into the validity of a byelaw, unless it is invalid on its face, in which case no inquiry would be necessary. Since the byelaws in question, the R.A.F. Greenham Common Bye-Laws 1985, are not invalid on their face, they adjourned the hearing before them in order that the issue of validity might be determined on an application for judicial review.

I can well understand why the Crown Court at Reading took the course it did, in view of the decision of this court in *Quietlynn Ltd. v. Plymouth City Council* [1987] 3 W.L.R. 189. That case appears to suggest that the long established practice whereby justices have ruled on the validity of byelaws has been overtaken by section 31 of the Supreme Court Act 1981. Justices are no longer to be expected "to assume the function of the Divisional Court" and decide difficult questions of law, which can more readily be decided on judicial review. The question for us is whether the decision in the *Quietlynn* case goes as far as might at first sight appear.

The facts of the two cases before us could hardly be more simple. In the first, Jean Emily Hutchinson and Georgina Smith, who describe themselves as "Greenham Women of Women's Peace Camp, Greenham Common, Newbury, Berkshire" were convicted at the Newbury Magistrates' Court on 23 July 1986, of an offence contrary to byelaw 2(b) of the R.A.F. Greenham Common Bye-Laws. Byelaw 2(b) reads:

"No person shall enter, pass through or over or remain in or over the protected area without authority or permission given by or on behalf of one of the persons mentioned in bye-law 5(1)."

The applicants appealed against their conviction to the Crown Court at Reading. The ground of their appeal was that the byelaws are invalid. They are expressed to be made by the Secretary of State for Defence under powers conferred on him by Part II of the Military Lands Act 1892. The only relevant section is section 14(1) which concludes:

3 W.L.R.

Reg. v. Reading Crown Court, Ex p. Hutchinson (D.C.)

Lloyd L.J.

A "Provided that no byelaws promulgated under this section shall authorise the Secretary of State to take away or prejudicially affect any right of common."

The applicants' case is that the byelaws are in breach of that proviso. Whether they are right or not, is not for us to decide on this application.

B The issue of validity was argued before the Crown Court on 2 and 3 April 1987. At that stage it was common ground that the Crown Court was competent to deal with the question. Unfortunately the hearing could not be completed on 3 April. So the case was adjourned. At the resumed hearing on 15 June, the prosecution applied for a further adjournment so as to enable the question of validity to be determined by the Divisional Court. The applicants opposed the adjournment. They
C asked the Crown Court to determine the question, but the Crown Court declined. It regarded itself as bound by the *Quietlynn* case [1987] 3 W.L.R. 189. So the applicants now seek an order of mandamus requiring the Crown Court to hear and determine the question whether the byelaws are valid.

I have said that, until a few years ago, the answer to the question would have been self evident. In *Wade on Administrative Law*, 5th ed. (1982), p. 758, it is said: "The commonest method of resisting an invalid regulation or byelaw is to plead its invalidity in defence to a prosecution or enforcement proceedings."

E The note to section 235 of the Local Government Act 1972 in *Stone's Justices' Manual 1986* contains a long list of cases in which the courts have had to consider the validity of byelaws. I would assume (though I have not checked) that in many if not most of them the question has come before the High Court on appeal from justices by way of case stated. I need only mention two of the cases listed in *Stone*, the first of which, *Reg. v. Rose, Ex parte Mary Wood* (1855) 19 J.P. 676, was not an appeal by way of case stated, but an application for certiorari. The applicant had been convicted under a byelaw for failing to clear snow from the footpath in front of her house. Her defence was that the
F byelaw was invalid. The stipendiary magistrate refused to inquire into the validity of the byelaw. He assumed it to be valid, since it had been approved by the Secretary of State. A strong Divisional Court quashed her conviction. The court held that the byelaw was bad, and that therefore the stipendiary magistrate had no jurisdiction to convict. But it is clear from the opening sentence of Lord Campbell's judgment that in his view the stipendiary magistrate was entitled to inquire into the
G validity of byelaws; and Crompton J. said, at p. 678:

"I am disposed to think that the justice had no jurisdiction to enforce a bad byelaw. He had a right to inquire whether it was bad or good, but that is not what he has done."

H The case is cited in *Stone* as authority for the proposition that justices are bound to decide on any objection to the validity of a byelaw.

The only other case I need mention is *Kruse v. Johnson* [1898] 2 Q.B. 91, perhaps the best known authority in this field. It was a case stated by five justices of the county of Kent. It came before a Divisional Court of seven judges. The defendant was charged under a byelaw with singing on a highway, within 50 yards of a dwelling-house, after being required by a constable to desist. The defence was that the byelaw was invalid, on the ground that it was unreasonable. The justices held that

the byelaw was reasonable, and convicted accordingly. The defendant's appeal was dismissed, by a majority of six to one. Not one of the judges in the Divisional Court suggested that the justices had had no jurisdiction to inquire into the validity of the byelaw.

Mr. Hamilton, for the Crown Prosecution Service, submits that *Kruse v. Johnson* was decided per incuriam. He would have to make the same submission with regard to all the many other cases in which byelaws have been considered by justices, and appeals brought before the Divisional Court on a case stated, whether by the prosecution or the defence. In all such cases, says Mr. Hamilton, the justices have exceeded their jurisdiction. Their proper course was always to adjourn the hearing before them so as to allow the defendant to apply for a prerogative writ, presumably prohibition.

I cannot accept so bold a submission. Nor can it be sustained by the consideration—which I would certainly accept—that the jurisdiction of justices is statutory. The absence of express statutory authority for justices to inquire into the validity of a byelaw does not mean that they do not have implied authority to do so, when the validity of the byelaw is challenged by the defendant.

So I would reject Mr. Hamilton's first submission. In my judgment justices have always had jurisdiction to inquire into the validity of a byelaw. They are not only entitled, but bound to do so when the defendant relies on the invalidity of the byelaw by way of defence.

Then has the position changed as a result of the new streamlined procedure for judicial review introduced following the Report on Remedies in Administrative Law, 1976 (Law Com. No. 73)? Or by virtue of section 31 of the Supreme Court Act 1981? Or has it changed as a result of the decision of the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237? Mr. Hamilton submits that it has. He concedes that there is nothing in any legislation to take away the jurisdiction of justices to inquire into the validity of byelaws, if (contrary to his first submission) they ever had it. But he submits that it is now contrary to public policy, or an abuse of the process of the court, for a defendant to challenge the validity of a byelaw under which he is charged, except by way of separate proceedings in the High Court.

I find Mr. Hamilton's second submission almost as bold as his first. *O'Reilly v. Mackman* decides, in broad terms, that it is an abuse of the process of the court for a plaintiff to proceed by writ when he is complaining of an infringement of his rights in public law, since to do so would circumvent the safeguards provided by R.S.C., Ord. 53. But how can that principle possibly apply to a case where the plaintiff is not complaining of anything, but is defending himself against a criminal charge? To use the well worn metaphor, the defendants in the present proceedings are deploying their arguments as a shield, not as a sword. To describe what they are doing as an abuse of the process of the court is fanciful. It is the Crown Prosecution Service who has invoked the process of the court, not them. Mrs. Smith, who appears before us in person, put the case very well when she said:

"Coming to London to the High Court is inconvenient and expensive. Byelaws are generally local laws which have been made for local people to do with local concerns. Magistrates' courts are local courts and there is one in every town of any size in England. The cost of proceedings in a magistrates' court are far less than in

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A the High Court. I believe this egalitarian aspect of seeking recourse
to the law in a magistrates' court to be an important sign of the
availability of justice for all. I think it unfair that the Crown Court
is refusing to decide our case when I have waited for a year for my
appeal to be heard. I want the Crown Court to make a decision in
my case as soon as possible and I do not want to have the
B additional worry and delay of judicial review proceedings. I am not
eligible for legal aid and have to pay for legal representation. I have
been advised that if we were to lose the judicial review application
we may be ordered to pay the costs of the Crown Prosecution
Service and the Secretary of State for Defence. This prospect bears
no relationship to justice, and it seems quite wrong to me that we
are being forced to go through such a lengthy and expensive
C procedure in order to appeal a conviction under a byelaw and a fine
of only £25."

As a matter of ordinary common sense, it cannot be said that the
defendants here are abusing the process of the court unless we are to
adopt the principle "cet animal est tres méchant—quand on l'attaque, il
se défend." It may be more convenient for the Crown Prosecution
D Service that the validity of byelaws, at any rate these byelaws, be tested
by way of judicial review, though I do not accept that it is. But even if it
were so, convenience of the Crown Prosecution Service is one thing; an
abuse of the process of the court is something quite different.

Even if there were ever any doubt as to the scope of the principle
stated in *O'Reilly v. Mackman* [1983] 2 A.C. 237 or its irrelevance to a
case such as the present, it was removed by the subsequent decision of
the House of Lords in *Wandsworth London Borough Council v. Winder*
E [1985] A.C. 461. In that case the plaintiff council claimed possession of
a council flat on the ground that the defendant had failed to pay the
increased rent lawfully due. The defendant contended that the council's
decision to increase the rent was ultra vires. The council applied to
F strike out the defence on the ground that it was an abuse of the process
of the court. The House of Lords held that it was a paramount principle
that the private citizen's recourse to the courts for the determination of
his rights was not to be excluded except by clear words. There is nothing
in the language of R.S.C., Ord. 53, which could be taken to have
abolished a citizen's right to challenge the decision of a local authority in
the course of defending an action for possession, nor did section 31 of
the Supreme Court Act 1981 which referred only to an "application" for
G judicial review, have the effect of limiting a defendant's rights sub
silentio. Lord Fraser of Tullybelton said, at p. 509:

"It would . . . be a very strange use of language to describe the
respondent's behaviour in relation to this litigation as an abuse or
misuse by him of the process of the court. He did not select the
procedure to be adopted. He is merely seeking to defend proceedings
H brought against him by the appellants. In so doing he is seeking
only to exercise the ordinary right of any individual to defend an
action against him on the ground that he is not liable for the whole
sum claimed by the plaintiff. Moreover he puts forward his defence
as a matter of right, whereas in an application for judicial review,
success would require an exercise of the court's discretion in his
favour. . . . I find it impossible to accept that the right to challenge
the decision of a local authority in the course of defending an action

for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform.”

So I would reject Mr. Hamilton's submissions on principle. Indeed, I hardly think he would have advanced them at all, but for two recent decisions of this court to which I now turn. In the first, *Director of Public Prosecutions v. Bugg* (unreported), 19 December 1986, the facts were very similar to the present case. The respondent was charged with contravening the R.A.F. Mildenhall Bye-Laws 1986. His defence was that the byelaws were invalid. The justices acquitted the respondent on the ground that the prosecution had not proved beyond reasonable doubt that the byelaws were valid. This was clearly wrong. So the appeal was allowed, and the case remitted with a direction to convict. The importance of the case for present purposes lies in certain observations of Watkins L.J. who gave the second judgment.

The case had come before the Divisional Court on appeal by way of case stated. Mr. Laws, appearing for the Crown Prosecution Service, reserved for the House of Lords the question whether the validity of the byelaws could be explored otherwise than by way of judicial review. That is precisely the same question as has been argued in the present case. Since the point was not argued, Mann J., giving the leading judgment, said nothing about it. But Watkins L.J. said:

“I agree. I have much sympathy with the justices and their clerk who had the misfortune to have to listen to a vast range of intricate submissions and to endeavour to comprehend them in the light of a mass of authorities upon the law such as no lay tribunal should be called upon to consider. If ever there was a case which demonstrates the need somehow to prevent challenges to byelaws and the like in a magistrates' court, I doubt if any better example than this could be found. Mr. Laws eschewed the opportunity of arguing whether the validity of byelaws can be explored otherwise than by judicial review. I regretted this although I fully understood his reasons for saying that he would prefer to reserve such an argument for the House of Lords. I feel bound to say, however, that I am not wholly satisfied, despite the existence of the authorities to which Mann J. has referred, that it is open to a defendant charged with a breach of them to question their validity in a magistrates' court. Not having looked exhaustively at these authorities, I am left wondering whether the right so to do has ever been challenged. If that be so, it seems to me that such a challenge is overdue.”

As there had been no argument on the point, Watkins L.J. must have had in mind the argument that had been addressed to his court a week or so earlier in the *Quietlynn* case.

As for *Director of Public Prosecutions v. Bugg* itself, although one can share, and, if I may say so, share fully, in the sympathy which Watkins L.J. felt for justices who have to grapple with difficult questions of law, the case is obviously no authority for the proposition that they are not obliged to inquire into the validity of byelaws which are challenged by way of defence.

Quietlynn Ltd. v. Plymouth City Council [1987] 3 W.L.R. 189 is, I confess, a difficult case. The company carries on the business of running sex shops. It applied for licences to various local authorities under section 2 of and Schedule 3 to the Local Government (Miscellaneous

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A Provisions) Act 1982. Licences were refused in respect of certain
premises in each of the three cases before the court. But the company
continued to use the premises as if a licence had been granted. In due
course the company was charged with offences under the Act. In each
case the company's defence was that the decision of the local authority
refusing a licence was invalid. The Divisional Court held that the
B justices had no jurisdiction to consider the validity of the decision to
refuse a licence. The only way such a decision could be challenged was
by way of judicial review. Until challenged, the decision must be
presumed to be valid.

C Now I do not doubt that the decision in the three *Quietlynn* cases
was fully justified on the facts. The facts of *Portsmouth City Council v.*
Quietlynn Ltd. were especially unmeritorious. In that case the local
authority had refused a licence on 11 July 1983. It gave its reasons by
letter dated 13 July 1983, but the company continued to use the premises
as a sex shop. So the local authority commenced proceedings. On 31
August 1983 the company applied for judicial review. That application
finally came on for hearing on 23 January 1985. But at the door of the
court the company withdrew its application. A few months later, on 15
D May 1985, the company was convicted in the magistrates' court. But the
company's appeal was allowed by the Crown Court. They acquitted the
company on the ground that the decision to refuse the licence was, in
the circumstances of the particular case, invalid. The Divisional Court
remitted the case with a direction to convict. It is not altogether
surprising that the court held that the proper procedure in the particular
case was by way of judicial review, since that was the procedure which
E the company had itself adopted, until it abandoned its application at the
door of the court.

The difficulty in the *Quietlynn* cases lies not so much in the actual
decision, as in some of the incidental reasoning employed by Webster J.
in giving the judgment of the court. After referring to *Wandsworth*
London Borough Council v. Winder [1985] A.C. 461 and a number of
the other cases, Webster J. said [1987] 3 W.L.R. 189, 201:

F "But we have been referred to no dictum in any of those cases
which suggests that challenges to the decisions of local authorities
are permissible in criminal proceedings; nor is it possible, in our
view, to derive from those decisions a principle that such a challenge
is permissible in proceedings of every kind."

G With great respect, I find it hard to follow the distinction between civil
and criminal proceedings in this context. If the validity of a decision of a
local authority is an essential element in the proof of the crime alleged,
then I can see no reason why it should not be challenged in the
magistrates' court or the Crown Court as the case may be. Indeed, this
seems to be contemplated as a proper procedure in an earlier passage in
the *Quietlynn* case, where, after referring to a dictum of Lord Hailsham
H of St. Marylebone L.C. in *London and Clydeside Estates Ltd. v.*
Aberdeen District Council [1980] 1 W.L.R. 182, 187, Webster J. said, at
p. 200:

"and, although justices sometimes, for the purpose of the case
immediately before them, have to rule upon the validity of a byelaw
or the decision of a local authority, that ruling is binding in no
other case . . ."

All that the applicants in the present case want is, I suspect, that the Crown Court at Reading should rule upon the validity of the byelaws "for the purposes of the case immediately before them." If so, then the present case is covered by the passage I have just quoted.

It may be said that there is a distinction between challenging a decision of the local authority, and challenging a local authority byelaw. But there is a difficulty in that approach, correct though it would have been on the facts of the *Quietlynn* case, since it is nowhere reflected in the judgment of the court in that case. Indeed the first of the two reasons given by the court for rejecting the company's argument, namely, the need to achieve uniformity between different magistrates' courts and Crown Courts, would seem to have even more force in the case of byelaws which are binding on all, than in the case of decisions of local authorities which operate in personam.

Moreover there is another passage, in addition to that which I have already quoted, which appears to treat byelaws and decisions on the same footing. Webster J. said, at p. 201:

"It has, of course, long been the practice for justices to decide for the purposes of a case immediately before them upon the validity of byelaws and, before the Town and Country Planning Act 1971, of enforcement notices. But those practices were established long before applications for judicial review were given statutory recognition in section 31 of the Supreme Court Act 1981. The law relating to judicial review has become increasingly more sophisticated in the past few decades, and in our view justices are not to be expected to have to assume the functions of the Divisional Court and consider the validity of decisions made by a local authority under this Act in the light of what is now a complex body of law. If a bona fide challenge to the validity of the decision in question is raised before them, then proceedings should be adjourned to enable an application for judicial review to be made and determined."

This passage seems to suggest that the right to challenge byelaws in the magistrates' court has been affected by section 31 of the Supreme Court Act 1981. Otherwise it is difficult to see why byelaws are mentioned at all. If that is the implication of the passage, then with great respect I would venture to disagree. Neither section 31 of the Supreme Court Act 1981, nor R.S.C., Ord. 53, has taken away the right of a defendant in criminal proceedings to challenge the validity of a byelaw under which he has been charged.

I mentioned earlier the convenience of the Crown Prosecution Service. Mr. Hamilton relied heavily on the importance of being able to obtain at an early stage a decision of the Divisional Court as to the validity of the byelaws which would be binding on all inferior courts. I can understand his anxiety. But the solution lies along traditional lines. The Crown Prosecution Service should wait until a decision goes against them, and then appeal to the Divisional Court by way of case stated. Such an appeal would be just as quick, and no more expensive, than an application to the Divisional Court for judicial review. Judicial review is not to be used as a means for obtaining a decision on a question of law in advance of the hearing, similar to the old consultative case in arbitration, or the new procedure under section 2 of the Arbitration Act 1979. However convenient such a procedure might be from the point of

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A view of the Crown Prosecution Service, it can be introduced only by legislation.

For the reasons I have given I would allow the application in the first case, and grant mandamus directed to the Crown Court at Reading to hear and determine the issue of validity of the byelaws. I would like to say again that the course which the court took, wrong though I have held it to be, was in no way their fault.

B The second case arises out of a decision of the Devizes justices on 15 June 1987. It was initially bedevilled by a serious procedural difficulty. The applicants before us were not, as in the first case, the defendants in criminal proceedings, but the Crown Prosecution Service itself; and the decision in respect of which they were seeking judicial review was a decision in their favour, namely, to adjourn the proceedings pending an application for judicial review by the defendant Mr. Ian Lee. This created an obvious problem for the applicants. But it also created a problem for us when the defendant, Mr. Lee (the respondent to the application) indicated that he did not wish to take advantage of the procedural obstacle in the way of the Crown Prosecution Service. So we felt obliged to ask for an amicus, Mr. Ter Haar, to be present. Fortunately his services were not required, since in order to preserve his locus standi should there be an appeal to the House of Lords, Mr. Lee decided, at the very end of the hearing, to seek leave to apply for judicial review himself. We acceded to his request, and treated the argument which we had already heard as argument in his application, whereupon Mr. Hamilton withdrew his application and the procedural obstacle disappeared.

D We would like to express our gratitude to Mr. Ter Haar for his willingness to assist, and indeed to all the other counsel in the two cases. The facts of the second case do not call for separate review. The point in the second case is precisely the same, save that the byelaws in issue are the Bulford Ranges Bye-Laws 1970. We will make the same order on Mr. Lee's application as we have made in the first case.

E MANN J. I agree with the result in each case and for the reasons given by Lloyd L.J. I was a party to the decision in *Quietlynn Ltd. v. Plymouth City Council* [1987] 3 W.L.R. 189. I do not repent at the actual decision of that case, but upon reflection and having heard argument in this court, it seems to me that the reference to byelaws at p. 201 could be ascribed a meaning which I for my part did not intend, having regard to my silence in *Director of Public Prosecutions v. Bugg* (unreported).

G Applications granted with costs out of central funds.
Certificate under section 1(2) of the Administration of Justice Act 1960 that point of law of general public importance involved in the decision, namely: "Whether a magistrates' court or Crown Court has jurisdiction to hear and determine an objection to the validity of byelaws."
H Leave to appeal refused.

Solicitors: Hodge Jones & Allen; Crown Prosecution Service, Reading; Bindman & Partners; Crown Prosecution Service, Chippenham; Treasury Solicitor.

[Reported by BARBARA SCULLY, Barrister-at-Law]

[QUEEN'S BENCH DIVISION]

GUMBLEY v. CUNNINGHAM
GOULD v. CASTLE

1987 July 7, 8; 28

Watkins L.J. and Mann J.

Road Traffic—Laboratory test—Proportion of alcohol—Proof of excess—Period between driving and giving specimen—Back calculation of amount of alcohol in motorist's blood at time of driving—Whether evidence admissible—Road Traffic Act 1972 (c. 20), ss. 6(1), 10(2) (as substituted by Transport Act 1981 (c. 56), s. 25(3), Sch. 8)

The two defendants had been involved in separate accidents and provided on request by police officers specimens of blood in the first case and breath in the second case for laboratory analysis. The specimens were provided over 4 hours and 3½ hours respectively after the accidents. The defendants were charged with driving with excess alcohol contrary to section 6(1) of the Road Traffic Act 1972,¹ as substituted, although the readings from the specimens showed alcohol concentrations below the limits prescribed in section 12(2) of the Act of 1972, as substituted. At their trials the prosecution adduced expert scientific evidence to show that, at the time of the accident in the first case, the alcohol in the defendant's body would have been above the prescribed limit and, in the second case, the alcohol would have been likely to have been above the prescribed limit. The scientific evidence was based on a process known as back calculation by which the respective rates of elimination of alcohol from their bodies could be reckoned from the time of the accidents to the time when the specimens were provided. The defendants were convicted.

On appeal by the defendants on the ground that sections 6 and 10 of the Act of 1972, as substituted, did not permit the prosecution to adduce evidence other than that provided by a defendant's specimen of breath, blood or urine to prove the offence under section 6:—

Held, dismissing the first and allowing the second appeal, that the effect of the new section 6(1) of the Road Traffic Act 1972 was to make it an offence to drive or be in charge of a motor vehicle if the proportion of alcohol in the motorist's breath, blood or urine exceeded the prescribed limit; that since it was no longer a question, as posed by the original section 6(1), of the proportion of alcohol at the time the specimen of breath, blood or urine was taken, evidence was permissible to show what the proportion of excess alcohol was at the time of driving; that, accordingly, the back calculation evidence was admissible and relevant to the question to be determined under the new section 6(1) and therefore, since in the first case there was evidence that the proportion of alcohol in the defendant's blood at the time of driving was above the prescribed limit, there were no grounds for quashing the conviction but, in the second case, the conviction would be quashed since the evidence before the justices had merely been that it was likely that the proportion of alcohol in the defendant's breath at the time

¹ Road Traffic Act 1972, as amended, s. 6(1): see post, p. 1077A.

S. 10: see post, p. 1077C–E.

S. 12(2): see post, p. 1077B.

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A of driving was above the prescribed limit (post, p. 1080B-D, G-H).

Rowlands v. Hamilton [1971] 1 W.L.R. 647, H.L.(E.) considered.

B *Per curiam.* The prosecution should not seek to rely on evidence of back calculation save where that evidence is easily understood and is clearly persuasive of the presence of excess alcohol at the time the defendant was driving. Moreover, justices must be very careful especially where there is conflicting evidence not to convict unless they are sure an excess of alcohol was in the defendant's body when he was actually driving as charged (post, p. 1080E-F).

The following cases are referred to in the judgment:

C *Anderton v. Lythgoe* [1985] 1 W.L.R. 222, D.C.
Rowlands v. Hamilton [1971] 1 W.L.R. 647; [1971] 1 All E.R. 1089, H.L.(E.)
Smith v. Geraghty [1986] R.T.R. 222, D.C.

The following additional case was cited in argument:

Heydon's Case (1584) 3 Co.Rep. 7a.

D

GUMBLEY v. CUNNINGHAM

CASE STATED by the Crown Court at Birmingham.

E On 28 October 1985 an information was preferred by the prosecutor, Thomas Joseph Cunningham, a police officer, against the defendant, Stephen Gary Gumbley, that the defendant on 7 May 1985 in the city of Birmingham did drive a motor car on a road, namely Queensway Tunnel, after consuming so much alcohol that the proportion of alcohol in his blood exceeded the prescribed limit, contrary to section 6(1) of the Road Traffic Act 1972, as amended by section 21 of the Road Traffic Act 1974 and the Transport Act 1981.

F On 25 June 1986 justices sitting at Birmingham heard the information and found the defendant guilty of the offence. The justices adjudged that the defendant should pay a fine of £200, his licence was endorsed and he was disqualified from holding or obtaining a driving licence for a period of 12 months. By notice of appeal dated 11 July 1986 the defendant notified his intention to appeal against the conviction to the G Crown Court on the general grounds "on a point of law as to the amount of alcohol which was said to have been in the defendant's blood stream at the material time." Before the justices there were two further informations preferred and heard; the first alleged an offence contrary to section 7(4) of the Road Traffic Act 1972, as substituted, and was found not proved. The second alleged an offence contrary to section 3 of the Road Traffic Act 1972, as substituted, and was found proved on the H defendant's own confession.

The Crown Court (Judge Ross Q.C. and a justice) heard the appeal and found the following facts. At about 8.30 p.m. on Tuesday, 7 May 1985, the defendant and his brother, Gordon, arrived at a public house in the Northfield area of Birmingham called The Dingle. The defendant left the public house at about 10.45 p.m. and with his brother as passenger began to drive to Erdington on the other side of the city. He drove for about six miles erratically and at about 11.15 p.m. the car

collided at high speed with the wall of an underpass in the city centre. There was no evidence of braking and the passenger was killed. The police arrived at the scene at about 11.35 p.m. and required the defendant to provide a specimen of his breath. He refused, was arrested and taken to Steelhouse Lane police station, arriving at about 11.45 p.m. At the police station the defendant complained that he felt ill and at sometime between 11.50 p.m. and 12.20 a.m. he vomited. He was thereafter taken to the nearby general hospital. At the general hospital, at 3.35 a.m. and with the consent of the doctor having care of him, the defendant provided a specimen of blood for analysis. The later analysis of the specimen revealed a concentration of not less than 59 milligrammes of alcohol per 100 millilitres of blood. Further, on the basis of the unchallenged medical evidence, the Crown Court found (i) that the defendant at the material time was 34 years of age, of average height and muscular build weighing some 11 stones. He was in good physical condition. (ii) That such a person would eliminate alcohol from his blood stream at between 10 and 25 milligrammes per 100 millilitres per hour; that the most likely elimination rate was in the region of 15 milligrammes per 100 millilitres per hour and the concentration of alcohol in his body four hours and 20 minutes before the specimen was collected would have been in the region of 120 to 130 milligrammes per 100 millilitres. (iii) That even in the almost unheard of event of an elimination rate of six milligrammes per 100 millilitres per hour the defendant's blood/alcohol concentration would have been in excess of the prescribed limit at the time of the collision.

It was contended on behalf of the defendant that sections 6 to 10 inclusive of the Road Traffic Act 1972, as substituted by the Transport Act 1981, did not permit the prosecution to adduce evidence other than the analysis of the specimen taken in pursuance of those sections, and that therefore the evidence of the doctors and forensic scientist was inadmissible, and that the difference between section 6(1) as substituted by the Act of 1981 from section 6(1) of the Act of 1972 was designed solely to remove the mischief brought to light by the peculiar facts of *Rowlands v. Hamilton* [1971] 1 W.L.R. 647.

It was contended on behalf of the prosecutor that the limitations upon the method of proving the amount of alcohol in a defendant's system, contained in section 6(1) of the Act of 1972 were no longer applicable given the form of section 6(1) as substituted by the Act of 1981. That section 10(2), as substituted, did not exclude the introduction of the sort of medical evidence heard in the instant case in order to prove the amount of alcohol in the defendant's system.

The Crown Court were of the opinion that the prosecutor's contentions were correct and accordingly dismissed the appeal.

The defendant appealed. The question for the opinion of the High Court was whether on a true construction of sections 6(1) and 10(2) of the Road Traffic Act 1972, as substituted, the prosecutor was entitled to adduce evidence other than by way of the specimen of breath or blood provided by a defendant in order to prove the proportion of alcohol in the defendant's breath or blood at the material time.

GOULD v. CASTLE

CASE STATED by Hertfordshire justices sitting at St. Albans.

On 28 October 1986 the prosecutor, Chief Inspector Castle, laid an information alleging that the defendant, Steven Adrian Gould, on 3 July

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A 1986 did drive a motor vehicle, namely a motor car, on a road or other public place, namely Hatfield Road, St. Albans, after consuming so much alcohol that the proportion of it in his breath was between 43 and 65 microgrammes of alcohol in 100 millilitres of breath which exceeded the prescribed limit of 35 microgrammes of alcohol in 100 millilitres of breath, contrary to section 6 of the Road Traffic Act 1972, as amended by section 25 of and Schedule 8 to the Transport Act 1981.

B The justices heard the information on 16 January 1987 and found the following facts: (a) the defendant was the driver of a motor vehicle on a road at 11.58 p.m. on 3 July 1986 when an accident occurred owing to the presence of that vehicle on the road. (b) At 3.05 a.m. on 4 July 1986 the defendant was seen at his home by Police Sergeant Brooks who had reasonable cause to believe the defendant to have been the driver of the vehicle at the time of the accident and who then conveyed him to a police station. (c) At the police station the breath test procedure was lawfully carried out and the defendant provided two specimens of breath for analysis. The lower of the two specimens provided was shown on analysis by the Lion Intoximeter 3000 to contain 28 microgrammes of alcohol in 100 millilitres of breath. (d)(i) The accident occurred at 11.58 p.m. on 3 July 1986. (ii) The defendant provided a sample of breath at 3.45 a.m. on 4 July 1986 which was shown on analysis to contain 28 microgrammes of alcohol in 100 millilitres of breath. (iii) The defendant weighed 13 stones. (iv) The defendant confirmed his last alcoholic drink prior to the accident at 11.40 p.m. on 3 July 1986 and did not consume any more alcohol after the accident and prior to the provision of the specimen of breath. (e) It was possible by a scientific calculation to estimate the breath alcohol concentration at a time prior to the provision of the breath test but it could only be approximate. (f) The result of scientific tests and calculation by a forensic scientist based on the information contained in (c) above revealed that the defendant would have eliminated between 15 and 37 microgrammes of alcohol per 100 millilitres of breath between the time of the accident and the provision of the breath specimen, and thus was likely to have had a breath alcohol concentration of between 43 and 65 microgrammes per 100 millilitres of breath at the time of the accident.

E The defendant contended that the only evidence of the proportion of alcohol in his breath at the time of the accident was that provided by the scientific calculation which revealed merely that he was likely to have had a breath alcohol concentration of between 43 and 65 microgrammes per 100 millilitres of breath; that evidence of a likelihood was not sufficient to enable the justices to be sure beyond reasonable doubt of the proportion of alcohol in the breath.

G The prosecutor contended that in order to find the defendant guilty the justices had to be certain beyond reasonable doubt that the proportion of alcohol in the defendant's breath exceeded the prescribed limit of 35 microgrammes in 100 millilitres of breath and that the justices did not have to be certain of the exact proportion.

H The justices were of opinion that (a) the scientific tests and calculation could not give the precise level of the proportion of alcohol in the breath. (b) The use of the word "likely" meant that the tolerance around the deduced level provided a range reaching down to 43 microgrammes and up to 65 microgrammes, and not that the level could have been higher or lower than those extremities. (c) The lowest level of the range quoted was well in excess of the permitted level of alcohol in

the blood. (d) The justices were satisfied beyond reasonable doubt that the level of alcohol in the defendant's breath exceeded the prescribed limit of 35 microgrammes in 100 millilitres of breath; and accordingly they convicted him of the offence, fined him £150, disqualified him for 12 months and ordered the particulars to be endorsed on his driving licence.

The defendant appealed. The question for the opinion of the court was (a) whether section 10 of the Road Traffic Act 1972 entitled the justices to admit and consider evidence of the amount of alcohol in the defendant's breath at the relevant time by a process of back calculation from the sample of breath actually obtained when that sample was below the prescribed limit; (b) whether the justices were entitled to feel sure of the defendant's guilt beyond reasonable doubt when the only evidence in support of the prosecution in relation to the amount of alcohol in the defendant's breath was that of the forensic scientist, who, after an estimation known as the "countback" procedure, calculated that "Mr. Gould is likely to have had a breath alcohol concentration of between 43 and 65 microgrammes per 100 millilitres at the time of the incident."

Dominic Roberts for the first defendant.

Richard O'Rorke for the second defendant.

Roger D. H. Smith for the prosecution.

Cur. adv. vult.

28 July. MANN J. read the following judgment of the court. There are before the court two appeals by way of case stated. The defendant in the first appeal is Stephen Gary Gumbley and the prosecutor is Thomas Joseph Cunningham, who is a police officer. The defendant in the second appeal is Steven Adrian Gould and the prosecutor is Chief Inspector Castle. The first case was stated by Judge Ross Q.C. and a justice in respect of their adjudication as a Crown Court sitting at Birmingham on 18 November 1986 when they dismissed the first defendant's appeal against his conviction by Birmingham justices that he on 7 May 1985 did drive a motor car after consuming so much alcohol that the proportion thereof exceeded the prescribed limit contrary to section 6(1) of the Road Traffic Act 1972 as substituted by section 25 of, and Schedule 8 to, the Transport Act 1981. The second case was stated by Hertford justices sitting at St. Albans in respect of their adjudication as a magistrates' court on 16 January 1987. On that day the justices convicted the second defendant of an offence against section 6(1) of the Act of 1972 as so substituted being an offence which was alleged to have been committed on 3 July 1986.

The two cases raise a common and important question. The second case has a discrete point which is of no general significance.

The common and important question is whether evidence can be admitted to show that a defendant's alcohol level was at the time of an alleged drink and driving offence higher than that shown in an analysis. The question cannot be understood without reciting the legislative context in which it has arisen. The context is that of some of the provisions substituted by the Transport Act 1981 for sections 6 to 12 of the Road Traffic Act 1972 as originally enacted. Section 6(1) now provides:

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A "If a person—(a) drives or attempts to drive a motor vehicle on a road or other public place; or (b) is in charge of a motor vehicle on a road or other public place; after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he shall be guilty of an offence."

B The "prescribed limit" is interpreted in the substituted section 12(2) of the Act of 1972 in these terms:

" 'the prescribed limit' means, as the case may require—(a) 35 microgrammes of alcohol in 100 millilitres of breath; (b) 80 milligrammes of alcohol in 100 millilitres of blood; or (c) 107 milligrammes of alcohol in 100 millilitres of urine . . . "

C Section 10 now provides:

D "(1) The following provisions apply with respect to proceedings for an offence under . . . section 6 of this Act. (2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen; but if the proceedings are for an offence under section 6 of this Act . . . in a case where the accused is alleged to have been unfit through drink, the assumption shall not be made if the accused proves—(a) that he consumed alcohol after he had ceased to drive, attempt to drive or be in charge of a motor vehicle on a road or other public place and before he provided the specimen; and (b) that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit . . . "

F The facts to which the legislative provisions are to be applied are as follows. In the first appeal the defendant was driving his motor vehicle on 7 May 1985 when at 11.15 p.m. he was involved in a fatal accident. At 3.35 a.m. on the next day he gave a specimen of blood in accord with the statutory procedure (under section 8) and on analysis the specimen was found to give a concentration of not less than 59 milligrammes of alcohol in 100 millilitres of blood. The concentration was thus below the prescribed limit. However, the prosecutor gave evidence to the effect that a person of the defendant's height, age, weight and physical condition would eliminate alcohol from his blood stream at between 10 and 25 milligrammes per 100 millilitres per hour and that accordingly the concentration of alcohol in his body at the time of the accident would have been in the region of 120 to 130 milligrammes per 100 millilitres of blood. That concentration is above the limit. The justices held that the prosecutor's evidence was admissible, accepted it, convicted the defendant, fined him £200, endorsed his licence and imposed a 12 month disqualification. The Crown Court dismissed the defendant's appeal and posed the following question for the opinion of this court:

"whether on a true construction of sections 6(1) and 10(2) of the Road Traffic Act 1972, as substituted, the prosecutor is entitled to adduce evidence other than by way of the specimen of breath or blood provided by the accused in order to prove the proportion of alcohol in the accused's breath or blood at the material time."

In the second appeal, the defendant was driving his motor vehicle on 3 July 1986 when at 11.58 p.m. he was involved in an accident. At 3.45 a.m. on the next day he gave two specimens of breath in accord with the statutory procedure. On analysis the lower of the two specimens showed 28 microgrammes of alcohol in 100 millilitres of breath. The concentration was thus below the prescribed limit. However, the prosecutor led evidence to the effect that the defendant would have eliminated between 15 and 37 microgrammes of alcohol per 100 millilitres of breath between the time of the accident and the provision of the specimen and was thus "likely" to have had a breath alcohol concentration of between 43 and 65 microgrammes per 100 millilitres of breath at the time of the accident. That concentration is above the limit. The justices held that the prosecutor's evidence was admissible, accepted it, convicted the defendant, fined him £150, endorsed his licence and imposed a 12 month disqualification. The justices pose the following questions for the opinion of this court:

"(a) whether the wording of section 10 of the Road Traffic Act 1972 entitled us to admit and consider evidence of the amount of alcohol in the defendant's breath at the relevant time by a process of back calculation from the sample of breath actually obtained when that sample was below the prescribed limit; (b) whether we are entitled to feel sure of the defendant's guilt beyond reasonable doubt when the only evidence in support of the prosecution in relation to the amount of alcohol in the defendant's breath was that of the forensic scientist, who after an estimation known as the 'countback' procedure, calculated that 'Mr. Gould *is likely* to have had a breath alcohol concentration of between 43 and 65 microgrammes per 100 millilitres at the time of the incident."

The question of the admissibility of evidence such as was in each case admitted for the prosecution has not previously been before this court. In *Smith v. Geraghty* [1986] R.T.R. 222 the Divisional Court held that a defendant could lead evidence to show that but for an alcoholic drink which he thought was non-alcoholic, he would have been below the prescribed limit at the time of driving and that accordingly there was a special reason for not imposing a disqualification: see section 93(1) of the Act of 1972. Glidewell L.J. said, at p. 232:

"Going back to the level of alcohol in the blood at the time of driving is clearly permissible but only practicable, in my judgment, provided that there is reasonably clear, straightforward and relatively simple evidence to show it. In other circumstances, though, as I say, it is for them, I would take the view that justices ought not to be drawn into any detailed scientific calculation."

The point in *Smith v. Geraghty* is plainly different from that which we now have to decide, but the cautionary words used by Glidewell L.J. about the production and reliance upon expert evidence is a matter which is of concern to us in the present case.

Counsel on behalf of the defendants showed us the provisions previous to the existing legislation. The first provision was section 1(1) of the Road Safety Act 1967. It provided:

"If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a

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A laboratory test for which he subsequently provides a specimen under section 3 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be liable . . .”

B This provision was substantially reproduced as the original section 6(1) of the Act of 1972. In *Rowlands v. Hamilton* [1971] 1 W.L.R. 647 the House of Lords held that the prosecution could not adduce evidence to show what the blood alcohol concentration of a defendant would have been at the time of driving when he had consumed alcohol after ceasing to drive but before providing a specimen. Lord Guest said, at pp. 653–654:

C “I am sure that the Crown were right in admitting that in the case where the ‘driver’ consumes alcohol after he ceases to drive the alcohol content at the time of the test could not be taken without adjustment to allow for the whiskies subsequently consumed. Otherwise, a person might have driven and taken no alcohol before driving, but he would be liable to be convicted if, after he has ceased to drive, he had consumed alcohol which resulted in the blood specimen showing an excess over the prescribed limit. The mischief aimed at by the statute was drinking before driving, not drinking after driving.

D “For the Crown to succeed it is, therefore, necessary for them to show that the adjustment made to eliminate the post-driving alcohol content could legitimately be made under the section. It is at this point that the words in section 1(1) ‘as ascertained from a laboratory test’ become important. Detailed provisions are made in section 3 regarding laboratory tests and ‘the prescribed limit’ referred to in section 1(1) is given as the arithmetical proportion of 80 milligrams of alcohol in 100 millilitres of blood. These provisions make it clear, to my mind, that the Act intended an automatic calculation to be made by means of a chemical analysis as to whether an offence had been committed. It is against the background of the disputes in the courts under the previous Road Traffic Acts as to the effect of alcohol on an individual’s capacity to drive that Parliament has in the Act of 1967 provided for automatic proof of guilt by the analysis. For Dr. Dolan to make the adjustment of the proportions it would be necessary to go outside the ‘laboratory test’ provided in section 1(1) and make calculations based upon certain assumptions as to the individual concerned and the time factor. It would ultimately depend upon the expert opinion of the doctor or chemist. I am convinced that Parliament never intended such calculations to be made and that these calculations would not be justified by the terms of the section. I am not satisfied that the section is ambiguous, but if it were I should unhesitatingly take the construction most favourable to the subject.

H “We were pressed by the Crown that if the respondent’s contention were right it would leave a loophole in the Act through which the ‘hip-flask’ driver, as he has been described, would escape. This may be so, but if the Act is not watertight then it is for Parliament and not the courts to supply the omission. I am more impressed by the argument for the respondent that if the Crown’s argument were sustained it would result in cases such as the present in lengthy arguments and evidence before the court, which would not lead to the clarity in which the law should be expressed.”

The "hip-flask" driver is now given the burden of establishing that his specimen revealed a level above the prescribed limit because of the consumption of alcohol after ceasing to drive: see section 10(2) of the Act of 1972, as substituted. It was urged upon us by the defendants that we should construe the substituted provisions in the Act of 1981 as doing no more than eliminate the loophole disclosed by *Rowlands v. Hamilton* [1971] 1 W.L.R. 647. We are driven to say we cannot agree. The new section 6(1) is different from the old. The question is now simply as to the proportion of alcohol at the moment of driving or of being in charge. The old section 6(1) raised the quite different question as to excess at the time of providing the specimen which was the subject of the laboratory test. Evidence which is material to the question of what was the proportion of alcohol at the moment of driving must be admissible. The provisions of section 10(2) do not preclude evidence other than that revealed by a specimen to show a greater level of alcohol although, subject to the "hip-flask" defence, the specimen will always provide a "not less" or base figure. If that figure is above the prescribed limit, other evidence is unnecessary to establish the offence.

Our conclusion means that those who drive whilst above the prescribed limits cannot necessarily escape punishment because of the lapse of time. However, our conclusion also means that in cases where a sample provided a substantial period of time after driving has ceased shows a level below the prescribed limit justices may find themselves confronted with evidence of a complicated and scientific nature. Back calculations involve a great number of factors: see *Wilkinson's Road Traffic Offences*, 13th ed. (1987), vol. 1, para. 4.75. This is regrettable but inevitable. We think it needs to be said, therefore, that in our view the prosecution should not seek to rely on evidence of back calculation save where that evidence is easily understood and clearly persuasive of the presence of excess alcohol at the time when a defendant was driving. Moreover, justices must be very careful especially where there is conflicting evidence not to convict unless, upon the scientific and other evidence which they find it safe to rely on, they are sure an excess of alcohol was in the defendant's body when he was actually driving as charged.

There remains the second question in the second appeal which relates to the justices' acceptance of evidence that it was "likely" that at the time of the accident the defendant's breath alcohol concentration was above the prescribed limit. We are unable to proceed on the basis that acceptance of evidence that a level was "likely" is equivalent to being satisfied so as to be sure that it was.

The result is accordingly that in the first appeal the question is answered "yes" and the appeal is dismissed. In the second appeal the first question is answered "yes" and the second "no" with the consequence that the appeal is allowed. We should add that in the second appeal the defendant was not offered an opportunity to provide a specimen of blood or urine which he should have been as the lower of his two specimens of breath contained less than 50 microgrammes of alcohol in 100 millilitres of breath: see section 8(6) of the Act of 1972, as substituted. The specimen of breath, on which the back calculation was based, should not therefore have been admitted: see *Anderton v. Lythgoe* [1985] 1 W.L.R. 222. The point was not taken before the

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A justices and understandably is not raised in the case. Had we not allowed the appeal on other grounds, the wrongful admission might have had to be considered elsewhere.

First appeal dismissed. Second appeal allowed.

Legal aid taxation of second defendant's costs.

Certificate under section 1 of the Administration of Justice Act 1960 in first appeal that point of law of public importance, namely, "Whether on a true construction of sections 6(1) and 10(2) of the Road Traffic Act 1972, as amended, the prosecutor is entitled to adduce evidence other than by way of the specimen of breath or blood provided by the accused in order to prove the proportion of alcohol in the accused's breath or blood at the material time," involved in decision. Leave to appeal refused.

Solicitors: Cremin Small & Co.; Crown Prosecution Service, Birmingham; Wynter Davies & Lee, Hertford; Crown Prosecution Service, St. Albans.

[Reported by ROBERT RAJARATNAM, ESQ., Barrister-at-Law]

[HOUSE OF LORDS]

A

CRACKNELL APPELLANT

AND

WILLIS RESPONDENT

1987 July 8;
Nov. 5Lord Keith of Kinkel, Lord Brandon of Oakbrook,
Lord Griffiths, Lord Oliver of Aylmerton
and Lord Goff of Chieveley

B

Road Traffic—Breath specimen for analysis—Lion Intoximeter 3000—Challenge to validity of device by motorist wishing to adduce evidence of amount of alcohol consumed—Whether evidence admissible—Road Traffic Act 1972 (c. 20), s. 10(2) (as substituted by Transport Act 1981 (c. 56), s. 25(3), Sch. 8)

C

Road Traffic—Breath specimen for analysis—Failure to provide specimen—One specimen of breath only provided at police station for analysis when two specimens required—Refusal to provide second specimen of breath—Whether failure to provide breath specimen for analysis alternative to excess alcohol charge—Whether offences mutually exclusive—Road Traffic Act 1972 (c. 20), ss. 6(1), 8(7), 10(2) (as substituted by Transport Act 1981 (c. 56), s. 25(3), Sch. 8)

D

The defendant, a motorist, was asked to take a roadside breath test. The test proved positive. He was arrested and at the police station he was asked to provide a specimen of breath on a Lion Intoximeter. The specimen which he provided gave a reading of 78 microgrammes of alcohol in 100 millilitres of breath, a reading over twice the permitted maximum. When he was asked to give a further specimen the defendant did not blow properly into the machine which aborted the test. The defendant failed to follow the instructions given to him as to the proper method of blowing into the mouthpiece of the machine and four attempts to obtain a specimen were aborted by the machine. The defendant then refused to provide a further specimen. The defendant was charged with two offences, namely, contravening section 6(1) of the Road Traffic Act 1972, as substituted, and section 8(7) of the Road Traffic Act 1972, as substituted.¹ The justices convicted the defendant of both offences. On appeal by the defendant by way of case stated, the justices stated the following questions for the opinion of the High Court: (i) Whether they were correct in following *Hughes v. McConnell* [1985] R.T.R. 244 in prohibiting the defendant from adducing evidence of the amount of alcohol which he had consumed, in order to show that the Lion Intoximeter machine was defective, and (ii) whether they were correct in following *Duddy v. Gallagher* [1985] R.T.R. 401 in convicting the defendant of both the offence of failing to supply a specimen of breath and actually supplying a specimen of breath which exceeded the prescribed limit. The Divisional Court of the Queen's Bench Division upheld the justices' decision and answered both questions in the affirmative.

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On appeal by the defendant:—

Held, allowing the appeal in part, (1) that evidence, which if believed, provided material from which the inference could

¹ Road Traffic Act 1972, s. 8(7), as substituted; post, p. 1087B.
S. 10(2), as substituted; post, pp. 1087H—1088B.

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A reasonably be drawn that the device was unreliable was admissible, since the language of section 10(2) of the Road Traffic Act 1972, as substituted, did not confine the challenge to the validity of a device to a particular type of evidence, and that accordingly, in the circumstances, the justices erred in refusing to allow the defendant to adduce evidence of the amount of alcohol he had consumed (post, pp. 1084B-D, 1095E, 1096E-F, H, 1097C, H—1098A, 1099D-F).

B *Hughes v. McConnell* [1985] R.T.R. 244, D.C. and *Price v. Nicholls* [1986] R.T.R. 155, D.C. overruled.

(2) That the offences prescribed by section 6 and section 8(7) of the Road Traffic Act 1972, as substituted, were mutually exclusive and that the defendant should not have been convicted of an offence under section 6(1) on the evidence of only one specimen of breath; but that the error of the justices in refusing to allow the defendant to adduce further evidence to challenge the validity of the device was no ground for quashing his conviction for refusing, without reasonable excuse, to provide a specimen of breath contrary to section 8(7) (post, pp. 1084B-D, 1088D-F, 1089E-G, 1097C, G-H).

Duddy v. Gallagher [1985] R.T.R. 401, D.C. and *Burridge v. East (Note)* [1986] R.T.R. 328, D.C. overruled.

D *Per curiam*. In assessing the penalty for refusing to provide a specimen of breath the magistrates are entitled to take into account any evidence that indicates the motorist's consumption of alcohol and that would include the result of the analysis of the first breath specimen if he unreasonably refuses to provide a second specimen (post, p. 1089E-G).

Decision of the Divisional Court of the Queen's Bench Division affirmed in part.

E

The following cases are referred to in their Lordships' opinions:

Burridge v. East (Note) [1986] R.T.R. 328, D.C.

Duddy v. Gallagher [1985] R.T.R. 401, D.C.

Fox v. Chief Constable of Gwent [1986] A.C. 281; [1985] 1 W.L.R. 1126; [1985] 3 All E.R. 392, H.L.(E.)

F *Howard v. Hallett* [1984] R.T.R. 353, D.C.

Hughes v. McConnell [1985] R.T.R. 244, D.C.

Lucking v. Forbes [1986] R.T.R. 97, D.C.

McGrath v. Field, The Times, 20 November 1986, D.C.

Newton v. Woods [1987] R.T.R. 41, D.C.

Price v. Nicholls [1986] R.T.R. 155, D.C.

G

The following additional case was cited in argument:

Reg. v. Skegness Magistrates' Court, Ex parte Cardy [1985] R.T.R. 49, D.C.

APPEAL from the Divisional Court of the Queen's Bench Division.

H This was an appeal by leave of the House of Lords (Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Oliver of Aylmerton) by the defendant, Robert Peter Cracknell, from the judgment dated 20 October 1986 of the Divisional Court of the Queen's Bench Division (Ralph Gibson L.J. and McNeill J.) dismissing the defendant's appeal by way of case stated against his conviction by Bromley justices on 7 April 1986, on informations preferred by the prosecutor, Police Constable Willis, of two offences, namely: (i) driving a motor vehicle on a road

after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 6(1)(a) of the Road Traffic Act 1972, as amended by the Transport Act 1981, and (ii) failing, without reasonable excuse, to provide a specimen contrary to section 8(7) of the same Act.

The facts are stated in the opinion of Lord Griffiths.

Keith Knight for the defendant.

Ann Goddard Q.C. and *Hilton Harrop-Griffiths* for the prosecutor.

Their Lordships took time for consideration.

5 November. LORD KEITH OF KINKEL. My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Griffiths. I agree with it, and for the reasons he gives would allow the appeal to the extent which he proposes, and dismiss it as regards the conviction under the substituted section 8(7) of the Road Traffic Act 1972.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Griffiths. I agree with it, and for the reasons which he gives I would allow the appeal to the extent proposed by him.

LORD GRIFFITHS. My Lords, on 13 February 1986 the appellant was followed by the police because of the speed at which he was driving. When he stopped outside his house he was asked by the police to take a roadside breath test. The test proved positive, he was arrested and taken to Orpington Police Station. At the police station he was asked to provide a specimen of breath on a Lion Intoximeter. He provided a specimen which gave a reading of 78 microgrammes of alcohol in 100 millilitres of breath, a reading well above the permitted maximum. When he was asked to give a further specimen the appellant did not blow properly into the machine which aborted the test. The police sergeant conducting the test explained to the appellant that he should blow continuously into the mouthpiece and asked for a further specimen. The appellant did not follow this instruction: at the next and subsequent attempts, he blew so that some of his breath went into the machine and some escaped through his hands. Four such attempts to obtain a specimen were aborted by the machine. The appellant then refused to provide a further specimen.

On these facts he was convicted on 7 April 1986 by the Bromley magistrates of the offence of driving a motor vehicle on a road with excess alcohol in his breath contrary to section 6(1) of the Road Traffic Act 1972, as substituted by the Transport Act 1981, for which he was fined £150 and disqualified from driving for 18 months and of the offence of failing to provide a specimen of breath contrary to section 8(7) of the Road Traffic Act 1972, as substituted by the Transport Act 1981, for which he was also fined £150 and disqualified for driving for 18 months.

At the request of the appellant the magistrates stated a case for the opinion of the High Court upon the following two questions:

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A "1. Whether we were correct in following the case of *Hughes v. McConnell* [1985] R.T.R. 244 in prohibiting the appellant from adducing evidence of the amount of alcohol which he had consumed, in order to show that the Lion Intoximeter machine was defective, and 2. Whether we were correct in following the case of *Duddy v. Gallagher* [1985] R.T.R. 401 in convicting the appellant of both the
B offence of failing to supply a specimen of breath and actually supplying a specimen of breath which exceeded the prescribed limit."

C The Divisional Court upheld the decision of the magistrates and answered both questions in the affirmative. In so doing they followed the previous decisions of the Divisional Court in *Hughes v. McConnell* [1985] R.T.R. 244 and *Duddy v. Gallagher* [1985] R.T.R. 401. The appellant now appeals to your Lordships' House and submits that both these previous decisions were wrongly decided.

D It will be convenient to deal first with the second question. It is common knowledge that in times past juries were very reluctant to convict motorists of the offence of driving a motor vehicle on a road when unfit to drive through drink or drugs. Why this should have been so I do not know, perhaps the public conscience had not yet fully awoken to the menace of the drink-affected driver, perhaps too many jurors in those days thought that they might one day be in the same predicament as the defendant and were over-confident of their own ability to drink and drive, perhaps the public did not yet realise that
E relatively small quantities of alcohol seriously affect the reaction times of most people. Whatever the reasons, those with experience of such cases know that they were invariably bitterly contested and it was unlikely that a conviction would be secured unless the defendant was very drunk. As the law was clearly failing to provide an adequate deterrent to drinking and driving, Parliament decided to introduce in the Road Safety Act 1967 an absolute standard and to provide that it would in
F future be an offence to drive with more than a permitted proportion of alcohol in the blood, and to make provision for laboratory tests of blood or urine to establish the proportion of alcohol in the blood. The level of alcohol consumption which corresponded to the level at which Parliament set the limit, although no doubt justifying the view that anyone exceeding the limit should not be driving, was undoubtedly much lower than that
G required to secure a conviction of the old offence and much easier to prove. When the Act of 1967 was replaced by the Road Traffic Act 1972 the old offence remained as section 5 and the new offence became section 6 of the Act. In practice from that time onward nearly all cases of drunken driving have been prosecuted under section 6 rather than section 5 of the Act of 1972. For some years the offence was proved by
H producing an analysis of a blood or urine sample provided by the motorist, but then a new device was invented that enabled the proportion of alcohol in the breath to be determined by immediate analysis. Provided that such a machine is reliable it has obvious advantages over the use of urine or blood samples. It can be operated by a trained police officer and prints out an immediate analysis of the breath, cutting out the delay involved in the laboratory analysis of urine and blood samples and the attendance of a doctor in the case of a blood sample.

But the motorist is at the mercy of the machine in the sense that he has no means of checking its performance, whereas in the case of a urine or blood sample, the statutory provisions require that the sample is divided into two, and one half given to the motorist who can, if he wishes, have it analysed himself to check the accuracy of the analysis provided by the prosecution. It was no doubt with these considerations in mind that Parliament provided certain safeguards to protect the motorist when it introduced the use of breath testing devices by the Transport Act 1981.

Section 25(3) of the Transport Act 1981 substituted the sections set out in Schedule 8 of the Act for sections 6 to 12 of the Act of 1972.

Section 6 now makes it an offence to drive with more than the prescribed limit of alcohol in breath, blood or urine. It is no longer necessary for an analyst to equate the percentage of alcohol in the urine to the alcohol in the blood. Section 12 provides that the prescribed limits are 35 microgrammes of alcohol in 100 millilitres of breath, 80 milligrammes of alcohol in 100 millilitres of blood and 107 milligrammes of alcohol in 100 millilitres of urine.

The substituted section 8 I must set out in full:

“(1) In the course of an investigation whether a person has committed an offence under section 5 or section 6 of this Act a constable may, subject to the following provisions of this section and section 9 below, require him—(a) to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State; or (b) to provide a specimen of blood or urine for a laboratory test. (2) A requirement under this section to provide specimens of breath can only be made at a police station. (3) A requirement under this section to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless—(a) the constable making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required; or (b) at the time the requirement is made a device or a reliable device of the type mentioned in subsection (1)(a) is not available at the police station or it is then for any other reason not practicable to use such a device there; or (c) the suspected offence is one under section 5 of this Act and the constable making the requirement has been advised by a medical practitioner that the condition of the person required to provide the specimen might be due to some drug; but may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide two specimens of breath. (4) If the provision of a specimen other than a specimen of breath may be required in pursuance of this section the question whether it is to be a specimen of blood or a specimen of urine shall be decided by the constable making the requirement, except that if a medical practitioner is of the opinion that for medical reasons a specimen of blood cannot or should not be taken the specimen shall be a specimen of urine. (5) A specimen of urine shall be provided within one hour of the requirement for its provision being made and after the provision of a previous specimen of urine. (6) Of any two specimens of breath provided by any person in pursuance of this

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A section that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded; but if the specimen with the lower proportion of alcohol contains no more than 50 microgrammes of alcohol in 100 millilitres of breath the person who provided it may claim that it should be replaced by such a specimen as may be required under subsection (4), and if he then provides such a specimen neither specimen of breath shall be used. (7) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section shall be guilty of an offence. (8) On requiring any person to provide a specimen in pursuance of this section a constable shall warn him that a failure to provide it may render him liable to prosecution. (9) The Secretary of State may by regulations substitute another proportion of alcohol in the breath for that specified in subsection (6)."

D The terms of subsection (3) make it clear that henceforth the breath specimen is to be the principal means of establishing the quantity of alcohol that the motorist had consumed for the purpose of a prosecution under section 6. It is only if a reliable machine is not available for use at the police station or there are medical reasons why the motorist cannot supply a specimen of breath that the police can demand a specimen of urine or blood. But there are the following safeguards introduced for the protection of the motorist:

E 1. The device must be of a type approved by the Secretary of State: subsection (1). 2. Two specimens of breath must be taken and the specimen with the lower proportion of alcohol in the breath used and the other disregarded: subsection (6). This is a precaution obviously introduced to give the motorist the benefit of the doubt in the case of any variation in the performance of the machine; and in my view it must follow that it was not intended that a motorist should be convicted on the evidence of only one specimen of breath. 3. If the machine indicates that the motorist is over the prescribed limit, but not excessively so, then the motorist can opt to give a specimen of blood or urine which replaces the breath specimens and neither breath specimen shall be used: subsection (6) and subsection (4). This provision coupled with the provision that only the lower specimen should be used appear to indicate a recognition of the fact that "trial by machine" is an entirely novel concept and should be introduced with a degree of caution. 4. That the particular machine used should be reliable, which I take to be implicit in the wording of subsection (3)(b) and which must, in any event, be read into the section, for it would be unthinkable that it could be intended that anyone should be convicted by an unreliable machine: see the decision of the Divisional Court in *Newton v. Woods* [1987] R.T.R. 41 to this effect.

H The other relevant section is section 10:

"(1) The following provisions apply with respect to proceedings for an offence under section 5 or section 6 of this Act. (2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged

offence was not less than in the specimen; but if the proceedings are for an offence under section 6 of this Act, or for an offence under section 5 of this Act in a case where the accused is alleged to have been unfit through drink, the assumption shall not be made if the accused proves—(a) that he consumed alcohol after he had ceased to drive, attempted to drive or be in charge of a motor vehicle on a road or other public place and before he provided the specimen; and (b) that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit and, if the proceedings are for an offence under section 5 of this Act, would not have been such as to impair his ability to drive properly.”

The object of the legislation is to provide a relatively simple way of establishing whether a motorist is driving after drinking too much, and if he is doing so to punish him. The motorist can of course frustrate the procedures by refusing to provide the necessary specimen. But if he does so without reasonable excuse he commits an offence under section 8(7) and is in effect treated as though he had driven when exceeding the prescribed limit, being subject to the same penalties as if he had committed an offence under section 6.

The appellant submits that the two offences were intended to be alternatives and that the Act should be construed so as to provide that they are mutually exclusive. Otherwise, as the appellant points out, the man who refuses to give a specimen because he knows he has drunk far too much, is better off than the man who has drunk much less and to his surprise finds he is over the limit on the first breath specimen and then panics and refuses the second specimen. The first man can only be prosecuted and convicted for a section 8(7) offence but if the present decision is right the second man can be convicted and punished under both section 6 and section 8(7). I am unwilling to think that such a result can have been intended when the Act of 1981 was passed. I must therefore consider whether *Duddy v. Gallagher* [1985] R.T.R. 401 was correctly decided.

The facts of that case were that the defendant was stopped when he was driving the wrong way down a one way street. His breath smelt strongly of alcohol. Despite three attempts he failed to provide a sample of breath for a roadside breath test. He was arrested and taken to the police station. He gave a specimen of breath on the Lion Intoximeter 3000 which displayed a reading of 55 microgrammes, the significance of which was explained to the defendant. The defendant then failed to provide a second specimen of breath. He was convicted of failing to provide a specimen of breath for the roadside breath test contrary to section 7 of the Act of 1972, as amended, of driving when the proportion of alcohol in his breath exceeded the prescribed limit in breach of section 6(1), and failing to provide a specimen of breath contrary to section 8(7). The Divisional Court upheld these convictions accepting the submission of the prosecution that provided the *first* specimen of breath was taken in accordance with the statutory procedure laid down in section 8 of the Act of 1972, it then became admissible to establish the section 6 offence by virtue of the provisions of section 10(2).

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A My Lords, I am unable to accept this construction of the Act. As
Lord Bridge of Harwich pointed out in *Fox v. Chief Constable of Gwent*
[1986] A.C. 281, 297 section 10(2) was introduced by the Act of 1981 in
order to deal with what had become known as the "hip flask defence."
B A motorist fearing that he was about to be breathalysed would drink
from a flask after he had stopped driving and then claim that the
subsequent analysis of blood or urine reflected this intake of alcohol and
was not a reliable guide to the alcohol in his system at the time he was
driving. In many cases the prosecution had difficulty in satisfying the
magistrates that they had discharged the burden that lay upon them to
show that despite this extra drink the accused nevertheless must have
C already been over the limit when he was driving. The effect of section
10(2) is to reverse the burden of proof if an accused raises this form of
defence. The magistrates must first determine the proportion of alcohol
in the relevant specimen, and having done this they are to assume that
at the time of the offence, i.e. when he was driving or in charge of a
motor vehicle, he had not less than that proportion of alcohol in his
breath, blood, or urine. This assumption can however be displaced if
the motorist proves that but for the extra alcohol he had drunk after the
D alleged offence he would not have been over the prescribed limit or
unfit to drive. The specimen which the magistrates take into account,
for the purpose of determining the proportion of alcohol in his breath,
blood or urine, must be a specimen which it was intended should be
relied upon by the court pursuant to the provisions of section 8. I have
E already pointed to the safeguards in section 8 which are designed to give
protection to the motorist against possible malfunction of the machine.
One of these is that two specimens of breath should be taken and only
the lower specimen should be used. The specimen which the magistrates
are entitled to rely upon for the purposes of determining the proportion
of alcohol in the breath under section 10(2) is the lower of the two
specimens. If only one specimen of breath has been taken it is not to be
F relied upon for the purposes of a conviction, and is not a specimen
which the magistrates are entitled to take into account under section
10(2).

I therefore consider that *Duddy v. Gallagher* [1985] R.T.R. 401 was
wrongly decided and that *Burridge v. East (Note)* [1986] R.T.R. 328
which also held that a motorist could be convicted of an offence under
section 6(1) on the evidence of one specimen of breath was also wrongly
G decided.

I would therefore hold that the appellant ought not to have been
convicted under section 6(1) in the present case. I would add, however,
that in assessing the penalty to be imposed for refusing to provide a
specimen of breath the magistrates are entitled to take into account any
evidence that indicates the motorist's consumption of alcohol and this
would include the result of the analysis of the first breath specimen if he
H unreasonably refuses to provide a second specimen.

I turn now to the first question in the case, which to my mind raises
far greater difficulties and may have disturbing consequences. The
question is how far, if at all, and by what evidence is a motorist entitled
to challenge the reliability of the machine which analysed his breath. In
the present case the appellant wished to give evidence of his consumption
of alcohol prior to his arrest for the purpose of attacking the reliability

of the machine. Presumably he was going to submit that as he had drunk so little the magistrates should draw the inference that the machine which, on the first specimen had shown his breath to contain over double the prescribed limit of alcohol, must have been unreliable and inaccurate. In his printed case the appellant puts it thus:

“Such evidence would have tended to show that the reading given in respect of the single breath sample was suspect and that the machine was defective, thereby providing support for the defendant’s case that the malfunctioning of the machine was the cause of his supplying only one specimen of breath.”

The magistrates who had heard no technical evidence to suggest that the machine was not working correctly held themselves bound by *Hughes v. McConnell* [1985] R.T.R. 244 and refused to allow the appellant to give evidence of the alcohol he had consumed.

In *Hughes v. McConnell* the magistrates had acquitted the defendant of a charge of driving with more than the prescribed limit of alcohol in his breath contrary to section 6(1). It was a remarkable decision in the light of the facts set out in the stated case, which were as follows:

“The justices heard the information on 18 April 1984 and found the following facts. (a) On 16 September 1983 the defendant went to the Dun Cow, Trench where he consumed a number of Coca-Colas (non-alcoholic drink), and then three pints of bitter shandy in the company of his wife and another couple, Mr. & Mrs. Allen. (b) The defendant left the public house with his wife between 10.34 p.m. and 10.50 p.m. and drove his car home. (c) At 11.05 p.m. a police constable on mobile patrol duty, together with a special constable noticed the defendant’s car, a blue Avenger, several times swerve across the white lines in the middle of the road then swerve back and clip the kerb. The constable stopped the defendant’s car and on speaking to the driver noticed that the defendant’s breath smelt of intoxicating liquor and that his speech was slurred. The constable requested the defendant to get out of the car and asked him to provide a specimen of breath for a breath test. The device used by the constable was an Alcotest (R) 80, tube and plastic bag. (d) The defendant’s breath test was found to be positive and he was cautioned then conveyed to Wellington police station to provide a specimen of breath for analysis. The arresting officers considered he was drunk, one saying he was very drunk. (e) At the police station at 12.03 a.m. the defendant provided two specimens of breath in the Lion Intoximeter 3000 device and the following readings were produced:

“First calibration check:	34
BLANK	0
First reading:	125
BLANK	0
Second reading:	120
BLANK	0
Second calibration check:	35

A "The station sergeant operating the device considered that the
defendant was very drunk; he particularly remembered him as he
was so drunk. (f) The defendant was then placed in a police cell
and was reported and released from the police station at 03.40 a.m.
having at that time provided a negative breath test on the Alcotest
B (R) 80 device. (g) The defendant had only drunk Coca-Cola and
three pints of bitter shandy. (h) The defendant was sober when he
called at his father's house in Brookhill Crescent, Ketley, in the
early hours of the morning after his release from the police station.
(i) The defendant's driving was normal when he drove from his
father's house back to his home in Haybridge Avenue, Hadley, and
on the subsequent journey to Anglesey the defendant was awake
and talking. (j) Having heard expert evidence on behalf of the
C prosecutor, the justices found the following facts: (i) that to attain a
reading of 120 microgrammes on the Lion Intoximeter 3000 the
subject would have had to consume between four and five pints of
beer beyond the 1½ apparently consumed; (ii) that, based on the
information received in this particular case, that the defendant had
only had three pints of bitter shandy—1½ pints of beer—then in the
expert's opinion the defendant could not be over the legal limit of
D 35 microgrammes; (iii) that a subject who gave a reading of 120 on
the Lion Intoximeter 3000 device would be so under the influence
of alcohol as to be in a stupor, and at the earliest would be sober at
9.00 a.m., but more likely not until 1.00 p.m. . . . Upon hearing the
evidence of the defendant and his witnesses the justices could not
be satisfied that the reading produced by the Lion Intoximeter 3000
E device was accurate and therefore, were not satisfied beyond all
reasonable doubt that the defendant had consumed so much alcohol
as to exceed the prescribed limit; they, therefore, dismissed the
information. . . . The question for the opinion of the court was:
1. Where a defendant is charged with driving a motor vehicle on a
road after consuming so much alcohol that the proportion of it in
his breath exceeds the prescribed limit contrary to section 6 of the
F Road Traffic Act 1972, as substituted by section 25 of, and Schedule
8 to, the Transport Act 1981, may he challenge the validity of a
statement automatically produced by an authorised device, by which
the proportion of alcohol in a specimen of his breath was measured,
by inferentially suggesting that it could not have been possible for
the defendant to have consumed so much alcohol as would have
G been required to produce this figure by reason of: (i) evidence of
the amount of alcohol he had consumed prior to providing the
specimen; (ii) evidence that he provided a negative specimen of
breath for a breath test within a few hours of providing a positive
specimen; (iii) evidence that he appeared sober within a few hours
of providing a positive specimen; and (iv) expert evidence that if
the matters set out at (i) to (iii) were correct, it was impossible that
H the measurement was correct? 2. On the facts as found in the case
was the court entitled to conclude that the validity of the statement
of the proportion of alcohol in the defendant's blood was put in
doubt?"

It is not surprising that the Divisional Court were disturbed by this decision of the justices. The findings of fact based on the one hand on the prosecution evidence and on the other on the defence evidence,

appear to be quite irreconcilable. For example, the finding of a positive roadside breath test, the erratic driving, the opinion of all the police that the defendant was drunk, and the expert evidence showing a consumption of $5\frac{1}{2}$ to $6\frac{1}{2}$ pints of beer; contrasted with a finding that the defendant had only drunk $1\frac{1}{2}$ pints of beer. The prosecution did not however attack the decision of the magistrates upon the ground of perversity but upon the ground that the defence evidence was inadmissible to challenge the accuracy of the analysis of the specimen of breath. In upholding this submission Watkins L.J. said [1985] R.T.R. 244, 249-250:

“With great respect to Mr. Halbert, who has stoutly endeavoured to support the justices in the manner in which they permitted this case to be conducted, I perceive very considerable danger arising from a failure to recognise that a device of this kind, which is properly approved, can only be shown to be defective by evidence which goes directly to the defective nature of the instrument itself. Proof of defect cannot be produced by means of an inference drawn from such facts as I have been describing. True it is, of course, that it may be difficult for a defendant to produce evidence of an acceptable kind, the more so when he is denied access to the record of maintenance of the machine on which a defendant has taken a test. However, nowadays a defendant is otherwise not left without a defence for he is enabled to have a blood or a urine test immediately following a test upon such a machine as a Lion Intoximeter 3000. My answer therefore to the question asked by the justices in this case is that the validity and accuracy of the printout from the Lion Intoximeter 3000 cannot be challenged by reason of (1) evidence of the amount of alcohol consumed prior to arrest, (2) a defendant’s appearance before arrest (3) the fact that the test taken on an Alcotest (R) 80 just before release from a police station is negative, that (4) a defendant apparently was, according to witnesses, sober within a few hours of the test on the Lion Intoximeter 3000 and (5) the kind of expert evidence given in this case. As I have indicated, the only way in which the effectiveness of the Lion Intoximeter 3000 could have been attacked here was by direct evidence of imperfection. As to the second of the questions, namely, on the facts as found in the instant case was the court entitled to conclude that the validity of the statement of the proportion of alcohol in the defendant’s blood was put in doubt, it must follow, from what I have already said, that the answer to that is the validity of the printout could not be put in doubt in the manner in which the justices sought to do. Accordingly I would allow this appeal and remit this case to the justices with a direction to convict.”

Shortly thereafter the Divisional Court again reconsidered the same question in *Price v. Nicholls* [1986] R.T.R. 155. The facts were that the defendant was arrested after a positive roadside breath test. At the police station he provided:

“specimens of breath for analysis by a Lion Intoximeter 3000 device. The printout revealed that self-calibration was properly achieved and readings of 170 and 171 microgrammes of alcohol in 100 millilitres of breath were recorded. He was tried on a charge of driving contrary to section 6(1)(a) of the Road Traffic Act 1972 as substituted. The defendant gave evidence that he had had a course of treatment for alcohol addiction two years previously, that he had

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A not taken alcohol for some months and that, before driving, he had consumed three glasses of barley wine and a glass of wine in the course of 3½ hours. He adduced a letter from the Home Office Forensic Science Laboratory that that amount of drink would have been likely to result in a breath-alcohol level below the prescribed limit and that the printout readings would require minimum rapid consumption of three-quarters of a bottle of spirits or equivalent.

B The justices, in view of the defendant's evidence and the letter, were not satisfied that he had more than the prescribed limit of alcohol in his breath, rejected the printout evidence and dismissed the information."

The Divisional Court allowed the prosecutor's appeal, relying both upon *Hughes v. McConnell* [1985] R.T.R. 244 and upon the wording of section 10(2). Watkins L.J. said, at pp. 160-161:

C "Mr. Curran, never lacking in courage has endeavoured in effect to cause this court to reconsider its decision in *Hughes v. McConnell* [1985] R.T.R. 244. He very stoutly maintains that there are good reasons why we should not follow that decision. Broadly speaking, he contends that the evidence which comes from the Lion Intoximeter 3000 in the form of a printout is merely evidence which is capable of being rebutted by evidence from a defendant of the amount of drink which he had taken, the more so if his account of the matter is supported by other persons or by some such information as is contained, for example, in the letter from the forensic scientist to whom I have already referred. It is evidence which the court is enjoined, he reminds us, to take account of by section 10 of the Act of 1972, as amended. It is not bound to accept the evidence of the printout, it merely takes account of it as it takes account of any other admissible form of evidence which comes before it. There is, in my view, an obvious flaw in that argument. Parliament has not simply enjoined a court to take account of that evidence, it has gone further and stated that 'it shall be assumed that the proportion of alcohol in the accused's breath . . . at the time of the alleged offence was not less than in the specimen.' So there is a direct assumption to be made by the court that the specimen shall be the indication of the amount of alcohol which was on the breath of the defendant at the time when he was driving.

G "However, the highest hurdle in the way of Mr. Curran is the decision in *Hughes v. McConnell* [1985] R.T.R. 244. It is abundantly clear that the attempt being made in this case, as was made in *Hughes v. McConnell*, is to take this court and courts below back to former days when there were long drawn out battles between on the one hand the prosecutor and on the other the defence as to the amount of drink taken by a defendant as compared with an analysis, usually produced as a result of the taking of a sample of urine. Parliament has by the legislation of more recent times set its face against contests of that kind and has, in my estimation, clearly indicated that when a device of the nature of the Lion Intoximeter 3000 shows on its face that its self-calibrating exercise has properly been gone through and has produced readings of the amount of alcohol in the breath those readings, unless there is direct evidence of some malfunction in the machine itself, are to be regarded as

conclusive of the amount of alcohol on a defendant's breath at the relevant time. For those reasons, I would allow this appeal and send this case back to the justices for them to convict the defendant."

In *Lucking v. Forbes* [1986] R.T.R. 97 the facts were as follows:

"The defendant, a motorist, provided two breath specimens in compliance with a requirement under section 8(1) of the Road Traffic Act 1972 as substituted. They were analysed by a Lion Intoximeter 3000 device and the printout revealed breath-alcohol of 54 and 58 microgrammes in 100 millilitres. Some 10 minutes thereafter he was charged with driving after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 6(1). He accepted a proffered opportunity to provide a blood sample for analysis, it was taken some 80 minutes after he had been charged and one half was given to him. At the hearing of the information the prosecutor produced the printout and a statement by a forensic scientist that the analysis of the defendant's blood found it to contain not less than 87 milligrammes of alcohol in 100 millilitres of blood. The defendant adduced the evidence of an analytical chemist who used a chromatograph to analyse the defendant's part sample of blood for four readings, which varied between 79.17 to not more than 81.2 milligrammes of alcohol in 100 millilitres of blood. The defendant challenged the accuracy of the Lion Intoximeter 3000 device's breath analysis. The justices were of opinion that, since they could not reconcile the various readings of the printout and the blood analyses in the light of the evidence of the analytical chemist called by the defendant, the reliability of the device was impugned and they dismissed the information."

On appeal by the prosecutor, on the question whether the justices could have found the defendant not guilty of driving after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, the Divisional Court upheld the finding of the justices upon the ground that the defence was entitled to impugn the Lion Intoximeter 3000 by reference to a blood or urine test carried out immediately. In giving judgment Lloyd L.J. took into account a Home Office circular (No. 32/84) which had advised the police that during the introductory period of operation of the Lion Intoximeter they should offer a motorist the option of giving a blood or urine sample even though the reading exceeded the figure of 50 microgrammes per 100 millilitres of breath. It will be remembered that if there is a reading between 35 and 50 microgrammes the police are under a statutory obligation to offer a blood or urine specimen and, if accepted, this replaces the breath specimen: section 8(6). The material part of the circular (paragraph 6) reads as follows:

"It is expected that in these cases the prosecution will proceed on the basis of the breath test printout as happens at present in cases over 50 microgrammes. The difference will be that the defendant will have available to him the certificate of analysis of the blood/urine sample and he will be free to apply to introduce this as evidence at his trial if he wishes to do so. The police have been advised that where this option is exercised a decision as to whether

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A to proceed with prosecution should take account of the results of both tests. . . .”

B In *McGrath v. Field*, The Times, 20 November 1986, the Divisional Court held that a failure by the police to provide a defendant with this non-statutory option to provide a blood or urine sample, did not prevent the justices relying upon a breath specimen when the reading was over 50 microgrammes.

C My Lords, I share the dismay of Watkins L.J. at the prospect of putting the clock back to the days when every drink and driving charge turned upon voluminous conflicting evidence as to the activities and alcoholic consumption of the defendant before he was stopped by the police and as to his condition after arrest. But I have the greatest difficulty in seeing any indication in the statutory provisions that point to only one type of evidence being admissible to challenge the reliability of the breath testing device used in a particular case. As matters now stand in the light of the decision of the Divisional Court only “direct” evidence of the malfunction of the machine is admissible—although as the Divisional Court has pointed out such evidence will rarely be available to a motorist. However, a specimen of urine or blood which indicates a lower level of alcohol than the reading in the breath testing machine is treated as “direct” evidence. It is not of course “direct” evidence of malfunction but merely evidence from which it is reasonable to draw the inference that the machine is not working properly. Whether or not the motorist has such evidence available to him will in any case when the reading is over 50 milligrammes depend upon whether or not the police chose to offer him the opportunity of providing a blood or urine specimen.

E I am unable to agree with the Divisional Court that the wording of section 10(2) gives any support for the view that Parliament intended any challenge to the reliability of a device to be limited to a particular type of evidence. The assumption in section 10(2) is not an assumption that the device is working correctly but an assumption that the proportion of alcohol in the relevant specimen was not less than the proportion of alcohol at the time of the offence. The specimen may be breath, urine or blood. Before making the “assumption” for the purposes of section 10(2) the magistrate will have to be satisfied, in the case of a urine or blood specimen, that they can rely upon the analysis of the specimen, and they may have to choose between the analysis supplied by the prosecution, and that supplied by the defence. In such a case they obviously cannot “assume” that the prosecution specimen is the reliable one because such an assumption would render nugatory the statutory requirement that the motorist should be provided with half the specimen so that he can have his own analysis carried out. In the case of a breath specimen there is of course a presumption that the machine is reliable but if that presumption is challenged by relevant evidence the magistrates will have to be satisfied that the machine has provided a reading upon which they can rely before making the “assumption.”

H We all know that no machine is infallible and, if despite this knowledge Parliament had intended that breath testing devices should be treated as virtually infallible I would have expected such an intention to be expressed in clear and direct language. I say virtually infallible because that is the effect of limiting a challenge to “direct evidence of malfunction” which the motorist cannot, in practice, obtain, or a blood

or urine test which the police are entitled to refuse unless the reading is below 50 microgrammes. Nowhere in the legislation can I find any indication that Parliament intended such a result.

Suppose that a teetotaler after dining with people of the highest repute, two bishops if you will, forgets to turn on his lights and is stopped by the police. He is asked to take a roadside breath test and indignantly but inadvisedly refuses. He is arrested and taken to the police station. There he thinks better of his refusal. He agrees to supply two specimens of breath and the machine to his astonishment shows very high readings. He asks to be allowed to prove the machine wrong by supplying a blood or urine specimen. The police agree and he gives a blood specimen. An analysis shows no alcohol in the specimen. It is virtually certain that the police would accept the analysis and he would not be prosecuted. But if he were prosecuted it is equally certain that the magistrates would prefer the analysis and he would be acquitted. But now suppose that the police refused his request to supply a blood or urine specimen because the reading on the machine was over 50 microgrammes. Is he to be convicted without the opportunity of calling the two bishops as witnesses to the fact that he had drunk nothing that evening and inviting the magistrates to draw the inference that the machine must have been unreliable? If he can invite the magistrates to draw such an inference from the work of the analyst, why should he not invite them to draw the inference from the word of the bishops?

In my view it would require the clearest possible wording to show that Parliament intended such an unjust result. If Parliament wishes to provide that either there is to be an irrebuttable presumption that the breath testing machine is reliable or that the presumption can only be challenged by a particular type of evidence then Parliament must take the responsibility of so deciding and spell out its intention in clear language.

Until then I would hold that evidence which, if believed, provides material from which the inference can reasonably be drawn that the machine was unreliable is admissible. I am myself hopeful that the good sense of the magistrates and the realisation by the motoring public that approved breath testing machines are proving reliable will combine to ensure that few defendants will seek to challenge a breath analysis by spurious evidence of their consumption of alcohol. The magistrates will remember that the presumption of law is that the machine is reliable and they will no doubt look with a critical eye on evidence such as was produced by *Hughes v. McConnell* [1985] R.T.R. 244 before being persuaded that it is not safe to rely upon the reading that it produces.

My Lords for these reasons I feel compelled to hold that *Hughes v. McConnell* and *Price v. Nicholls* [1986] R.T.R. 155 were wrongly decided, they should not have been followed in the present case, and the Divisional Court should have answered the first question in the negative and held that the magistrates were wrong in refusing to allow the appellant to adduce evidence of the amount of alcohol he had consumed.

However although the magistrates erred in refusing to admit this evidence, it provides no ground for quashing the appellant's conviction for refusing, without reasonable excuse, to provide a specimen of breath contrary to section 8(7). The fact that a motorist does not believe that he has drunk more than the prescribed limit does not provide a reasonable excuse entitling him to refuse to provide a specimen of

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A breath. The appellant in the present case himself proved that the machine would provide a reading by blowing into it properly for the first specimen. Thereafter the machine aborted because the appellant did not blow into it properly but allowed his breath to escape from his hands. There was no evidence either given or offered to suggest that this failure was in anyway connected with the amount of alcohol in his
B enough breath for a specimen to be taken. If evidence had been given of the amount of alcohol the appellant had consumed it could have provided no excuse for his behaviour when asked to give the second specimen and his ultimate refusal to give it.

C For these reasons I would allow this appeal to the extent of quashing the appellant's conviction under section 6(1)(a) of the Act of 1972 but the conviction under section 8(7) must stand.

LORD OLIVER OF AYLMEYTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Griffiths. I agree that, for the reasons which he has given, the appeal should be allowed to the extent which he has indicated.

D LORD GOFF OF CHIEVELEY. My Lords, I add a few words to the speech of my noble and learned friend Lord Griffiths, if only because
E your Lordships' House is deciding, in my opinion rightly, to overrule a decision, *Duddy v Gallagher* [1985] R.T.R 401, to which I myself was party and indeed in which I delivered the leading judgment of the court. The question in that case was whether the defendant, having provided
F one specimen of breath which showed a reading over the prescribed limit but having failed to provide a second specimen, could be convicted not only of an offence under section 8(7) of the Act of failing without reasonable excuse to provide a specimen of breath, but also of an offence under section 6(1) of having driven a motor vehicle on a road having consumed alcohol in such a quantity that the proportion of alcohol in his breath exceeded the prescribed limit. The Divisional
G Court held that the defendant could properly be convicted of both offences. Section 10(2) of the Act provides that "evidence of the proportion of alcohol . . . in a specimen of breath . . . provided by the accused shall, in all cases, be taken into account . . ." Such a specimen must have been provided pursuant to the provisions of the Act: see *Howard v. Hallett* [1984] R.T.R 353. We were satisfied that the first specimen of breath had been provided pursuant to the provisions of the Act; and further that, since two specimens of breath had not been provided, no question arose of disregarding the specimen with the higher proportion of alcohol in it as required in such circumstances by section 8(6). However, I have now been persuaded by Mr. Knight that this approach involves too narrow a construction of the Act. I accept his submission that the broad intention of the Act is that evidence of a
H specimen of breath shall only be given where two specimens of breath have been provided and the one with the higher proportion of alcohol has been disregarded, it being sufficient where the defendant has without reasonable excuse failed to provide more than one specimen that he should be convicted of the offence under section 8(7).

On the second and more fundamental question in the case, I too can see no escape from the conclusion reached by my noble and learned friend Lord Griffiths. The crucial provision in the Act, as I see it, is

section 10(2), to which I have already referred. The opening sentence provides that:

“Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused’s breath, blood or urine at the time of the alleged offence was not less than in the specimen; . . .”

The function of that provision, as I see it, is that, where a specimen has been taken in accordance with the provision of the Act, evidence of such a specimen (given in accordance with the provisions of the Act) shall be admissible in evidence, and furthermore shall be evidence not only of the proportion of alcohol in the defendant’s breath, blood or urine (as the case may be) at the time when such specimen was taken, but also of such proportion at the time when the defendant was driving, attempting to drive or in charge of a motor vehicle. That of course is why the statutory assumption is required to be made; and that is also why the exception relating to the so called “hip-flask” defence is here relevant. Such evidence, being so admissible, has, if tendered, to be considered by the court in all cases under section 5 or section 6 of the Act; it has, as the statute provides, to be “taken into account.” But it is one thing for evidence to have to be taken into account, and it is another thing for such evidence to be conclusive. For a court may take evidence into account, and yet reject it as unreliable. This may plainly occur in cases under the statute where the defendant has provided a specimen of blood or urine. In such cases, it is expressly provided by section 10(6) that one part of the specimen shall be provided to the defendant. This must be to enable him to obtain an independent analysis of his part of the specimen, thereby avoiding any possibility of a conviction on the basis of a mistaken analysis presented in evidence by the prosecution. But if conflicting analyses are in such a case put in evidence before the court, the court has to decide whether to reject that presented by the prosecution; and if it does so, then, although it will have complied with its duty under section 10(2) to take such evidence into account, it will also have acted properly in rejecting it.

It must follow that, since section 10(2) provides equally for evidence relating to specimens of breath, blood or urine, evidence relating to a specimen of breath may likewise be rejected if the court comes to the conclusion that the print-out from the particular machine is unreliable. I have considered carefully whether any distinction can properly be drawn between specimens of breath on the one hand, and specimens of blood or urine on the other, having regard to the many safeguards built into the Act in relation to specimens of breath. These safeguards are as follows. First, specimens of breath have to be analysed by means of a machine. Second, such a machine has to be a device of a type approved by the Secretary of State. Third, as is well known, the relevant approved device has built into it a mechanism by which it tests itself, and prints out the results of such a test on the statement automatically produced by it, each time it analyses a person’s specimen of breath. Fourth, a requirement to provide a specimen of breath can only be made at a police station. Fifth, two specimens have to be given, and that with the higher reading has to be disregarded. Sixth, if the specimen with the lower reading contains less than a specified quantity of alcohol, the defendant may ask that it be replaced with a specimen of

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Lord Goff
of Chieveley

A blood or urine, in which event, if he provides such a specimen, no
specimen of breath shall be used. This is a formidable list of protections
for the motorist. Having so provided, it was open to Parliament to
consider whether a specimen of breath so provided should constitute
conclusive evidence of the quantity of alcohol in the defendant's breath
at the time of driving, attempting to drive or being in charge of a motor
vehicle, or whether it should be conclusive subject only to certain
specified limited defences (such as the "hip-flask" defence), possibly
coupled with the safeguard that the motorist should in every case be
given the opportunity of providing a specimen of blood or urine in
substitution for his specimen of breath. Parliament might have decided
so to provide on the ground that the public interest in securing
convictions in the case of an offence which is known to cause so much
suffering to other citizens was so great that a defence founded, for
example, on an allegation that the defendant had drunk so little that the
print out from the particular device could not be accepted as reliable,
should not be permitted. But in my opinion, on a true construction of
the present Act, no such provision has been enacted. It has been
enacted only that evidence of the proportion of alcohol in a specimen of
breath taken in accordance with the statute shall be taken into account;
and the exception to the statutory assumption relating to the "hip-flask"
defence is not expressed to be the only defence and is only here referred
to because it relates to drinking during the period between driving,
attempting to drive or being in charge of a motor vehicle and providing
the specimen, and is concerned to place the burden of proof upon the
defendant who raises the "hip-flask" defence. Once it is accepted, as in
my opinion it must be, that evidence of the proportion of alcohol in a
specimen of breath, blood or urine is not conclusive but can be rejected
by the court as unreliable, I can, like my noble and learned friend, see
no basis in the statute for limiting the ground on which the court may
reject the evidence as unreliable in the manner decided by the Divisional
Court in *Hughes v. McConnell* [1985] R.T.R. 244. Take the following
example. Suppose that a specimen of breath is provided by the
defendant which is shown by the printout to contain just over 50
microgrammes of alcohol in 100 millilitres of breath. The defendant
asks that it should be replaced by a specimen of blood or urine. He has
no right to this under section 8(6) of the Act. The police officer,
however, causes a urine specimen to be taken and provides the defendant
with part of the specimen. The defendant has his part of the urine
specimen analysed; the analysis shows that he was not over the limit.
Under the Act, evidence of the proportion of alcohol in the specimen of
breath is nevertheless admissible. Like my noble and learned friend
Lord Griffiths, I find it difficult to believe that, upon the defendant
tendering in evidence the analysis of his part of the urine specimen, it
should not be open to the magistrates to reject the printout relating to
the specimen of breath as unreliable.

H I fear that I do not share the optimism of my noble and learned
friend that motorists will desist from seeking to persuade magistrates
to reject evidence from printouts as unreliable on the ground that
they have drunk so little that the reading cannot be right. It is
notorious that there is an industry devoted to assisting motorists in
defeating charges brought under section 6 of the Act; and once the
decision in the present case is reported, attention will rapidly be
drawn to this new possibility. Furthermore, the consequences of a

conviction can be so serious for many motorists that there is a great temptation to grasp at any straw which may assist them in their defence. I have little doubt that the point will be taken time and time again. I place greater faith in the good sense of magistrates who, with their attention drawn to the safeguards for defendants built into the Act to which I have referred earlier in this opinion, will no doubt give proper scrutiny to such defences, and will be fully aware of the strength of the evidence provided by a printout, taken from an approved device, of a specimen of breath provided in accordance with the statutory procedure. Even so, I anticipate that the responsible authorities will be keeping the situation arising from the decision of your Lordships' House under very careful review, in order to consider whether the provisions of the Act require to be strengthened in the public interest.

Appeal allowed in part.

Conviction under section 6(1) of the Road Traffic Act 1972, as amended by the Transport Act 1981, quashed.

Conviction under section 8(7) of the Road Traffic Act 1972, as amended, affirmed.

Costs incurred by the appellant in the House of Lords and in the Divisional Court to be paid out of central funds pursuant to section 16 of the Prosecution of Offenders Act 1985.

Solicitors: Lee Bolton & Lee for J. W. Saunders & Co., Erith; Solicitor, Metropolitan Police.

J. A. G.

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A

[COURT OF APPEAL]

ATTIA v. BRITISH GAS PLC.

[1984 A. No. 1703]

1987 June 5; 26

Dillon, Woolf and Bingham L.JJ.

B

Negligence—Foreseeability of risk—Nervous shock—Plaintiff's home set on fire by negligence of central heating installers—Plaintiff suffering psychiatric illness due to witnessing fire—No physical injury to plaintiff or other persons—Damage to property only—Whether plaintiff entitled to damages for nervous shock

C

The plaintiff engaged the defendants to instal central heating in her home. In the course of the installation the defendants' employees negligently caused a fire which extensively damaged the home and its contents. The defendants admitted liability and settled the plaintiff's claim for damage to the home and its contents. The plaintiff subsequently brought an action against the defendants claiming damages for nervous shock alleging that she had suffered a psychiatric illness as a result of witnessing the fire. The parties agreed that the question whether the plaintiff could recover damages should be determined as a preliminary issue on assumed facts to save costs. The judge held that damages for nervous shock could only be recovered if consequent upon physical injury, that therefore it was not reasonably foreseeable that the plaintiff might suffer psychiatric illness as a result of the defendants' negligence in starting the fire and he dismissed the plaintiff's claim.

D

E

On appeal by the plaintiff:—

Held, allowing the appeal, that a plaintiff who suffered psychiatric illness caused by witnessing damage to her property rather than personal injury to another person could recover damages for nervous shock if she could prove causation and reasonable foreseeability; that those were issues of fact which should be determined on full and proven facts rather than assumed facts; and that, in the circumstances, the matter should proceed to trial (post, pp. 1104H—1105C, 1106A–D, 1109D–G, 1112B–D, H—1113B, D–E).

F

McLoughlin v. O'Brian [1983] 1 A.C. 410, H.L.(E.) considered.

Decision of Sir Douglas Frank Q.C., sitting as a deputy judge of the Queen's Bench Division, reversed.

G

The following cases are referred to in the judgments:

Hay (or Bourhill) v. Young [1943] A.C. 92; [1942] 2 All E.R. 396, H.L.(Sc.)

Czarnikow (C.) Ltd. v. Koufos [1969] 1 A.C. 350; [1967] 3 W.L.R. 1491; [1967] 3 All E.R. 686, H.L.(E.)

Donoghue v. Stevenson [1932] A.C. 562, H.L.(Sc.)

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)

H

Jaensch v. Coffey (1984) 58 A.L.J.R. 426

King v. Phillips [1953] 1 Q.B. 429; [1953] 2 W.L.R. 526; [1953] 1 All E.R. 617, C.A.

McLoughlin v. O'Brian [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298, H.L.(E.)

Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C.

Owens v. Liverpool Corporation [1939] 1 K.B. 394; [1938] 4 All E.R. 727, C.A. A

No additional cases were cited in argument.

APPEAL from Sir Douglas Frank Q.C. sitting as a deputy judge of the Queen's Bench Division.

By a writ dated 18 May 1984 the plaintiff, Madiha Attia, claimed against the defendants, British Gas Plc., damages for nervous shock suffered as a result of witnessing a fire in her home which was caused by the defendants' negligence while installing central heating there. The parties agreed that the matter should proceed by way of preliminary issue raising the question:

"Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants' negligence while installing central heating in the plaintiff's home?" C

On 19 December 1986 the judge gave judgment in the defendants' favour by answering the question in the negative.

By a notice of appeal dated 11 February 1987 the plaintiff appealed on the grounds that (1) the judge had misdirected himself in posing the question "was it readily foreseeable by the defendants that the ordinary householder exposed to the experience undergone by the plaintiff might break down under the shock of the event and suffer psychiatric illness as opposed to grief and sorrow at losing one's home?" The question ought to have been was it reasonably foreseeable and not readily foreseeable; (2) the judge was wrong to hold, if he did so hold, that damages for nervous shock could only be recovered if consequent upon physical injury. Nervous shock was itself a form of injury and whether damages were recoverable therefore depended upon the question of whether the defendants ought reasonably to foresee that psychiatric illness to the plaintiff might arise from their acts or omissions; and (3) the judge ought to have held that the defendants ought reasonably to have foreseen that the plaintiff, exposed to the consequences of the fire caused by their admitted fault, might be so affected through her senses that she might suffer psychiatric damage. D E F

The facts are stated in the judgment of Dillon L.J.

David Tucker for the plaintiff. G

Janet Turner for the defendants.

Cur. adv. vult.

26 June. The following judgments were handed down.

DILLON L.J. This is an appeal by the plaintiff in the action against a decision of Sir Douglas Frank Q.C., sitting as a deputy judge of the High Court in the Queen's Bench Division, which was given on 19 December 1986 by way of determination of a preliminary issue in the action. H

As to the facts, in the summer of 1981 the plaintiff, Mrs. Attia, lived (as I apprehend she still does) at 11, Leaver Gardens, Greenford, Middlesex, and the defendants, British Gas Plc., were engaged to instal

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A central heating there. When she was returning home at about 4 p.m. on 1 July 1981 she saw smoke coming from the loft of the house. She telephoned the fire brigade, but by the time the firemen arrived, the whole house was on fire and it took the firemen over four hours to get the fire under control. Obviously the house and its contents were extensively damaged.

B The defendants admit that the fire was caused by their negligence, i.e., by the carelessness of their employees who were working at the house, and we were told that the plaintiff's claims for damage to the house itself and its contents have been settled. In this action the plaintiff's only claim is for a different type of damage, namely, damages for nervous shock; by this is meant that, though she did not suffer any physical injury, the plaintiff, as the result of seeing her home and its contents ablaze, has suffered a psychiatric or mental illness, the effects of which are set out in some detail in her statement of claim.

C The defendants dispute this claim of the plaintiffs, but in order to save costs, especially as the plaintiff has legal aid, the parties agreed, and the master ordered, that the following question should be set down for determination as a preliminary issue, viz:

D "Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants' negligence while installing central heating in the plaintiff's home?"

E For the purpose of this preliminary issue, the facts alleged in the statement of claim are to be assumed to be true; in particular it is to be assumed that the plaintiff has suffered a psychiatric illness which was caused by the shock of seeing her home and its contents ablaze. Causation does not therefore have to be considered on the preliminary issue, though it will have to be considered at the trial if the preliminary issue is not answered in the negative, as the defendants would wish. The defendants say on the preliminary issue that the plaintiff cannot succeed in this action for either of two reasons, viz: (1) that it was not reasonably foreseeable that the plaintiff might suffer any psychiatric illness as a result of the defendants' negligence in starting the fire; or (2) that, even if it was reasonably foreseeable that the plaintiff might suffer psychiatric illness, damages for "nervous shock" can, as a matter of law and public policy, only be recovered if the shock was caused by the death or injury of a person, or by fear of the death or injury of a person, normally a person closely related to the plaintiff, and cannot be recovered if it was merely caused by injury to property.

G The preliminary issue was raised to test these two contentions of the defendants. The deputy judge decided in favour of the defendants on contention (1) and therefore dismissed the action. The plaintiff now appeals.

H The law as to "nervous shock" has recently been considered very carefully and helpfully by the House of Lords in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 and by the High Court of Australia in *Jaensch v. Coffey* (1984) 58 A.L.J.R. 426. In *McLoughlin v. O'Brian* Lord Bridge said, at p. 431:

"The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be

recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.”

The plaintiff accepts this statement of the law, and accordingly it is claimed that what she has suffered, as described in the statement of claim, amounts to a positive psychiatric illness. Where exactly the line is to be drawn between possibly extravagant grief, distress or other normal emotion and a positive psychiatric illness, may perhaps be difficult to discern in what may, for all I know, be a matter of degree; but that is a matter for the trial and does not arise on the preliminary issue.

In the next place it is to be assumed that the plaintiff is of a normal disposition or toughness, possessing, as it has been put in the cases, “the customary phlegm”. Whatever the position may be at the trial, on this preliminary issue we are not concerned with the possibility of it being shown that she has suffered psychiatric illness because, though the defendants did not know and she herself may not have known, she was particularly or “abnormally” susceptible to some form of psychiatric illness.

A third point which emerges from the cases cited is that damage for “nervous shock,” i.e., for psychiatric illness occasioned by shock, is regarded as a separate head of damage, distinct, for example, from damage for personal injury. The law has developed step by step and is still developing. In those circumstances I would be particularly reluctant to lay down any general rule as to the conditions in which such damages can or cannot be recovered as a matter of public policy. For that reason the procedure of a preliminary issue on assumed facts, somewhat briefly stated, has disadvantages where what is under consideration is how the law should develop in a matter of some general importance.

That said, however, as appears from the speeches in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 and the judgments in the Australian case, *Jaensch v. Coffey*, 58 A.L.J.R. 426, a great deal of the difficulty which has been felt over the development of the law as to damages for “nervous shock” has arisen in relation to what, in the terminology of the tort of negligence, is described as the question of proximity. How far is it right that the law should allow a claim for damages against a wrongdoer, where the wrong done by the wrongdoer was primarily a wrong done to someone other than the claimant, and the claimant is a person of whom, at the relevant time, the wrongdoer had no knowledge and who may then have been far away from the scene of the wrongdoer's act? This difficulty is particularly concerned with whether the wrongdoer owed any duty of care to the claimant. But that difficulty does not arise in the present case because in the present case there is no problem of proximity. The defendants knew about the plaintiff and unquestionably owed a duty of care to her not to start a fire in her house. If her claims for damage to the house and contents had not been settled, she would have brought the one action against the defendants in which she would have pleaded the negligence of the defendants in starting the fire and would have gone on to assert that, by reason thereof, she had suffered and was suffering damage and loss, which would be put under two headings, viz. (1) damage to the house and contents; and (2) damage for nervous shock. The issues at the trial, assuming the facts pleaded,

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A including the psychiatric illness, were proved, would have been (a)
causation and (b) foreseeability of the damage as a question of
remoteness. I can see no good reason why, in such a context, the law
should have refused to allow her damages for "nervous shock" if she
could get over the hurdles of causation and foreseeability as an aspect of
remoteness. It cannot make any difference that in the event her claim
for damage to the house and contents has been settled; the duty was
B nonetheless there.

I am not therefore prepared to hold that the fact that the shock
which caused the plaintiff's assumed psychiatric illness was caused by
damage to property must preclude her from recovering damages for
"nervous shock" even if it was reasonably foreseeable that she might
suffer psychiatric illness as a consequence of the defendants' negligence
C in causing the fire in her house.

Are the defendants right, then, in asserting a priori that it was not
reasonably foreseeable that the plaintiff might suffer any psychiatric
illness as a result of their negligence in starting the fire? It is not
necessary that any particular psychiatric illness should have been
foreseen.

D Whether it was reasonably foreseeable to the reasonable man—
whether a reasonable onlooker, or, in the context of the present case, a
reasonable gas fitter employed by the defendants to work in the
plaintiff's house—is to be decided, not on the evidence of psychiatrists
as to the degree of probability that the particular cause would produce
the particular effect in a person of normal disposition or customary
phlegm, but by the judge, relying on his own opinion of the operation of
cause and effect in psychiatric medicine, treating himself as the
E reasonable man, and forming his own view from the primary facts as to
whether the chain of cause and effect was reasonably foreseeable: see
per Lord Bridge in *McLoughlin* [1983] 1 A.C. 410, 432C–D. The good
sense of the judge is, it would seem, to be enlightened by progressive
awareness of mental illness: *per* Lord Bridge at p. 443D. One consequence
of this approach is, however, that the view of the courts as to what is
F reasonably foreseeable is, in this field, likely to lag behind informed
medical opinion. Another consequence is that a view which finds favour
with the courts at one time may well be considered unacceptable and
out of date a few years later—when progressive awareness has progressed
further.

The question which the deputy judge asked himself in the present
case was whether it was readily foreseeable by the defendants that the
ordinary householder exposed to the experience undergone by the
plaintiff might break down under the shock of the event and suffer
psychiatric illness as opposed to grief and sorrow at losing one's home.
If "reasonably" is substituted for "readily"—as the judge probably
intended—I would for my part endorse that as a correct direction. It is
not however a test of probability, as opposed to possibility.

H Was the damage, in the way of psychiatric illness from shock, though
of a different kind from the damage to the house itself and contents
most obviously foreseeable, nonetheless itself foreseeable? Would the
reasonable man, endowed with appropriately progressive awareness of
mental illness, have regarded the danger of psychiatric illness from
shock as so fantastic or far-fetched that he would have paid no attention
to it or would he have thought that it was something that the plaintiff
might suffer from seeing her house and its contents in flames?

That, if the house caught fire from the defendants' workmen's fault, the plaintiff would see and hear it burning was foreseeable. But how much she saw and heard, and how extensive was the damage to or destruction of the house and contents by the fire we are left to guess at on this preliminary issue. We are asked to say, in effect, that psychiatric illness caused by the shock can never, as a matter of fact rather than law, be a foreseeable consequence when a woman sees her home and its contents burning down. I am not prepared to make any such general a priori ruling on such scanty material. Whether the plaintiff's assumed illness caused by the shock was or was not a foreseeable consequence of the defendants' negligence must depend on the actual evidence given at the trial.

Accordingly I would allow this appeal, set aside the order of the deputy judge and leave this action to proceed to trial.

It follows that the attempt to decide this action on a preliminary issue has, in my judgment, failed. But in view of the expense and delays of litigation at the present time and of the difficult position of a defendant who is not legally aided when sued by a legally aided plaintiff, I would not for my part criticise the parties' advisers at all for making the attempt.

WOOLF L.J. There have now been a series of decisions by courts of the highest authority both in this country and in the Commonwealth dealing with the problems created by actions for damages where the plaintiff is seeking to recover compensation for psychiatric illness due to what has been colloquially called "nervous shock." On this appeal counsel on both sides relied on two of these decisions, namely, a decision of the House of Lords in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 and the decision of the High Court of Australia in *Jaensch v. Coffey* (1984) 58 A.L.J.R. 426. However, the circumstances giving rise to the preliminary issue with which this appeal is concerned differ from the circumstances of those two decisions in two significant respects.

The first difference is that in those two decisions the plaintiff was contending that she suffered her injuries because she had learnt that members of her family had been involved in a serious accident as a result of which they had either been killed or seriously injured while in this case no one had suffered any personal injury. The plaintiff alleges that her injury was caused in consequence of her seeing her home, of which she was proud, on fire, a fire which continued to burn for over four hours before the fire was brought under control by the fire brigade.

The second difference is that in both of the earlier decisions the plaintiff had not witnessed the accident which caused the injuries to their respective family and the judgments therefore focused on the question as to whether the plaintiffs were owed a duty of care by the defendants, it being contended by both defendants that it could not be foreseen that their acts could injure the plaintiffs. However, in this case undoubtedly the defendants owed a duty of care to the plaintiff in respect of the damage which was caused to her home and indeed she has been compensated for this damage. Furthermore, if the plaintiff, who entered the house to telephone the fire brigade had been physically injured, as could have happened, then in relation to that physical injury the defendants would have owed her a duty of care and she would be entitled to be compensated by them for that injury. The problem raised by the preliminary issue is therefore as to whether the damage actually

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Woolf L.J.

A alleged to have been suffered by the plaintiff is too remote and is not as to whether there was a breach of a duty of care. The distinction between the two situations was discussed in eloquent terms by Denning L.J. in *King v. Phillips* [1953] 1 Q.B. 429, 439–440:

B “What is the reasoning which admits a cause of action for negligence if the injured person is actually struck, but declines it if he only suffers from shock? I cannot see why the duty of a driver should differ according to the nature of the injury. I should have thought that every driver was under a plain duty which he owed to everyone in the vicinity. He ought to drive with reasonable care. If he drives negligently with the result that a bystander is injured, then his breach of duty is the same, no matter whether the injury is a wound or is emotional shock. Only the damage is different. The bystander may be so close as to be put in fear for himself, or he may be just a little way off and be shocked by fear for the safety of others. In either case he has been injured by the driver’s negligence. If you view the duty of care in this way, and yet refuse to allow a bystander to recover from shock, it is not because there was no duty owed to him, nor because it was not caused by the negligence of the driver, but simply because it was too remote to be admitted as a head of damage.

D “A different result is reached by viewing the driver’s duty differently. Instead of saying simply that his duty is to drive with reasonable care, you say that his duty is to avoid injury which he can reasonably foresee, or, rather, to use reasonable care to avoid it. Then you draw a distinction between physical injury and emotional injury, and impose a different duty on him in regard to each kind of injury, with the inevitable result that you are driven to say there are two different torts—one tort when he can foresee physical injury, and another tort when he can foresee emotional injury. I do not think that that is right. There is one wrong only, the wrong of negligence. I know that damage to person and damage to property are for historical reasons regarded as different torts; but that does not apply to physical injury and emotional injury. Lord Wright clearly treated impact and shock as one cause of action when he said in *Bourhill v. Young* [1943] A.C. 92: ‘The man who negligently allows a horse to bolt, or a car to run at large down a steep street, or a savage beast to escape is committing a breach of duty towards every person who comes within the reach of foreseeable danger, whether by impact or shock.’

G “The true principle, as I see it, is this: Every driver can and should foresee that, if he drives negligently, he may injure somebody in the vicinity in some way or other; and he must be responsible for all the injuries which he does in fact cause by his negligence to anyone in the vicinity, whether they are wounds, or shocks, unless they are too remote in law to be recovered. If he does by his negligence in fact cause injury by shock, then he should be liable for it unless he is exempted on the ground of remoteness.”

H The position must be the same if, instead of causing a traffic accident, what is being considered is causing a fire at someone’s home. Later in the same judgment Denning L.J. went on to say, at p. 441, whether the issue was one of duty of care or remoteness of damage since in *Bourhill v. Young* [1943] A.C. 92 the test of liability for shock is

foreseeability of injury by shock. This dicta was expressly endorsed by Viscount Simonds when giving the judgment of the House of Lords in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388, 426.

However, notwithstanding the fact that the test both in the case of breach of duty and remoteness is foreseeability, it is helpful to identify the true nature of the problem in considering the two reasons relied upon by the defendants for saying that it is possible on this preliminary issue to decide that the plaintiff cannot succeed in her action. Those reasons being (1) that the defendants could not reasonably foresee that as a result of their being responsible for starting the fire, the plaintiff would suffer psychiatric injury, and, (2) that in any event as a matter of policy the law does not allow damages for psychiatric injury to be recovered in the absence of personal injury either to the plaintiff or a member of her family.

In *Jaensch v. Coffey*, 58 A.L.J.R. 426 Brennan J. in a judgment in which he helpfully analysed virtually all the authorities on recovering damages for "nervous shock," with regard to the test of foreseeability referred to the present rule in negligence as being that stated by Lord Reid in *C. Czarnikow Ltd. v. Koufos* [1969] 1 A.C. 350. In that case Lord Reid was considering foreseeability in the context of remoteness of damage. He said, at p. 385:

"The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it."

In the same case a similar approach was adopted by Lord Upjohn, who said, at p. 422:

"The test in tort, as now developed in the authorities, is that the tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach however unlikely it may be, unless it can be brushed aside as far fetched."

In deciding the preliminary issue in favour of the defendants Sir Douglas Frank, before whom the issue was argued, as it was before this court, on the basis that it raised a question of duty of care, said:

"It is widely recognised that the burning of one's home can be a frightening experience and give rise to a sense of grief and sorrow at the loss of all that is embodied in the word 'home' and of one's possessions. It can result in great inconvenience and sometimes hardship. Nevertheless the loss of possessions from various causes happens to a large proportion of the population. A burglary can not only result in the loss of valued and irreplaceable possessions but to some people it is a traumatic and frightening experience. Nevertheless, in my judgment the ordinary householder endures such incidents and the shock of them without suffering mental illness. I think that the same applies to nervous shock caused by a fire, albeit in one's own house, unless the fire caused injury which in turn triggered off the nervous shock. That is where I would draw the line. In my judgment, therefore, it was not reasonably foreseeable that the plaintiff would suffer mental illness as a result of the defendants' negligence and this action fails."

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A Especially if the question of foreseeability is approached in the manner indicated by Lord Reid, as I consider it should be, the judge was not entitled to come to this conclusion. I can conceive of circumstances where it would be readily foreseeable that intense distress would be caused to an "ordinary householder" who saw her home being destroyed by fire particularly if the process was as protracted as it appears to have been on the basis of the facts set out in the statement of claim which for the purpose of the determination of the issue have to be assumed to be true. Such distress could well be of the order of the "acute emotional trauma" which "like a physical trauma can well cause a psychiatric illness in a wide range of circumstances and in a wide range of individuals" as indicated by Lord Bridge in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 433D.

C It appears from the passage which I have quoted that the judge came to his decision in favour of the defendants not only on the basis of foreseeability but also as a matter of policy in accordance with the second ground relied upon by the defendants. With regard to this part of Sir Douglas Frank's judgment, differing views were taken by the members of the House of Lords in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 and by the members of the High Court of Australia in *Jaensch v. Coffey*, 58 A.L.J.R. 426 as to whether, if the injury was foreseeable, liability could be excluded as a matter of policy. Fortunately, for the purposes of this appeal I do not consider that it is necessary to resolve this divergence of opinion. Even assuming that the test is not confined to being one of foreseeability, I cannot conceive that, if the injury which the plaintiff alleges that she suffered was a foreseeable consequence of the defendants' negligence, there could be any overriding policy reason for preventing her recovering damages. As I have already pointed out, she could well have sustained physical injuries as well as the psychiatric injuries of which she complains when she would have been entitled to damages and in my view there can be no reason of policy for distinguishing between the two types of injury.

F In agreement therefore with the judgments of Dillon and Bingham L.JJ., which I have had the advantage of seeing in draft, I would allow this appeal. I would also not determine finally the preliminary issue in favour of the plaintiff on the facts before this court. Like Dillon and Bingham L.JJ., I consider that it is preferable that an issue of this sort should only be determined after the court has had an opportunity of exploring all the relevant facts as to liability. The statement of claim which contains the only facts before this court only indicates in outline the circumstances in which the plaintiff sustained her injuries. While the facts which are before this court do not disclose a situation where as a matter of law the plaintiff cannot succeed, whether she is entitled to succeed should only be finally determined after a trial.

H BINGHAM L.J. The plaintiff's claim pleaded in this action is a simple one. She alleges that the defendants were installing central heating in her house and that a fire occurred as a result of the defendants' negligent work. This the defendants admit. The plaintiff further pleads that she returned home to see smoke coming from the loft of the house and then witnessed the burning of the house for over four hours until the fire was brought under control. This experience, she alleges, caused her "nervous shock in the form of a serious psychological reaction evidenced by an anxiety state and depression."

Her claim is accordingly one for what have in the authorities and the literature been called damages for nervous shock. Judges have in recent years become increasingly restive at the use of this misleading and inaccurate expression, and I shall use the general expression "psychiatric damage," intending to comprehend within it all relevant forms of mental illness, neurosis and personality change. But the train of events (all of which must be causally related) with which this action, like its predecessors, is concerned remains unchanged: careless conduct on the part of the defendant causing actual or apprehended injury to the plaintiff or a person other than the defendant; the suffering of acute mental or emotional trauma by the plaintiff on witnessing or apprehending that injury or witnessing its aftermath; psychiatric damage suffered by the plaintiff.

There is, however, one respect in which this case differs from all the decided cases; or almost all: *Owens v. Liverpool Corporation* [1939] 1 K.B. 394 would appear to be an exception. Although the plaintiff suffered injury in that her home and presumably her possessions were burned and damaged, it is not said that she was at any time in fear for her own personal safety or that of anyone else, nor is it said that physical injury (as opposed to the psychiatric damage of which she complains) was suffered by anyone. It was no doubt this singular feature of the case which led the parties to agree to the trial of a preliminary issue:

"Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants' negligence while installing central heating in the plaintiff's home?"

The parties are not to be criticised for adopting a procedure which they conscientiously believed would save costs and time. But it would, I think, have been better if the action had proceeded to trial, at any rate on liability, perhaps leaving the assessing of damages, if any, to a later date. For I think that there are, within the issue set down for trial, two distinct questions. One is a question of far-reaching legal principle: is a claim for damages for psychiatric damage suffered by one who has witnessed the destruction of her property, in the absence of any actual or apprehended physical injury, one that must necessarily fail as a matter of law? In the light of such illustrious precedents as *Donoghue v. Stevenson* [1932] A.C. 562 and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, questions such as this cannot be regarded as unsuitable for determination on, in effect, demurrer. But there is in this case a special feature to which I shall return, namely, a pre-existing relationship between the defendants as contractors and the plaintiff as occupant of a house in which they were working. I would be happier deciding even this legal question against a background of full and proven, rather than outline and assumed, facts. The second question is much more limited. It is whether on the facts pleaded it was reasonably foreseeable by the defendants that careless performance of their work might cause psychiatric damage to the plaintiff. This is a question of fact which, for reasons I shall give, cannot in my view be fairly decided at this stage.

The question of principle

As Lord Russell of Killowen pointed out in *Bourhill v. Young* [1943] A.C. 92, 101, what the defendant ought to have contemplated as a

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A reasonable man is relevant both to testing the existence of a duty as the foundation of alleged negligence and to the question of remoteness of damage. The leading cases on psychiatric damage have very largely concentrated on examining what was reasonably foreseeable by the defendant in order to determine whether the careless defendant owed a duty of care to the particular plaintiff at all. This is understandable and perhaps inevitable. A defendant, however careless, cannot owe a duty of care towards the whole world. It is accordingly necessary to apply the tests of proximity and foreseeability derived from Lord Atkin's classic statement in *Donoghue v. Stevenson* [1932] A.C. 562 in order to define the class to whom the defendant owes a duty and decide whether the plaintiff falls within it. This is a particularly necessary exercise in the psychiatric damage cases, where the defendant will ordinarily have no awareness of the plaintiff as an individual before the act of carelessness occurs. Unless, therefore, it can be shown that the plaintiff is a person who is so closely and directly affected by the defendant's act that he ought reasonably to have him or her in contemplation as being so affected when he directs his mind to the acts or omissions which are called in question, the plaintiff cannot surmount the first hurdle which confronts any plaintiff in negligence, that of establishing a duty of care.

D In this case the problem is somewhat different. Since the defendants were working in the house where the plaintiff lived, it must have been obvious to them that she would be so closely and directly affected by their performance of their work that they ought reasonably to have her in contemplation as being so affected when they carried out the work. It is not, I think, contested that the defendants owed her a duty to take reasonable care to carry out the work so as to avoid damaging her home and property. But it is said that the defendants owed her no duty to take reasonable care to carry out the work so as to avoid causing her psychiatric damage. This analytical approach cannot, I think, be said to be wrong, but it seems to me to be preferable, where a duty of care undeniably exists, to treat the question as one of remoteness and ask whether the plaintiff's psychiatric damage is too remote to be recoverable because not reasonably foreseeable as a consequence of the defendant's careless conduct. The test of reasonable foreseeability is, as I understand, the same in both contexts, and the result should be the same on either approach. So the question in any case such as this, applying the ordinary test of remoteness in tort, is whether the defendant should reasonably have contemplated psychiatric damage to the plaintiff as a real, even if unlikely, result of careless conduct on his part.

G *McLoughlin v. O'Brian* [1983] 1 A.C. 410 is the most recent House of Lords authority on psychiatric damage and the ratio of that decision is of course binding upon us. All members of the House were agreed that for the plaintiff in that case to succeed it was necessary for her to show that the psychiatric damage which she in fact suffered was a reasonably foreseeable result of the defendant's careless driving. A minority of the House (Lord Scarman and Lord Bridge of Harwich) held that, if causation was established, that was all that the plaintiff need show and that it was not for the courts on policy grounds to limit a right to recover for reasonably foreseeable psychiatric damage caused by the defendant. Lord Wilberforce and Lord Edmund-Davies, although agreeing in the result, rejected the contention that reasonable foreseeability was the sole test of liability for the consequence of wrongdoing. It was, they held, proper for the courts to limit on grounds of policy the class of

those, within the larger class of those to whom psychiatric damage was reasonably foreseeable, to whom a duty of care should be held to be owed. Lord Russell of Killowen accepted policy as something which might in an appropriate case feature in a judicial decision, but saw no policy requirement to restrict the plaintiff's right to recover on the facts of that case. The majority ratio of this decision is, therefore, if I have correctly understood their Lordships' speeches, that reasonable foreseeability of psychiatric damage to the plaintiff is a necessary condition of a successful claim, but that even where reasonable foreseeability of such damage is shown a right to recover may be denied on grounds of policy.

Whether the psychiatric damage suffered by this plaintiff as a result of the carelessness of the defendants was reasonably foreseeable is not something which can be decided as a question of law. In considering the present question of principle reasonable foreseeability must for the present be assumed in the plaintiff's favour. So the question is whether, assuming everything else in the plaintiff's favour, this court should hold this claim to be bad in law because the mental or emotional trauma which precipitated the plaintiff's psychiatric damage was caused by her witnessing the destruction of her home and property rather than apprehending or witnessing personal injury or the consequences of personal injury.

It is submitted, I think rightly, that this claim breaks new ground. No analogous claim has ever, to my knowledge, been upheld or even advanced. If, therefore, it were proper to erect a doctrinal boundary stone at the point which the onward march of recorded decisions has so far reached, we should answer the question of principle in the negative and dismiss the plaintiff's action, as the deputy judge did. But I should for my part erect the boundary stone with a strong presentiment that it would not be long before a case would arise so compelling on its facts as to cause the stone to be moved to a new and more distant resting place. The suggested boundary line is not, moreover, one that commends itself to me as either fair or convenient. Examples which arose in argument illustrate the point. Suppose, for example, that a scholar's life's work of research or composition were destroyed before his eyes as a result of a defendant's careless conduct, causing the scholar to suffer reasonably foreseeable psychiatric damage. Or suppose that a householder returned home to find that his most cherished possessions had been destroyed through the carelessness of an intruder in starting a fire or leaving a tap running, causing reasonably foreseeable psychiatric damage to the owner. I do not think a legal principle which forbade recovery in these circumstances could be supported. The only policy argument relied on as justifying or requiring such a restriction was the need to prevent a proliferation of claims, the familiar floodgates argument. This is not an argument to be automatically discounted. But nor is it, I think, an argument which can claim a very impressive record of success. All depends on one's judgment of the likely result of a particular extension of the law. I do not myself think that refusal by this court to lay down the legal principle for which the defendants contend, or (put positively) our acceptance that a claim such as the plaintiff's may in principle succeed, will lead to a flood of claims or actions, let alone a flood of successful claims or actions. Insistence that psychiatric damage must be reasonably foreseeable, coupled with clear recognition that a plaintiff must prove psychiatric damage as I have defined it, and not merely

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A grief, sorrow or emotional distress, will in my view enable the good sense of the judge to ensure, adopting Lord Wright's language in *Bourhill v. Young* [1943] A.C. 92, 110, that the thing stops at the appropriate point. His good sense provides a better, because more flexible, mechanism of control than a necessarily arbitrary rule of law.

I would therefore answer this broad question of principle in favour of the plaintiff.

B

The question of fact

We were asked to determine, assuming the truth of the facts pleaded, whether psychiatric damage to the plaintiff was reasonably foreseeable by the defendants. This might fairly have been done in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, where the plaintiff was the mother, or in *Jaensch v. Coffey*, 58 A.L.J.R. 426, where the plaintiff was the wife, of the alleged tortfeasor's immediate victim, although in each of those cases there was a full trial. But one must be very cautious in determining questions of fact on assumed facts, and the risk of doing so unfairly to one side or the other is increased where, as here, the parties were by no means strangers to each other before the careless act occurred. In deciding what the defendants should reasonably have foreseen I would wish to have a much fuller picture than pleadings can give of the plaintiff's personality and circumstances as manifested to and known by the defendants. I therefore decline to answer this question because I do not think it is fairly answerable on existing materials at this stage.

D

I am accordingly of opinion that this appeal should be allowed. The case should be remitted to a judge for trial of all live issues related to reasonable foreseeability, causation and damage on the footing that, if the plaintiff succeeds on all these issues, her claim may in principle be upheld. Whether the parties wish to defer the assessment of damages (if any) is a question for them.

E

Appeal allowed.

Leave to appeal refused.

F

Solicitors: Fremont & Co.; Solicitor, British Gas Plc. (North Thames Region).

M. F.

G

H

[COURT OF APPEAL]

KYTE v. KYTE

1987 June 15;
July 22Purchas, Nicholls and
Russell L.JJ.

Husband and Wife—Financial provision—Conduct of parties—“Inequitable to disregard it”—Husband suffering from depression and suicidal—Wife at first rescuing husband from attempted suicides—Wife forming adulterous relationship—Wife assisting husband to attempt suicide—Whether inequitable to disregard wife’s conduct—Matrimonial Causes Act 1973 (c. 18), s. 25(2)(g) (as substituted by Matrimonial and Family Proceedings Act 1984 (c. 42), s. 3)

The husband and wife married in July 1975. By early 1980 the marriage was in difficulties. The husband suffered from depression and was suicidal and unpredictable. He went into hospital for treatment several times. In the summer of 1982 he attempted to commit suicide but was rescued by the wife. He made other attempts and, in July 1983, the wife complied with the husband’s request to help him commit suicide by taking drink and a drug to his office and she did not try to dissuade him. By that time the wife had, unknown to the husband, formed an association with the party cited and wanted to set up home with him. She knew that she stood to gain by the husband’s death. Thereafter, she started divorce proceedings and obtained an injunction in February 1984 ousting the husband from the matrimonial home. By October 1984 the wife and the party cited were living together in the matrimonial home. She applied for ancillary relief. The registrar concluded that on the evidence before him the wife’s conduct had been such that it would be inequitable to disregard it by virtue of section 25(2)(g) of the Matrimonial Causes Act 1973¹, as amended. He made a property adjustment order and dismissed her claim for a lump sum. On the wife’s appeal the judge granted her a lump sum of £14,000.

On appeal by the husband:

Held, allowing the appeal, that, under section 25(2)(g) of the Matrimonial Causes Act 1973, the court had to consider the conduct of both parties if it was conduct that might or might not have contributed to the breakdown of the marriage or if in some other way the nature of the conduct was such that it would be inequitable to ignore it in determining financial or property adjustment orders; that even in relation to the conduct of the husband which contributed to the unhappiness of the marriage, the wife’s conduct motivated by gain in relation to the husband’s suicide attempt in July 1983 together with her deceitful conduct in relation to her association with the party cited was conduct of such a nature that it was inequitable to disregard it; and that, accordingly, the judge’s order should be varied and the lump sum awarded reduced to £5,000 (post, pp. 1123B–C, F–H, 1124G).

Order of Ewbank J. varied.

The following cases are referred to in the judgment of Purchas L.J.:

Hall v. Hall [1984] F.L.R. 631, C.A.

M. v. M. (Financial Provision: Conduct) (1982) 3 F.L.R. 83

Martin v. Martin [1976] Fam. 167; [1976] 2 W.L.R. 901; [1976] Fam. 335; [1976] 3 W.L.R. 580; [1976] 3 All E.R. 625, C.A.

¹ Matrimonial Causes Act 1973, s. 25(2)(g), as amended: see post, p. 1116A–B.

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- A *Robinson v. Robinson* [1983] Fam. 42; [1983] 2 W.L.R. 146; [1983] 1 All E.R. 391, C.A.
Vasey v. Vasey [1985] F.L.R. 596, C.A.
W. v. W. (Financial Provision: Lump Sum) [1976] Fam. 107; [1975] 3 W.L.R. 752; [1975] 3 All E.R. 970
Wachtel v. Wachtel [1973] Fam. 72; [1973] 2 W.L.R. 366; [1973] 1 All E.R. 829, C.A.
- B *West v. West* [1978] Fam. 1; [1977] 2 W.L.R. 933; [1977] 2 All E.R. 705, C.A.

No additional case was cited in argument.

APPEAL from Ewbank J.

- C The wife, Diana Kathleen Kyte, applied in her divorce proceedings for financial relief and property adjustment orders. Mr. Registrar Gee in chambers at the Manchester County Court made an order on 7 October 1986 that the husband, Graham Rodger Kyte, should forthwith transfer to the wife all his interest in the matrimonial home, 111, Downham Crescent, Prestwich; on completion of the transfer the wife should forthwith transfer to the husband or to his nominees her shareholding in G.R. Kyte Ltd. and the wife's claims for periodical payments for herself and for a lump sum order were dismissed. The registrar also made
- D certain orders for the maintenance of the children.

The wife appealed from that order and, on her application, the case was transferred to the High Court. On 16 January 1987 Ewbank J. in chambers at Manchester allowed the appeal. He ordered that in addition to the orders made on 7 October 1986 the husband should pay to the wife a lump sum of £14,000 within two months.

- E By a notice of appeal dated 13 February 1987 the husband appealed against the order for a lump sum on the grounds, inter alia, that (1) on the evidence before the court, it having been established before the registrar that on two occasions the wife had assisted the husband to commit suicide, the judge misdirected himself in holding that the conduct complained of was not such that it would be inequitable to disregard it; (2) the judge misdirected himself in holding (a) that the registrar had considered the behaviour of the wife in isolation and not in the context of the marriage, (b) that the registrar had not had sufficient regard to the well being of the children as first consideration and the needs of the wife and children were not satisfied by the registrar's order.

The facts are stated in the judgment of Purchas L.J.

- G *F. J. Burns* for the husband.
M. P. Allweis for the wife.

Cur. adv. vult.

22 July. The following judgments were handed down.

- H PURCHAS L.J. This is an appeal by Graham Rodger Kyte ("the husband") against an order made by Ewbank J. on 16 January 1987 at Manchester when the judge allowed an appeal from an order made by the registrar (Mr. Registrar Gee) on 7 October 1986 to the extent that, in addition to the orders made by the registrar, the husband was ordered to pay to Diana Kathleen Kyte ("the wife") a lump sum of £14,000. The central issue raised in the appeal relates to section 25 of the Matrimonial Causes Act 1973 as substituted by section 3 of the Matrimonial and Family Proceedings Act 1984. The parts of the section relevant to this appeal are:

“(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 or 24A above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18. (2) As regards the exercise of the powers . . . in relation to a party to the marriage, the court shall in particular have regard to the following matters— . . . (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it . . .”

After hearing evidence on 20 August 1986 and submissions made by counsel, the registrar delivered a reserved judgment on 5 September 1986. The wife's application claimed all the usual forms of ancillary relief but as recorded in the registrar's judgment the only live issues were: (a) what provision should be made in respect of the matrimonial home at 111, Downham Crescent, Prestwich; (b) what lump sum, if any, should the husband pay to the wife; (c) what level of periodical payments should be ordered in respect of the three relevant children of the family.

The short background to the application was as follows. The parties were married on 25 July 1975. There are four children of the family, two of whom were the wife's children by a former marriage, namely Paul, born on 21 September 1965, and Andrea, born on 29 January 1969; and two who were the issue of the parties to the marriage, Victoria, born on 7 October 1977, and Rachel, born on 17 January 1980. The marriage appears to have come under stress at or soon after the birth of Rachel. The husband suffered from depression and spent numerous periods in hospital under treatment for this condition. In the particulars of behaviour upon which the wife relied in support of her petition for dissolution of marriage based upon section 1(2)(b) of the Matrimonial Causes Act 1973, which generally were accepted by the husband, it appears that, as a result of his depression, he was unpredictable and suicidal. Particularly severe incidents are recorded in April 1981. In the summer of 1982 he attempted suicide at his office and was rescued only by the wife and his office driver who, missing him, had called the wife for assistance. Other suicidal incidents occurred in the summer of 1983.

On the findings of fact reached by the registrar, which were generally accepted by the judge on appeal, the wife started associating with a Mr. Gregory as early as June 1983, although she did not start living with him permanently until 1984. The husband's case, which was accepted by the registrar, was that, although one of the serious suicidal attempts in the summer of 1983 was caused by the wife withdrawing her support from him, he was not at that time aware of the wife's association with Mr. Gregory. Subsequently, he realised that she was only using his conduct as a means to dissolve the marriage and set up home with Mr. Gregory.

Having initiated the suit, the wife obtained an injunction ousting the husband from the matrimonial home in February 1984. It is his assertion that this application was contrived to enable her to set up home with Gregory in the matrimonial home. The registrar found that, in presenting her version of these events to him, the wife had lied on oath.

After hearing evidence at length from the wife, the husband, from other witnesses including Gregory's wife, the registrar came to certain

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A firm findings of fact on the issues. The relevant parts of his judgment can conveniently be set out at this stage:

"I think there is no doubt that, as stated in paragraph 1 of the particulars of behaviour in the petition the husband's behaviour was unpredictable and suicidal and he spent many periods in hospital. I need not repeat them but the incidences of the husband's behaviour, which were brought about by his condition, are set out in the particulars of behaviour and notwithstanding that no 'fault' as such can be attached to the husband in the sense that his behaviour was brought about by his condition, there is no doubt that the wife had just cause for complaint and which more than justified a petition under section 1(2)(b) of the Matrimonial Causes Act 1973. The husband for the most part accepts the allegations which were made against him, although he did file an answer denying that the marriage had broken down and asking that the prayer for dissolution be rejected. Subsequently when he found out about the wife's relationship with Gregory his answer was with leave amended to include a cross prayer for dissolution based on an allegation of adultery with Gregory who became the party cited. At the decree hearing, by agreement, cross decrees were granted on the petition and answer. The husband's case is that until his first really serious suicide attempt in July 1983 the wife had been supportive and understanding. It was her withdrawal of support which led to him seriously attempting to take his own life. He could not understand why her attitude had changed. He knew nothing of Gregory at the time of this attempt in July 1983 but now believes that the wife only used his 'conduct' as a basis for a divorce so that she could set up house with Gregory and, as he believes, inherit all his estate in the likely event that he successfully committed suicide. The wife's case is that her relationship with Gregory only started some time after the proceedings were commenced and after the suicide attempt in July and that this gradually blossomed until the stage was reached only in about October 1984 that she started to live with him permanently. I am quite satisfied on the evidence I heard that the wife has not told me the truth about her relationship with Gregory. She denied writing a 'love letter' to Gregory as early as June 1983 but Gregory's former wife Barbara Gregory gave evidence to me that she found such a letter on 17 June 1983 which read something like: 'Dear Michael, Miss you very much. Can't wait for our meeting. Love You. Diana.' Mrs. Gregory appeared on witness summons and had no reason to tell me any untruths. I accept her evidence which I think proves conclusively that the relationship between the wife and Gregory, for it to have reached the stage in which a letter such as that was written, must have started some time well before June 1983. The wife therefore in my view lied to me on that point.

"Next, the husband asserts that the obtaining by the wife of an injunction ousting him from the matrimonial home in February 1984 was a manufactured set of circumstances to give her premises in which she could set up house with Gregory. The wife asserts that whilst Gregory, after she returned, stayed from time to time it was much later in that year before he moved in finally. Certainly in April 1984 the wife's solicitors wrote to the husband's then solicitors

asserting that there in effect was no relationship at all. That was clearly not the case. Mrs. Gregory gave evidence that she believed that her husband had started to live with [the wife] at the Kyte matrimonial home in about February 1984. She had been told that his taxi (he was then a taxi driver) was there day and night and she asked him about it and he told her that he was living there. He had already admitted to her that 'sex was involved' when she had found the letter to which I have referred. I accept Mrs. Gregory's evidence on this point and accordingly conclude that again the wife has not told me the truth on this issue and that Gregory was effectively living with her from shortly after she moved back to the matrimonial home.

"The husband put to the wife that she had thrown a party for Gregory in February 1984. The wife whilst accepting that there had been a party at this time at which Gregory was present, denied that it was for him (his birthday being on 10 February) and said that the birthday party she threw for him was in February 1985 which was after he had admittedly moved in. Mrs. Gregory gave evidence on this point as well. Gregory had told her of a party in February 1984 which was 'for his birthday and because [the husband] had left the house.' Again I think the wife was less than truthful. I think the husband is right. She wanted him out of the house 'to set up shop' with Gregory and having successfully attained her objective she threw a party to celebrate this and Gregory's birthday."

The registrar also found in the husband's favour over an incident which occurred in April 1984 on the day that the husband was discharged from hospital and went to the outside of the matrimonial home, where he had a shouted conversation with the wife who was speaking from an upstairs window. The husband alleged that he asked the wife what she wanted and received an answer to the effect: "I want the house, the contents and £50,000." Having had this conversation the registrar accepted evidence of admissions made by the wife to a third party that she, the wife, returned to the adulterous bed, which she was, at the time of the conversation, sharing with Gregory.

The first major suicidal attempt with which the registrar dealt was in July 1983. He made this finding:

"I therefore conclude that on this occasion, whilst the wife did not give active assistance in the attempted suicide, she left him alone to get on with it. In the result it would seem that the husband, whilst taking sufficient drugs and alcohol to kill himself, came downstairs (although he could not recall it) with the result that medical assistance was called (presumably by the wife) and after a period in intensive care he recovered. I conclude that the wife only called for medical assistance because she was really left with no alternative."

Turning to the second incident, the registrar found the facts in these terms:

"The next and perhaps most serious incident was when the husband was in a psychiatric ward following his period in intensive care after his July 1983 suicide attempt. The husband's case is that he telephoned the wife indicating that he again wished to kill himself and asked her to bring round some tablets and some alcohol to his office, which in fact was only just round the corner. He walked

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A round to the office having told the wife where there [were] some more tablets hidden under a bed and having told her to park her car on a main road and walk round so that her car would not be seen nearby. She arrived after about 10 minutes and rang the bell. When he answered the door she was there but no car was in view. She had a bag in her hand which contained a bottle of whisky and some cans of lager and some sodium amytol and other tablets. He asked her to come in but she didn't want to. He asked if he could kiss her or touch her one last time and she refused. She then left but in the result the husband felt unable to go through with it and having drunk some of the alcohol did not take the tablets. He phoned his father who came for him. Before this he had again telephoned the wife and said that he could not go through with it to which she replied, 'I knew you had no guts.'

C Finally, before parting with the facts as found by the registrar, I wish to quote one further passage:

D "I do however conclude that the wife's main objective was to set up house with the party cited and to get as much from the husband as possible. If she had admitted the allegations concerning her assistance with the husband's attempts at suicide but said that they arose from humanitarian principles I would have been more sympathetic to her. However, she denied the allegations and I accordingly do conclude that it was in the back of her mind, if not in the forefront, that if he was successful she would inherit all his estate."

E The registrar applied the provision of section 25(2)(g) of the Act of 1973 in these terms:

F "I think the right question I have to ask myself is whether a right thinking member of society, faced with the conclusions I have reached, would say that the matters of conduct were such as to reduce or extinguish the wife's entitlement. Many, I am sure, would say that on these facts she should get as little as possible but in my view the position is not so simple. I certainly conclude that the conduct is such that it would be inequitable to disregard it but that is only one of the factors I have to take into account under section 25 of the Act of 1973."

G The registrar then carefully reviewed all the features of the financial resources and needs of the parties in accordance with the provisions of section 25. I do not find it necessary to rehearse this careful appraisal of the position which is shown in the notes of the registrar's judgment. It is not criticised by Ewbank J. nor has it been attacked on appeal save only as to one respect: that is that the registrar's estimation of the total capital assets of the family was too low.

H In the event, the registrar ordered that the wife should have the whole of the interest in the property 111, Downham Crescent, Prestwich, and that, on completion of the transfer to her of the husband's interest, she should transfer to him or to his nominee her shareholding in the husband's limited company. The registrar then dismissed the wife's claim for periodical payments and lump sum and ordered periodical payments at the nominal amount of 5p per annum in favour of Andrea and periodical payments at the rate of £25 per week until the age of 17 or further order in favour of Victoria and Rachel.

The wife appealed against the order of the registrar and sought a transfer of the proceedings to the High Court District Registry at Manchester. Thus the matter came on before Ewbank J. The procedure to be adopted by the judge in dealing with an appeal of this sort must be essentially a matter for his own discretion. There may be occasions which call for a complete hearing of the evidence *de novo* and others where the appropriate course is to deal with the matter on the evidence before, and findings of fact by, the registrar. Mr. Allweis, who appeared for the wife before Ewbank J., has told the court that he, and indeed the husband, had arrived prepared for a full hearing by Ewbank J. of all the evidence *de novo*.

Somewhat to the parties' surprise the judge indicated at the outset that the witnesses would not be required, except that evidence would be received from the husband to deal with his financial position. If a judge decides to adopt the course taken by Ewbank J. in this application, then the exercise of his discretion in determining facts, other than the financial position of the husband, will be constrained in the same manner as this court is inhibited on appeal. By the same token, this court is in just as good a position as the judge to review the findings of the registrar, particularly as regards the central issue of conduct.

Turning now to the transcript of the judgment of Ewbank J., the judge recorded the respective ages of the husband and wife (48 and 39 respectively) and the ages of the children, and then continued to deal with the financial position of the husband's company and the financial position he enjoyed in relation to the company, namely that he was substantially living on the capital and income of the company as a wasting asset. It is only necessary to refer to one finding in detail:

"The registrar had rather diffuse evidence about the company, and he came to the conclusion that the total assets with which he had to deal were in the region of £160,000. This was an underestimate, and I have to say that the figures I have got, on the evidence I have heard today, bring the total assets to £200,000, rather than £160,000."

It is accepted by Mr. Burns, who appears for the husband, that the judge's finding on the total assets is correct.

The judge then passed to deal with the question of conduct. It is not apparent that he criticised any of the findings of fact or assessments of credit reached by the registrar. Indeed, in view of the course that he decided to take in hearing the appeal, it would be quite impossible for him so to do. He dealt with this aspect of the case in the following terms:

"The registrar went into great detail about the wife's conduct, and took a very adverse view of her conduct. Now, it was right to say, to an extent at any rate, that the husband was not responsible for his behaviour since it developed from his mental ill health, but it is not right to divorce the wife's behaviour from the general history—that is made clear in *Vasey v. Vasey* [1985] F.L.R. 596. The wife's behaviour has to be weighed in the light of the history of the marriage and not taken in isolation, and I fear the registrar has treated it in isolation. The wife is blameworthy in some of the things she has done. She has committed adultery; she has been less than kind to the husband; and she has told lies to the court. But that has to be taken in the context of the deep unhappiness caused

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A to her by the husband's behaviour, albeit as a result of his mental ill health, and, having considered all the factors in this case, I would have thought the registrar was wrong to come to the conclusion that it would be inequitable to disregard the wife's conduct."

The judge eventually decided to allow the appeal in these terms:

B "The registrar, in my judgment, was wrong in two aspects, as I have mentioned. First of all, in the assessment of the total capital, I have had up-to-date evidence from the husband himself on this and, as I have mentioned, the registrar's figure of £160,000 is wrong. The right figure is about £200,000. The second ground on which the registrar was wrong was in deciding that it would be inequitable to disregard the wife's conduct, and thereby reducing what would otherwise have been her entitlement. Having come to that conclusion, I come to the decision that there should be a lump sum to the wife, as well as the house, to meet the requirements of section 25, and I assess that lump sum at £14,000."

D Turning now to the central issue raised in this appeal, namely that of conduct, it is first necessary to notice the alterations in the statutory law achieved by the Matrimonial and Family Proceedings Act 1984. This Act in its preamble is described:

"An Act to amend the Matrimonial Causes Act 1973 . . . so far as [it relates] to the exercise of the jurisdiction of courts in England and Wales to make provision for financial relief . . ."

E Mr. Burns informed the court that the alterations to section 25 so far as conduct is concerned have been viewed by the Bar as confirming but in no way affecting the law as it existed immediately prior to the passing of the Act under the wording of section 25 in the Matrimonial Causes Act 1973 before amendment together with the case law ensuing thereon. The relevant parts of section 25 as originally enacted are:

F "(1) It shall be the duty of the court in deciding whether to exercise its powers . . . in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say— . . . and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

G The new form of section 25 in its relevant provisions for this purposes has already been set out in this judgment.

H The significant changes involve: (a) an emphasis that the welfare of the minors must be given "first consideration;" (b) that subject to (a) the various factors of the parties, e.g. income, financial needs, standard of living, age, physical disability, etc., all of which are incorporated in the original form of section 25(1), with the addition, as a specific matter to be taken into account, the question of conduct and (c) the revocation of the duty subject to conduct making it "just so to do" to place the parties in the financial position in which they would have been, etc. The first and third differences are substantive amendments to the law as originally provided so far as financial relief: the first emphasising that not only as regards provision for the children under section 23 and

section 24, first regard must be had to their welfare in all other aspects of the case; and, secondly, a recognition of the futility of the third provision, attention to which was repeatedly drawn by the courts having to deal with applications for ancillary relief. It may well, therefore, be argued that the Matrimonial and Family Provisions Act 1984, being an amending Act, should in the first instance be read so as to give effect to the ordinary meaning of the words used. These are not the test of gross and obvious conduct as developed in *Wachtel v. Wachtel* [1973] Fam. 72, or conduct such as to make it repugnant to ignore it as between the parties. It may well be that the use of the words "it would in the opinion of the court be inequitable to disregard it" (the conduct of each of the parties) may give a broader discretion to the court than that envisaged hitherto under the authorities. Happily, in this case, it is not necessary to decide this matter as, in my judgment, the behaviour established against the wife would satisfy the test under either approach and, as the point has not been argued, it would be wrong for me to express a concluded view.

Mr. Burns referred the court to a number of cases which involved violent physical conduct: *Hall v. Hall* [1984] F.L.R. 631; *M. v. M. (Financial Provision: Conduct)* (1982) 3 F.L.R. 83 and *Vasey v. Vasey* [1985] F.L.R. 596, which was an authority to which the judge referred in his judgment. That case was an appeal from the justices, although the relevant statutory provisions were in equivalent terms: namely, that the financial needs and capacities of the parties must all be weighed in the balance and, if appropriate, conduct must also be placed in the scales. Mr. Burns submitted (and in my view rightly) that Ewbank J. was not justified when he criticised the registrar for failing to consider the conduct against the whole context of the marriage.

Mr. Allweis submitted that the inclusion of conduct as one of a number of paragraphs in section 25(2) in the new form indicated that, if the court came to the conclusion conduct should be considered, it must be considered along with all the other factors to which reference is specifically made in the paragraphs in section 25(2). He submitted that the authorities showed a general theme that conduct is only to be taken into account when the victim of the conduct is "blameless." In support of this submission he referred to part of the judgment of Waller L.J. in *Robinson v. Robinson* [1983] Fam. 42, 50, where Waller L.J. said in referring to *West v. West* [1978] Fam. 1:

"There is, however, an important point of difference in that in *West v. West* the judge found that the husband had to accept a share of the responsibility for the breakdown or failure to start the marriage, although by far and away the greater burden was on the wife. In the present case the husband was said to be blameless. In my opinion there is very little to choose between them. For the husband to be blameless is an unusual feature and the fact that the marriage broke down in just over four years does not make the case so different when this feature is taken into account. This is not the kind of case that Ormrod J. refers to when he says in *Wachtel v. Wachtel* [1973] Fam. 72, 80B: 'generally speaking, the causes of breakdown are complex and rarely to be found wholly or mainly on one side . . .'"

Mr. Allweis emphasised the finding of the registrar and the judge that, during the marriage, notwithstanding that the husband "could not

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A help himself" as a result of his manic depression, the wife must have suffered. In the present case the husband, therefore, could not be said to be "blameless."

B With respect to the submissions of Mr. Allweis, I am not impressed by this approach. The section refers to "the conduct of each of the parties" and this must relate to relevant conduct and does not envisage one or the other being blameless. Again, under the old authorities, the conduct did not necessarily have to be conduct contributing to the breakdown of the marriage, and frequently conduct subsequent to the breakdown was taken into account: see *Hall v. Hall* [1984] F.L.R. 631; *W. v. W. (Financial Provision: Lump Sum)* [1976] Fam. 107 and *Martin v. Martin* [1976] Fam. 167 and [1976] Fam. 335, C.A. As I have indicated earlier in this judgment, I see no restricting words or meaning to be inferred in the wording of the section 25(2). The court is entitled, in my judgment, to look at the whole of the picture, including the conduct during the marriage and after the marriage which may or may not have contributed to the breakdown of the marriage or which in some other way makes it inequitable to ignore the conduct of each of the parties. A clear example of such a case is where the parties may each not have been blameless (almost inevitably in a normal marriage) but where the imbalance of conduct one way or other would make it inequitable to ignore the comparative conduct of the parties.

E I accept the submission made by Mr. Burns that it is abundantly clear from the long and careful judgment of the registrar that he took into account the conduct of the wife in the context of the conduct of the husband and all the circumstances arising during the marriage and that the judge, with great respect to him, was not entitled to criticise his judgment in this respect in the way in which he did. I add only one comment, namely that the findings of the registrar as to the credibility of the wife cannot be ignored when viewing the contents of her petition as being reliable evidence of the specific facts there set out. The husband did in general terms accept that many of the allegations were true and to this extent, subject to the qualification just mentioned, the contents of the petition are reliable. The suit was finally determined by consent on cross-decrees and it is not clear to me to what extent the allegations in the petition were ever fully examined.

G I have, reluctantly, come to the conclusion that the judge was wrong to have reversed the registrar on the findings of conduct. The test as to conduct which the registrar set for himself is as apt an interpretation of the phrase "inequitable to ignore it" that I can readily envisage. The conduct of the wife not only in actively assisting or, alternatively, taking no steps to prevent the husband's attempts at suicide in the presence of the motive of gain which the registrar found on ample evidence to be established, together with her wholly deceitful conduct in relation to her association with Gregory, would amount to conduct of a gross and obvious kind which would have fallen within the concept under the old law and, in my judgment, could certainly render it inequitable to ignore it even against the conduct of the husband which contributed to the unhappy conditions which existed during the marriage and afterwards as a result of the husband's manic depression.

H I have, therefore, come to the conclusion that his appeal must be allowed on one of the two aspects upon which the judge in turn reversed the order of the registrar. This leaves the question of what this

court ought to do in those circumstances. I am unable to accept Mr. Burns' submission that the court should adopt the view that the order of the registrar provided the financial provision that was required to comply with the interests of the minors within section 25(1) of the Act of 1973 and that, therefore, no further payment should be made to the wife in any event. This would place too much weight on the conduct of the wife and would be inconsistent with the approach of the registrar ("I do not think that her conduct is such as to disentitle her altogether . . ."). On the other hand, I cannot accept Mr. Allweis' submission that conduct should not affect the distribution of the extra £40,000 of capital assets and that the judge's decision to give the wife £14,000 of it as a matter of discretion ought not to be disturbed. This ignores the fact that the judge was working on the basis that conduct was irrelevant, and we have found that he was in error in doing this. The judge also had the matter of costs in mind. Although the husband appeared in person in order to reduce costs, the wife has at all stages been an assisted person under the Legal Aid Act 1974. Before the registrar the wife's costs of the ancillary relief proceedings were expected to be in the region of £5,000. Before the judge her costs were said to be £15,000 in respect of which there would be a charge in the favour of The Law Society. On inquiring about this extraordinary difference, the court was told that the figure for the wife's costs included costs incurred in numerous applications involving the children. Although the information given to the court was not very clear, I understand that certainly not all the additional £10,000 costs related to the costs of this appeal. Again on the basis that the registrar was wrong over conduct, the judge awarded costs to the wife both before the registrar and on appeal.

In view of the decision we have reached in this court, it would be quite wrong to allow the judge's orders on costs to stand. The order of the registrar, i.e. no order as to costs, should be restored and, subject to further argument, it would appear that the husband should be awarded the costs of the appeal against the wife, such order not to be enforced without leave of the court. In these circumstances, it appears probable that, apart from the protected part of any lump sum award, The Law Society charge will absorb the balance. This is, of course, no reason for not making an award.

The approach which I propose to adopt is to vary the judge's apportionment of the £40,000 additional capital to take into account the question of conduct which he wrongly ignored. Bearing in mind that the interests of the minors have already been catered for and that the wife enjoys the support of Gregory, and her conduct, which I considered was extremely grave, even taking into account the difficulties of the marriage, I would reduce the lump sum to £5,000.

NICHOLLS L.J. I agree.

RUSSELL L.J. I also agree.

Appeal allowed with costs.

Order for costs not to be enforced without leave of court.

No order for costs before registrar.

Legal aid taxation of wife's costs.

Solicitors: Clifford Otten & Co., Manchester; March Pearson & Skelton, Manchester.

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A

[QUEEN'S BENCH DIVISION]

HAYMAN v. GRIFFITHS AND ANOTHER
WALKER v. HANBY

1987 July 6; 27

Watkins L.J. and Mann J.

B

Revenue—Value added tax—Return—Registered persons posting returns to controller in prepaid and preaddressed envelopes—Commissioners not receiving returns—Whether failure to “furnish”—Value Added Tax Act 1983 (c. 55), s. 39(8)(b), Sch. 7, para. 2(1) (as amended by Finance Act 1985 (c. 54), s. 12(8))—Value Added Tax (General) Regulations 1985 (S.I. 1985 No. 886), ref. 58(1)

C

Regulation 58 of the Value Added Tax (General) Regulations 1985, made pursuant to paragraph 2(1) of Schedule 7 to the Value Added Tax Act 1983 provides:

“every person who is registered [for value added tax] shall . . . furnish the controller, not later than the last day of the month next following the end of the period to which it relates, with a return on the form numbered 4 in the Schedule to these Regulations showing the amount of tax payable by or to him . . .”

D

The taxpayers, who were registered for value added tax, posted their returns in a prepaid and preaddressed envelope supplied by the Commissioners of Customs and Excise for that purpose within the relevant period and on the form prescribed by regulation 58. Officers of the Customs and Excise preferred informations against the taxpayers alleging a failure to furnish the returns, contrary to section 39(8)(b) of the Act of 1983¹. Before the justices, the officers adduced evidence in the form of certificates, pursuant to paragraph 11(1)(b) of Schedule 7 to the Act of 1983, that there was no record of the returns having been received by the commissioners. In the first case, the justices accepted the taxpayers' evidence that they had posted the return and dismissed the informations, but the justices in the second case were of opinion that the evidence of the certificate could only be rebutted by proof of receipt of the return and that proof of posting was insufficient. They found the taxpayer guilty, fined him £100 and ordered him to make payment in addition of £75 for the costs of the prosecution.

E

F

On appeal by the officer in the first case and by the taxpayer in the second case:—

G

Held, dismissing the first appeal and allowing the second, that a taxpayer, registered for value added tax, fulfilled his obligation to “furnish” a return within the terms of regulation 58(1) by completing the prescribed form, complying with the instructions printed on that form and returning it with any tax payable in the prepaid and preaddressed envelope supplied for that purpose; that the commissioners had adopted the Post Office as their agents in facilitating delivery of the return and were obliged to accept responsibility if the return was duly posted and not delivered; and that, accordingly, since the

H

¹ Value Added Tax Act 1983, s. 39(8), as amended: “Where a person's failure to comply with any regulations made under this Act consists— . . . (b) in not furnishing a return in respect of any period within the time required by regulations under paragraph 2(1) of Schedule 7 to this Act, that person shall be liable on summary conviction to a penalty of level 3 on the standard scale . . .”

Sch. 7, para. 11(1): see post, pp. 1128H—1129A.

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taxpayers had proved that they had posted the returns, they had not failed to furnish them, and the justices were right to acquit in the first case but wrong to convict in the second case (post, pp. 1131G—1132A, E—F).

Aikman v. White [1986] S.T.C. 1 applied.

The following case is referred to in the judgment:

Aikman v. White [1986] S.T.C. 1

No additional cases were cited in argument.

HAYMAN V. GRIFFITHS

CASE STATED by Dyfed justices sitting at Aberystwyth.

On 4 June 1986 informations were preferred by Peter Arthur Hayman, a customs officer, against the taxpayers, Arthur Owen Griffiths and Elizabeth Mary Griffiths, that they being registered under the Value Added Tax Act 1983 for the purpose of value added tax as persons carrying on a business in partnership failed to comply with regulation 58 of the Value Added Tax (General) Regulations 1985 by failing to furnish to the Controller, Customs and Excise, Value Added Tax Central Unit, Southend-on-Sea, a return for the period from 1 December 1985 till 28 February 1986 in the form prescribed by the Regulations of 1985 not later than 31 March 1986, contrary to section 39(8)(b) of the Value Added Tax Act 1983, as amended by section 12(8) of the Finance Act 1985.

The justices heard the information on 26 September 1986 and found the following facts. (a) The officer adduced in evidence (1) a certificate under paragraph 11(1)(a) of Schedule 7 to the Value Added Tax Act 1983, dated 22 May 1986, certifying that the taxpayers were registered for value added tax on 1 December 1985 and remained so on 31 March 1986; (2) A certificate showing that the return of value added tax posted by the taxpayers on 20 March 1986 had not been processed at his headquarters at Southend. (b) The officer could give no evidence whatsoever as to the posting of the return in question and could not prove beyond reasonable doubt that the return had not been received or mislaid on receipt. (c) The only proof as to the posting of the return to Southend was given by one of the taxpayers, Elizabeth Mary Griffiths, and the person who actually posted the return, namely, Gordon Rees. The latter was called as a witness by the taxpayers. (d) Gordon Rees gave evidence that he had posted the return to the officer on 20 March 1986 in a prepaid and preprinted envelope supplied by the officer for that purpose and the justices accepted that undisputed evidence.

It was contended by the officer that the return had not been "furnished" by the taxpayers as he had no record of the return having been received or processed at his office at Southend.

It was contended by the taxpayers that the return had been posted to the officer on 20 March 1986 in a prepaid and preprinted envelope for that purpose provided by the officer and that the return had therefore been "furnished."

The justices were of the opinion that (a) direct evidence had been given by the taxpayers that the return had been posted to the officer in a prepaid and preprinted envelope supplied by him for that purpose. (b)

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A The only evidence produced by the officer was the certificate under paragraph 11(1)(b) of Schedule 7 to the Act of 1983. (c) As the only direct evidence as to posting came from the taxpayers, and in the light of *Aikman v. White* [1986] S.T.C. 1, the justices were of the opinion that the return had been “furnished” by the taxpayers by posting the return in the prepaid and preprinted envelope referred to above on 20 March 1986.

B The customs officer appealed. The question for the opinion of the High Court was whether the return had been “furnished” to the officer when posted by the taxpayers in a prepaid and preprinted envelope supplied by the officer for that purpose.

WALKER v. HANBY

C CASE STATED by North Yorkshire justices sitting at Northallerton.

On 28 February 1986 an information was preferred by Allison Kathryn Hanby, a customs officer, against the taxpayer, Peter Allyn Walker, that he being registered for the purpose of value added tax under the Value Added Tax Act 1983 failed to comply with regulation 58 of the Value Added Tax (General) Regulations 1985 by failing to furnish to the Controller, Customs and Excise, Value Added Tax Central Unit, Southend-on-Sea, a return for the period from 1 September 1985 until 30 November 1985 in the form prescribed by the Regulations of 1985 not later than 31 December 1985, contrary to section 39(8)(b) of the Value Added Tax Act 1983, as amended by section 12(8) of the Finance Act 1985.

E The justices heard the information on 4 June 1986 and found the following facts. (a) The taxpayer was on 1 September 1985 registered for the purpose of value added tax and remained so on 31 December 1985. (b) No return of value added tax had been made by the taxpayer as at 8 April 1986, as shown by the certificate made pursuant to paragraph 11(1)(b) of Schedule 7 to the Act of 1983. (c) The taxpayer posted the return at Northallerton post office on 24 December 1985 but he was unable to prove that it had been received at Southend by the Controller of Customs and Excise.

F It was contended by the taxpayer that he was entitled to rely upon section 46 of the Act of 1983 which dealt with service of documents. It provided for the service of such documents by sending them by post in a letter addressed to a person at his last or usual residence or place of business. The taxpayer submitted that by compliance with section 46 he had complied with the law's requirements as to the furnishing of his value added tax return.

G It was contended on behalf of the officer that the obligation to furnish such a return, as contained in section 39(8)(b) of the Act of 1983 and regulation 58 of the Regulations of 1985, was absolute. In support of that contention, it was pointed out that paragraph 4(1) of Schedule 7 to the Act of 1983 provided that where a person had failed to make a return the commissioners might assess the amount of tax due from him to the best of their judgment and notify that to him. That would mean that if a person complied with the requirements as to service his legal obligations under the Act of 1983 would be at an end. Not only would he be deemed to have furnished a return when it had not been received at Southend, but the commissioners would thereby be prevented from making an assessment under paragraph 4(1) of Schedule 7.

H

Having heard the evidence on 4 June 1986 the justices reserved judgment until 25 June 1986, when they were of opinion that the evidence of posting the return to Southend was not sufficient to rebut the presumption raised by the production of the certificate, pursuant to paragraph 11(1)(b) of Schedule 7, that the return was not furnished. The justices' view was that the evidence of such a certificate could only be rebutted by proof of receipt of the return and that proof of posting would not suffice. Accordingly they found the taxpayer guilty, fined him £100 and ordered him to pay £75 towards the costs of the prosecution.

The taxpayer appealed. The question for the opinion of the High Court was whether the justices were correct in the view that the requirement to furnish a return was absolute and would not be complied with merely by proof of posting.

David Pannick for the customs officers.

Edward Fitzgerald for the taxpayers in the first case.

The taxpayer in person in the second case.

Cur. adv. vult.

27 July. MANN J. read the following judgments.

HAYMAN v. GRIFFITHS

There is before the court an appeal by way of case stated by Peter Arthur Hayman who is an officer of the Customs and Excise. The taxpayers are Mr. and Mrs. Arthur Griffiths who carry on an hotel business in partnership and who were at the material time registered as taxable persons under the Value Added Tax Act 1983. The case has been stated by justices for the county of Dyfed acting in and for the petty sessional division of Gogledd Ceredigion in respect of their adjudication as a magistrates' court sitting at Aberystwyth on 26 September 1986. On that day the justices dismissed informations which on 4 June 1986 the officer had preferred against the taxpayer. Those informations alleged the commission of an offence contrary to section 39(8)(b) of the Act of 1983 as substituted by section 12 of, and Schedule 6 to, the Finance Act 1985. The offence was that of failing to furnish a return of value added tax for the period 1 December 1985 to 28 February 1986 not later than 31 March 1986.

The case cannot be understood without a consideration of certain provisions of the Act of 1983 and of regulations made thereunder. By reason of section 38 of the Act of 1983 Schedule 7 has effect with respect to the administration, collection and enforcement of value added tax. Paragraph 2(1) of Schedule 7 provides:

"Regulations under this paragraph may require . . . the making of returns in such form and manner as may be specified in the regulations . . ."

Paragraph 4(1) provides:

"Where a person has failed to make any returns required under this Act . . . the commissioners . . . may assess the amount of tax due from him to the best of their judgment and notify it to him."

Paragraph 11(1) provides:

"A certificate of the commissioners . . . (b) that any return required by or under this Act has not been made or had not been made at

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Mann J.

A any date . . . shall be sufficient evidence of that fact until the contrary is proved.”

Regulations made under paragraph 2(1) of Schedule 7 to the Act of 1983 include regulation 58 of the Value Added Tax (General) Regulations 1985. Sub-paragraph (1) of that regulation provides:

B “Save as the commissioners may otherwise allow, every person who is registered . . . shall, in respect of . . . every period of three months ending on the dates notified either in the certificate of registration issued to him or otherwise, furnish the controller, not later than the last day of the month next following the end of the period to which it relates, with a return on the form numbered 4 in the Schedule to these Regulations showing the amount of tax payable by or to him and containing full information in respect of the other matters specified in the form and a declaration that the return is true and complete.”

The form numbered 4 which is in the Schedule is headed “Return of Value Added Tax” and contains the following instruction:

D “Please complete the whole of this form. The notes on the back and *Filling in your VAT return* will help you to do this. Return it, with any VAT due, in the enclosed envelope to the Controller, VAT Central Unit, HM Customs and Excise, 21 Victoria Avenue, SOUTHEND-ON-SEA X.”

A “failure” to comply with regulation 58(1) is a summary offence: see section 39(8)(b) of the Act of 1983 as amended.

E The facts of the case are in a short compass. The officer adduced a certificate under paragraph 11(1)(b) of Schedule 7 to the Act of 1983 to the effect that the return for the relevant period had not been made by the taxpayers and said that there was no record of a return having been received by the commissioners. The taxpayers’ answer was that a form 4 had been posted on 20 March 1986 in a prepaid and preaddressed envelope supplied by the commissioners for the purpose and that accordingly a return had been “furnished.” The justices accepted the evidence as to the posting on 20 March and were of the opinion that accordingly the return had been “furnished.” They pose the following question for the opinion of this court:

G “whether the return had been ‘furnished’ to the officer when posted by the taxpayers in a prepaid and preprinted envelope supplied by the officer for that purpose.”

H Mr. Pannick for the customs officer submitted that the answer to be given is, “no.” The offence, he said, was that of a failure to “furnish.” He is plainly correct in so saying. His statement invites an inquiry as to the meaning of the word furnish. The court’s attention was drawn to the *Shorter Oxford English Dictionary*, 3rd ed., vol. 1, p. 763 where furnish is, amongst other meanings, given the meaning of provide or supply. I would not dissent from the proposition that this is the ordinary English meaning which is appropriate to the word as it is used in regulation 58(1) of the Regulations of 1985. The meaning involves a receipt of a thing before it can be said that the thing has been furnished. The apparent consequence for present purposes is that if a taxable person posts a form 4 in accord with what is printed on the form then he is guilty of a criminal offence if the form is not received by the addressee.

Such a consequence seems surprising but is not impossible should primary and secondary legislation combine to secure its achievement. A

However, the consequence was rejected by the High Court of Justiciary in *Aikman v. White* [1986] S.T.C. 1. In that case the facts, although (and immaterially) set in the context of the Value Added Tax (General) Regulations 1980 (S.I. 1980 No. 1536), were identical to those in the present case. The Lord Justice-Clerk, Lord Wheatley said, at pp. 5-6: B

“The second chapter was in fact the main argument advanced by counsel for the respondent. It ran thus. The statutory form was sent by the controller to the respondent. It contained the following instruction: ‘The person named here must complete the whole of the form in accordance with the Notes overleaf and return it in the enclosed envelope to the Controller, VAT Central Unit, HM Customs and Excise, 21 Victoria Ave., Southend-on-Sea.’ The envelope was a prepaid and preaddressed one supplied by the commissioners for the express purpose of sending the return to the controller. There is a finding that this envelope containing the completed return was posted to the controller. Accordingly, the special circumstances warranted the submission that the commissioners were directing the taxpayer on how to meet the requirements of the regulation in regard to furnishing the return to the controller, and were thus using the Post Office as their agents. Thus, if the envelope went missing in these circumstances and was not received, the finding of fact that it was posted meant that the failure to deliver was the fault of the Post Office, which had been chosen by the controller as his agent in the delivery process. That being so, the respondent should not be convicted of failing to furnish the return. C D E

“The counter to this argument was that all that the controller was doing was facilitating the work of the taxpayer in making the return by giving her instructions on how to complete the form correctly and providing a prepaid addressed envelope for convenience. This was done to secure an accurate and speedy return of the information required for a tax assessment, but it could not be regarded as altering the statutory responsibility for seeing that the return was furnished and accordingly delivered. If this responsibility remained with the taxpayer, the latter had to bear the burden of non-delivery resulting in non-furnishing. In other words, the form could not detract from or alter the requirements imposed by the regulations. F G

“Even on the basis of the general principle to which I have referred applying, the certificate issued by the commissioners, on which their case was based, can be negated by proof to the contrary. In this case a completed return was made and posted, all in accord with the instructions given by the commissioners in the form. The respondent had done all that she was required to do by the commissioners, who, by giving these instructions, were clearly indicating how the return should be furnished to them. In doing so, they were adopting the Post Office as their agents, and must accept responsibility for the non-delivery of the return which was posted. H

“I am accordingly of the opinion that the respondent carried out what she was requested to do by the regulations and the Act—she

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Hayman v. Griffiths (D.C.)

Mann J.

A furnished the commissioners with the return in the manner in which they asked her to do. This, in my view, both qualifies the general definition of 'furnishing' and negatives the evidential value of the certificate, and, this being a criminal charge, with all the stringencies attached thereto, the sheriff was right in acquitting her in the circumstances."

B Lord Robertson said, at p. 7:

C "As the controller on the form specifically instructs the sender of the form to return it in an envelope specially enclosed for the purpose, stamped and addressed, it seems to me that it is the controller who is using the Post Office as his agent, not the sender, and he is indicating that he accepts that the return is furnished when it is posted in the prescribed way. A further indication of this is in the terms of the complaint, which charges that the failure to comply with the order took place at the respondent's premises, not the controller's office."

Lord Dunpark said, at p. 8:

D "In terms of the note on form 5 they invited the respondent to complete the return, place it in the hands of the Post Office for delivery to them at their office in Southend. In effect they were saying to the respondent 'This is all that you have to do "to furnish" us with the return.' In my opinion they thereby intimated to the respondent that they were appointing the Post Office as their agent to receive the return on their behalf. This I believe to be the reason why the sheriff acquitted the respondent, although he makes no reference to agency."

E A decision of the High Court of Justiciary is a persuasive authority for this court. The more is it so when regard is had to the desirability of a uniform system of taxation being uniformly interpreted throughout the Kingdom. However, Mr. Pannick submitted that the decision was a wrong one. He advanced three reasons. First, that which is printed on form 4 cannot limit the obligation to furnish. Second, that which is so printed does no more than give aid in facilitating the making of a return. Third, that the court was not correct in allowing the commissioners to erode the taxable person's duty to furnish by making the Post Office an agent, that there was no factual basis for such an agency and that the agency was an agency to carry and not to receive, i.e. was not an agency to complete the act of furnishing.

G I cannot accept the force of these criticisms. The obligation to "furnish" derives from regulation 58(1) and is an obligation to furnish a return on the form numbered 4. Form number 4 informs the taxable person what he is to do. I agree with the Lord Justice-Clerk, Lord Wheatley, when he observed, at p. 6:

H "The respondent had done all that she was required to do by the commissioners, who, by giving these instructions, were clearly indicating how the return should be furnished to them. In doing so, they were adopting the Post Office as their agents, and must accept responsibility for the non-delivery of the return which was posted."

Regulation 58(1) of the Regulations of 1985 by its own adoption of form 4 has effected a refined meaning of furnish. This seems to me to remove any force from Mr. Pannick's criticisms. I respectfully agree with

the decision of the High Court of Justiciary. Accordingly, in this case the taxpayers establish that there was no failure to furnish, the certificate under paragraph 11(1)(b) of Schedule 7 to the Act of 1983 lost its potency and the justices were right to acquit.

I would accordingly answer the question posed "yes" and in accordance with the intimation already given, dismiss the appeal.

WALKER V. HANBY

There is before the court an appeal by way of cases stated by the taxpayer, Peter Allyn Walker, who is a solicitor and who at the material time was registered as a taxable person under the Value Added Tax Act 1983. The respondent is an officer of the Customs and Excise. The case has been stated by justices for the county of North Yorkshire acting in and for the petty sessional division of Allertonshire in respect of their adjudication as a magistrates' court sitting at Northallerton on 4 June 1986. On that day the justices found the taxpayer guilty on an information which charged him with an offence contrary to section 39(8)(b) of the Act of 1983 as amended by section 12 of, and Schedule 6 to, the Finance Act 1985. The offence was that of failing to furnish a return of value added tax for the period 1 September 1985 to 30 November 1985 not later than 31 December 1985.

The justices found that the taxpayer had posted a return to the commissioners on 24 December 1985. There was no evidence that the return had been received by the commissioners. On those facts the justices found the taxpayer guilty, fined him £100 and ordered him to pay £75 towards the costs of the prosecution.

The result in this case is the converse of that which was achieved in the previous case. The result in that case has determined this case. Accordingly, in response to the justices' question as to whether they were correct in the view that the requirement to furnish a return is absolute and would not be complied with merely by proof of posting I would return the answer "no" and would in accordance with the intimation already given, allow this appeal.

WATKINS L.J. I agree with both judgments. Accordingly, the appeal of Hayman will be dismissed and the appeal of Walker will be allowed.

Appeal in first case dismissed with costs.

Legal aid taxation.

Appeal in second case allowed with costs.

Certificate under section 1 of the Administration of Justice Act 1960 that point of law of general public importance involved in decision refused.

Leave to appeal refused.

Solicitors: Solicitor, Customs and Excise, Morris Bates & Godwin Aberystwyth.

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A

[COURT OF APPEAL]

HINES v. BIRKBECK COLLEGE AND ANOTHER

NOTE

1987 Aug. 4

Dillon, Stephen Brown and Neill L.JJ.

B

Education—University—Visitor's jurisdiction—Dismissal of professor by college—University committee recommending deprivation by university of title and status—Whether subject to jurisdiction of college and university—Whether dispute within exclusive jurisdiction of visitor

C

APPEAL from Hoffmann J.

The Court of Appeal dismissed the appeal of the plaintiff, Albert Gregorio Hines, from the decision of Hoffmann J. [1986] Ch. 524; [1986] 2 W.L.R. 97, who had ordered to be struck out his claims against the first defendant, Birkbeck College, for a declaration that its dismissal of him from his employment as a professor of economics was ultra vires, null and void, and against the second defendant, the University of London, for an injunction restraining it from depriving him of his title of professor and status as an appointed teacher, on the basis that they fell within the exclusive jurisdiction of the visitor of the respective defendants and that the court therefore lacked jurisdiction to intervene.

D

The plaintiff in person.

E

James Munby for the first defendant.*Mark Studer* for the second defendant.

F

DILLON L.J., in a judgment with which Stephen Brown and Neill L.JJ. agreed, said, after considering fully the arguments advanced and authorities cited by the plaintiff: The judgment of Hoffmann J. has, as a matter of law, been approved by the House of Lords in *Thomas v. University of Bradford* [1987] 2 W.L.R. 677, 690; it is not for us to differ. The House of Lords has not of course decided the plaintiff's case but the views expressed by the House of Lords are the guidelines by which we have to decide that case. We are concerned particularly with the application of what are now those guidelines by Hoffmann J. I can see no beginnings even of a successful argument that Hoffmann J. has erred in his judgment and, without any hesitation, I would dismiss this appeal.

G

Solicitors: Dawson & Co.; Clifford Chance

[Reported by CLIVE SCOWEN ESQ., Barrister-at-Law]

H

[CHANCERY DIVISION]

BUSINESS COMPUTERS INTERNATIONAL LTD. v.
REGISTRAR OF COMPANIES AND OTHERS

1987 June 18, 19

Scott J.

Negligence—Duty of care to whom?—Litigant—Petition to wind up company—Petition served at incorrect address—Company unaware of petition—Winding up order made but later set aside—Company's claim against petitioner for negligence—Whether petitioning company owing duty of care—Whether statement of claim to be struck out

The second defendant company, claiming to be the assignee of a debt owed by the plaintiff company, presented a petition to wind up the plaintiff company. The petition was served at an address stated in the petition to be the plaintiff's registered office in Wembley, and the petition was subsequently advertised. On 21 July 1986, the petition came before the Companies Court, but nobody appeared on behalf of the plaintiff company, and a winding up order was made. The Wembley address was not in fact the plaintiff's registered office, but that of another company. On learning of the making of the winding up order, the plaintiff successfully applied for it to be set aside. On 4 February 1987, the plaintiff issued a writ against, inter alia, the Registrar of Companies and the second defendant claiming damages in respect of the damage alleged to have been caused by the making of the winding up order.

On the second defendant's motion for an order that the plaintiff's action against it to be struck out as failing to disclose a reasonable cause of action:—

Held, granting the motion, that no duty of care was owed by one litigant to another as to the manner in which the litigation was conducted, whether in regard to the service of process or in regard to any other step in the proceedings; and that, accordingly, the plaintiff company's statement of claim as against the second defendant did not disclose any reasonable cause of action, and ought to be struck out (post, pp. 1140A–G, 1142D–H, 1143H–1144H).

Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210, H.L.(E.) and dictum of Sir John Donaldson M.R. in *Orchard v. South Eastern Electricity Board* [1987] Q.B. 565, 571, C.A. applied.

Marrinan v. Vibart [1963] 1 Q.B. 528, C.A. and *Rondel v. Worsley* [1969] 1 A.C. 191, H.L.(E.) considered.

The following cases are referred to in the judgment:

Anns v. Merton London Borough Council [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.)

Cabassi v. Vila (1940) 64 C.L.R. 130

Donoghue v. Stevenson [1932] A.C. 562, H.L.(Sc.)

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)

Kelly v. London Transport Executive [1982] 1 W.L.R. 1055; [1982] 2 All E.R. 842, C.A.

Leigh and Silavan Ltd. v. Aliakmon Shipping Co. Ltd. [1986] A.C. 785; [1986] 2 W.L.R. 902; [1986] 2 All E.R. 145, H.L.(E.)

Marrinan v. Vibart [1963] 1 Q.B. 528; [1962] 3 W.L.R. 912; [1962] 3 All E.R. 380, C.A.

Orchard v. South Eastern Electricity Board [1987] Q.B. 565; [1987] 2 W.L.R. 102; [1987] 1 All E.R. 95, C.A.

3 W.L.R. Business Computers Ltd. v. Company Registrar (Ch.D.)

- A *Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210; [1984] 3 W.L.R. 953; [1984] 3 All E.R. 529, H.L.(E.)
- Radivojevic v. L.R. Industries Ltd.* (unreported), 22 November 1984; Court of Appeal (Civil Division) Transcript No. 514 of 1984, C.A.
- Rondel v. Worsley* [1969] 1 A.C. 191; [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993, H.L.(E.)
- B *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1987] 3 W.L.R. 776; [1987] 2 All E.R. 705, P.C.

No additional cases were cited in argument:

MOTION

- C The plaintiff company, Business Computers International Ltd., issued a writ, dated 4 February 1987, accompanied by a statement of claim, against the first defendant, the Registrar of Companies, and the second defendant, Alex Lawrie Factors Ltd., and others, alleging negligence in respect of the facts that on 11 June 1986 the second defendant company presented a petition for the winding up of the plaintiff company and served it at 65, Castleton Avenue, Wembley, an address that was not
- D the registered office of the plaintiff company which was at an entirely different address, namely 5/7, Singer Street, London E.C.2, with the result that when the petition came on for hearing before the Companies Court on 21 July 1986, the plaintiff company was unaware of the existence of the petition and no one appeared on its behalf, and the usual winding up order was made. Having heard of the making of the winding up order, the plaintiff company at once applied for the order to
- E be set aside, and the order was duly set aside. In its statement of claim the plaintiff company alleged, inter alia, that the second defendant, in presenting the petition, owed a duty to the plaintiff company to take reasonable steps to ensure that the registered address of the plaintiff company was correctly stated, that the matters alleged in the petition could be conscientiously verified and that the petition was properly
- F served on the plaintiff company at its registered office. The prayer for relief claimed damages in respect of loss and damage to the plaintiff company, in various respects.

By a notice of motion dated 10 April 1987, the second defendant applied for the statement of claim to be struck out as against it.

The facts are stated in the judgment.

- G *M. F. Harris* for the second defendant.
J. D. Martineau for the plaintiff company.

- H SCOTT J. I have before me an application by the second defendant, Alex Lawrie Factors Ltd., that the claim made against it by the plaintiff, Business Computers International Ltd., be struck out on the ground that the claim discloses no reasonable cause of action.

The circumstances which give rise to the claim are unusual. The second defendant claimed to be the assignee of a debt owed by the plaintiff. On 11 June 1986 the second defendant presented a petition to wind up the plaintiff. The petition was based on the plaintiff's failure to pay the alleged debt. In the petition the plaintiff's registered office was stated to be "65, Castleton Avenue, Wembley." The second defendant served the petition at 65, Castleton Avenue, Wembley. Subsequently the

petition was advertised. On 21 July 1986 the petition came before the Companies Court. Nobody appeared for the plaintiff, and the usual winding up order was made.

No. 65, Castleton Avenue was not in fact the registered office of the plaintiff, which was at 5/7, Singer Street, London, E.C.2. The circumstances which gave rise to the error in the petition and to the service of the petition at 65, Castleton Avenue are not relevant to the application before me. Suffice it to say that the other defendants in the plaintiff's action include the Registrar of Companies, Monorell Ltd., whose registered office was at the material time 65, Castleton Avenue, and one of the directors of Monorell Ltd.

Having learnt of the winding up order the plaintiff at once applied to the Companies Court for the order to be set aside. The order was set aside. The plaintiff contends that it has suffered damage caused by the winding up order.

The writ in this action was issued on 4 February 1987 and was accompanied by a statement of claim. I will read the paragraphs of the statement of claim that plead the plaintiff's case against the second defendant:

"4.(a) On or about 26 June 1985 the plaintiff duly presented to the registrar form 4A, dated 26 June 1985, notifying the registrar that its registered office was 5/7, Singer Street, London EC2 (being the office of the plaintiff's accountants)"

Paragraphs 4(b) and (c) I need not, I think, read. The paragraph concludes:

"Such forms were all duly recorded by the registrar. . . . 9. The second defendant is and was at all material times a company engaged in the business of debt factoring. 10. At the material time the second defendant believed that there had been assigned to it by Trinitec Ltd. a debt owed to Trinitec by the plaintiff. (The plaintiff disputes that the debt to Trinitec was in fact owed by the plaintiff but such dispute is not material to these proceedings). 11. On a date unknown to the plaintiff, the second defendant, acting by itself or its agent, searched in the plaintiff's register at the companies registry and recorded the registered office of the plaintiff as being 65, Castleton Avenue, Wembley, Middlesex. . . . 13. On 11 June 1986, the second defendant presented a petition for the compulsory winding up of the plaintiff, based upon the aforesaid alleged debt. In so doing, the second defendant owed a duty to the plaintiff to take reasonable steps to ensure that the registered office of the plaintiff was correctly stated in the petition, that the matters alleged in the petition could be conscientiously verified and that the petition was properly served on the plaintiff's registered office. 14. In the petition it was falsely alleged that the plaintiff's registered office was 65, Castleton Street. The second defendant then purported to serve the petition at 65, Castleton Avenue aforesaid and subsequently advertised the petition. 15. The petition did not come to the notice of the plaintiff prior to its hearing in the High Court of Justice on 21 July 1986 at which hearing it was ordered, in the absence of the plaintiff, that the plaintiff should be compulsorily wound up. 16. On 23 July 1986 the plaintiff first became aware of the petition and that a winding up order had been made against it when it was so informed by the official receiver acting as provisional liquidator of

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Scott J.

A the plaintiff. . . . 20. In acting as pleaded in paragraph 14 above the second defendant acted negligently and in breach of its duty pleaded in paragraph 13 above.

"Particulars of Negligence"

B "(1) If the second defendant made its only search prior to 21 May 1986, failing to search the register at a time immediately before presentation of the petition (at which time the plaintiff's registered office was correct). (2) If the second defendant made its only or any search after 21 May 1986, recording or confirming the plaintiff's registered office incorrectly from form 9B instead of from the then correct form 4A, alternatively failing to appreciate that the plaintiff's registered office was 5/7, Singer Street. (3) Whenever the second defendant searched, failing to observe that the registered office of 65, Castleton Avenue was for a company with a completely different name from the plaintiff's, without any change of name having been registered, and to query the correctness of the supposed registered office. (4) Whenever the second defendant searched, failing to observe the inconsistencies in the documentation on the plaintiff's register and to query the correctness of the supposed registered office. (5) In any event verifying the petition in the circumstances mentioned above. (6) In any event and in all the circumstances serving the petition on an address which was not even purportedly the plaintiff's registered office and had not been since 21 May 1986, either at all, or alternatively without a fresh search, or alternatively without inquiry or notification to the address previously shown as the plaintiff's registered office namely 5/7, Singer Street.

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"21. By reason of the negligence of the registrar or of the second, third, fourth and/or fifth defendants or some one or more of them, the plaintiff has suffered loss and damage including at least the following items.

F *"Particulars of Damage"*

"(1) Costs incurred in connection with application to prevent perfection of the winding up order and to rescind the same, including legal fees and accountant's fees, amounting to not less than £8,197.50. (2) Wasted expenditure on promoting and publicising the name of 'Business Computers International,' alternatively expenditure incurred in devising, promoting and publicising an alternative trading name to 'Business Computers International,' by reason of having to abandon such name through damage to its reputation, amounting to not less than £93,134. (3) Loss of goodwill in the name 'Business Computers International Ltd.' The plaintiff will supply further particulars of damage upon the inquiry as to damages which it will ask the court to order."

G

H

The prayer for relief claims damages for negligence.

The plaintiff's action against the second defendant is, therefore, an action in negligence. The alleged negligent conduct was the inclusion of the incorrect address in the winding up petition, the service of that petition at the incorrect address and the advertisement of a petition which had, in the event, never been properly served. The second defendant's application to strike out was dated 10 April 1987.

The question for decision is whether the pleading that I have read discloses a reasonably arguable cause of action against the second defendant.

Mr. Harris, for the second defendant, has presented an attractively simple argument. The alleged negligence was negligence in the presentation and prosecution of a winding up petition. A claim based upon the improper commencement or prosecution of legal proceedings can only be entertained as an action for malicious prosecution: malice is required. Negligence does not suffice. A tortious duty of care is not owed by one litigant to another.

Mr. Harris supported these propositions by references to authority. In *Radivojevic v. L.R. Industries Ltd.* (unreported), 22 November 1984; Court of Appeal (Civil Division) Transcript No. 514 of 1984, the first instance judge, Sir Douglas Frank Q.C. sitting as a deputy High Court judge, had dismissed the plaintiff's claim for damages against the defendants for maliciously bankrupting him. The Court of Appeal dismissed the plaintiff's appeal. I have been supplied with a transcript of the judgments in the Court of Appeal. May L.J. said:

"Although such a claim does not come frequently before the courts, an action does lie in respect of injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company, or bankruptcy proceedings against an individual. It is necessary to show, first, that the proceedings terminated favourably in favour of the plaintiff; secondly that there was absence of reasonable and probable cause for bringing them; and thirdly, that there was malice or improper motive."

It is implicit in the decision that the commencement of bankruptcy proceedings or the presentation of a winding up petition cannot found an action in damages unless associated with malice.

It is clear also that a civil action can never be based on the falsity of evidence given in judicial proceedings. In *Marrinan v. Vibart* [1963] 1 Q.B. 528 the plaintiff alleged that two police officers had conspired to give false evidence about him, first in a report to the Director of Public Prosecutions, secondly at a trial at the Central Criminal Court, and, thirdly, at an inquiry before the Benchers of his Inn of Court. Salmon J. held that the statement of claim disclosed no cause of action. The Court of Appeal dismissed the plaintiff's appeal. Sellers L.J. cited with approval, at p. 536, the following passage from the judgment of Starke J. in *Cabassi v. Vila* (1940) 64 C.L.R. 130, 140-141:

"No action lies in respect of evidence given by witnesses in the course of judicial proceedings, however false and malicious it may be, any more than it lies against judges, advocates or parties in respect of words used by them in the course of such proceedings or against juries in respect of their verdicts. . . . the rule of law is that no action lies against witnesses in respect of evidence prepared (Watson v. M'Ewan [1905] A.C. 480), given, adduced or procured by them in the course of legal proceedings. The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice . . ."

In the present case the winding up petition must have been verified by an affidavit sworn on behalf of the second defendant. That affidavit must, therefore, have verified 65, Castleton Avenue as the registered

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A office of the plaintiff. There must also have been an affidavit deposing to service of the petition on the plaintiff at its registered office. Both these affidavits must, if the plaintiff's pleaded case is right, have been negligently false. *Marrinan v. Vibart* [1963] 1 Q.B. 528 establishes that an action cannot be based on the falsity of these affidavits.

B Mr. Harris referred me also to *Rondel v. Worsley* [1969] 1 A.C. 191 in support of his submission that the negligent prosecution of an action cannot be made the basis of an action in damages for negligence. The facts of the case are too well known to need rehearsing. Lord Pearce said, at p. 268:

C "It is a hardship that a man who has done no wrong should be subjected by a plaintiff to a baseless charge, in meeting which he will incur large expense. The charge may be reported largely in the newspapers and injure his reputation . . . But the basic hardship is inevitable and will always remain, namely, that any plaintiff can use the legal machine as a sounding board for untruthful allegations and cause harm, trouble and expense to an innocent defendant, and yet the law holds him (and the press who report the case) immune from paying damages for their untruth. Yet to remove this immunity would create a great injury to justice. Without it, the honest litigant might not dare to bring an honest claim for fear that if he fails he might be sued for damages."

D Mr. Martineau for the plaintiff, emphasised that the plaintiff's claim in negligence against the second defendant was not based on the incorrect statement in the petition of the plaintiff's registered office and was not based on the falsity of the affidavit verifying the petition or on the falsity of the affidavit of service. He accepted that a claim so based would be barred by the authorities on which Mr. Harris relied. The plaintiff's claim, he said, was based on the second defendant's negligent failure to serve the petition on the plaintiff. That failure had deprived the plaintiff of the opportunity of taking steps to prevent the advertisement of the petition and the making of the winding up order. The need for a petitioner to take care that his winding up petition was properly served on the respondent company was, Mr. Martineau submitted, manifest. The potential damage to the respondent company if care were not taken demonstrated the need. Mr. Martineau distinguished *Marrinan v. Vibart* [1963] 1 Q.B. 528 as being concerned only with the position of witnesses. He distinguished *Rondel v. Worsley* [1969] 1 A.C. 191 as being concerned with a claim arising out of the conduct of a trial. There was, he submitted, no authority which prevented a duty of care in regard to proper service of proceedings from being imposed on petitioners.

H As to Mr. Harris's malicious prosecution point, the requirement of malice for malicious prosecution was, submitted Mr. Martineau, no more of a bar to the plaintiff's negligence action than the requirement of dishonesty in an action for deceit was a bar to an action for negligent mis-statement.

I accept that both *Marrinan v. Vibart* [1963] 1 Q.B. 528 and *Rondel v. Worsley* [1969] 1 A.C. 191 are distinguishable on their facts. And I accept that the availability of an action for malicious prosecution where malice can be shown is not a conclusive answer to the plaintiff's negligence action.

The propriety of the plaintiff's negligence action against the second defendant depends, in my judgment, on the proposition that a person who institutes legal process owes a duty of care to the respondent or defendant in regard to service of the proceedings. Naturally enough Mr. Martineau confined his submissions to winding up petitions. He accepted that bankruptcy petitions would be on all fours with winding up petitions. But he did not accept that the same principles would necessarily apply to ordinary actions. For my part, I can see no reasonable ground of distinction. Any and every inter partes originating process is capable of leading to an order against the defendant. If a defendant does not appear an order may be made against him in his absence. No doubt an affidavit of service would be required before the order was made. But if the affidavit was in regular form the court would not usually question whether the address given for service was the correct address. If the originating process gave the wrong address for the defendant and the service thereof was made at the wrong address, an order might well be made against the absent defendant. The order might cause considerable damage before it could be set aside. The damage could be said to have been caused by the negligent default of the plaintiff in correctly identifying the address of the defendant and in serving the originating process at that correct address.

In my view, if the second defendant owed a duty of care as alleged in the present case, every petitioner or plaintiff would have a like duty.

There is, as Mr. Martineau pointed out, no authority which establishes that an action for damage caused to a defendant by the negligent failure of a plaintiff to effect proper service on him of the originating process cannot be brought. Equally, there is no authority which establishes that such an action can be brought. Mr. Martineau relied, therefore, on the *Donoghue v. Stevenson* [1932] A.C. 562 neighbour principle. It is foreseeable, he submitted, that failure to serve at the right address may result in damage to the defendant. So, he submitted, the neighbour principle established by *Donoghue v. Stevenson* justifies imposing on plaintiffs and petitioners a duty to take reasonable care to serve at the correct address. In my judgment, however, this argument is too superficial. A number of recent cases in the House of Lords and the Privy Council have established that foreseeability of harm does not of itself automatically lead to the imposition of a duty of care. In *Anns v. Merton London Borough Council* [1978] A.C. 728, Lord Wilberforce said, at p. 751:

"the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

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A In *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210, Lord Keith of Kinkel said, at p. 239:

B “Lord Atkin’s famous enunciation of the general principles upon which the law of negligence is founded, in *Donoghue v. Stevenson* [1932] A.C. 562, 580, has long been recognised as not intended to afford a comprehensive definition, to the effect that every situation which is capable of falling within the terms of the utterance and which results in loss automatically affords a remedy in damages.”

Lord Keith then referred to *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1027 and to Lord Wilberforce’s remarks in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751–752, and went on, at pp. 240, 241:

C “There has been a tendency in some recent cases to treat these passages as being themselves of a definitive character. This is a temptation which should be resisted. The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin’s sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case. . . . So in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.”

E In *Leigh and Silavan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] A.C. 785, 815, Lord Brandon of Oakbrook said about Lord Wilberforce’s remarks in *Anns v. Merton London Borough Council*:

F “Lord Wilberforce was dealing, as is clear from what he said, with the approach to the questions of the existence and scope of a duty of care in a novel type of factual situation which was not analogous to any factual situation in which the existence of such a duty had already been held to exist.”

The present case involves, I think, that novel type of factual situation.

G The most recent decision is that of the Privy Council in *Yuen Kun Yeu v. Attorney-General of Hong Kong*, *The Times*, 11 June 1987 (now reported in [1987] 3 W.L.R. 776). Lord Keith of Kinkel is reported as saying this of Lord Wilberforce’s dictum in *Anns v. Merton London Borough Council* [1978] A.C. 728:

H “There were two possible views of what Lord Wilberforce meant. The first was that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second was that he meant the expression ‘proximity or neighbourhood’ to be a composite one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580. The second view was the correct one. As Lord Wilberforce observed in *McLoughlin v. O’Brian* [1983] 1 A.C. 410, 420 it was clear that foreseeability did not of itself, and automatically, lead to a duty of care. Foreseeability of harm was a necessary ingredient of a relationship apt to give rise to a duty of care, but it was not the only one.”

Then a little further on in the report of the judgment Lord Keith is reported as saying:

"The second stage of Lord Wilberforce's test was one which would rarely have to be applied. One of those rare cases was *Rondel v. Worsley* [1969] 1 A.C. 191. Such a policy consideration was invoked in *Hill v. Chief Constable of West Yorkshire* (The Times, 21 February 1987 [1987] 2 W.L.R. 1126). In view of the direction in which the law had since been developing, their Lordships considered that for the future it should be recognized that the two stage test in *Anns* [1978] A.C. 728 was not to be regarded as in all circumstances a suitable guide to the existence of a duty of care."

In the present case Mr. Martineau is contending for a duty of care

"in a novel type of factual situation which [is] not analogous to any factual situation in which the existence of such a duty had already been held to exist:" *per* Lord Brandon in the *Leigh and Silavan* case [1986] A.C. 785, 815.

So, as Lord Keith observed in the *Yuen Kun Yeu* case [1987] 3 W.L.R. 776, the second stage of Lord Wilberforce's test becomes relevant. The right approach is, I think, summarily expressed by Lord Keith's dictum in the *Peabody* case [1985] A.C. 210, 241:

"in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so."

Is it just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the originating process? I do not think that it is. The plaintiff and the defendant, the petitioner and the respondent, are antagonists. The plaintiff, or the petitioner, is seeking a legal remedy in an adversarial system. The system stipulates the rules and requirements that must be observed by the two parties. The plaintiff must issue his process and must serve it on the defendant. If there is default in service the process may be struck out. If an order is obtained without the prescribed rules or regulations having been observed, the order may be discharged or set aside, sometimes by an application at first instance, sometimes on appeal. The prosecution of the action or of the petition is subject throughout its career from institution to final judgment to judicial control. Service of process is a step, and usually an essential step, in the prosecution. It must usually be proved before an order can be obtained against an absent defendant. The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd. The safeguards against ineffective service of process ought to be, and I think must be, found in the rules and procedures that govern litigation. The rules and procedures require that, save on *ex parte* applications, proof of service be shown before an order is made against an absent party. If the proof of service is false, be it through negligence or design, an order may be made that should not have been made. The injured party's remedy is to have the order set aside. An action for damages cannot be based on the falsity of the proof of service. Nor, in my judgment, can the adequacy of the efforts made to effect service be subjected to a tortious duty of care.

It would, I suppose, be possible for an undertaking in damages to be required to be given by every plaintiff or petitioner who obtained a final

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A order against an absent defendant or respondent in case the proof of
service of process turned out to be false. If that were ever to become
the practice it would protect parties in the position of the plaintiff. The
practice would become part of the rules and regulations governing the
prosecution of actions and would represent an additional safeguard
against the damage that might be caused to a defendant by inadequate
B efforts by a plaintiff to effect proper service. But there is no such
practice.

C In *Kelly v. London Transport Executive* [1982] 1 W.L.R. 1055, Lord
Denning M.R., in an obiter passage, suggested that a tortious duty of
care might be owed by the solicitors of a legally aided party to the other
party. This passage was commented on by Sir John Donaldson M.R. in
Orchard v. South Eastern Electricity Board [1987] Q.B. 565. He pointed
out that Lord Denning M.R.'s remarks were not supported by the other
two members of the court, and then said, at p. 571:

D "I have quoted from the judgment [of Lord Denning M.R.] at some
length for two reasons. First, because it provides a useful summary
of the duties of a solicitor acting for a legally aided client. Whether
that duty is owed to the opposing party is open to considerable
doubt, at least where the solicitor is acting with the authority of his
client and is not carrying on the litigation on his own account.
However, the duty is undoubtedly owed to the court (see *Myers v.*
Elman [1940] A.C. 282, 302 *per* Lord Atkin), the duty being to
conduct the litigation with due propriety, and the court may, in the
E exercise of its traditional jurisdiction over its own officers, order the
solicitor to compensate the opposing party where the solicitor is in
breach of that duty to the court."

F I take this passage from Sir John Donaldson M.R.'s judgment as
supporting the view that I have endeavoured to express, namely, that
control of litigation and of the various steps taken in prosecuting
litigation lies in the court and the rules and procedures that govern
litigation and cannot be sought via a tortious duty of care imposed on
one party for the benefit of the other.

G This view is not, in my opinion, undermined but is reinforced by the
facts of the present case. Mr. Martineau has submitted forcefully that
the plaintiff has been damnified, through no fault of its own, and that,
on the plaintiff's pleaded case, the damage would not have happened
had the second defendant exercised proper care in ascertaining the
correct address of the plaintiff's registered office. All this I am prepared
to accept. But the damage of which the plaintiff complains was caused
by the legal process instituted by the second defendant and by the
winding up order made by the court. Damage of this character is not,
H in my judgment, apt to be remediable in an action based on tortious
negligence.

In my judgment, there is no duty of care owed by one litigant to
another as to the manner in which the litigation is conducted, whether in
regard to service of process or in regard to any other step in the
proceedings. The safeguards against impropriety are to be found in the
rules and procedure that control the litigation and not in tort. I am

therefore of opinion that the plaintiff's statement of claim does not disclose a reasonable cause of action against the second defendant and ought to be struck out.

*Action as against second defendant
dismissed with costs.
Leave to appeal.*

Solicitors: Sweptstone Walsh & Son; Barry Posner Pentol & Co..

T. C. C. B.

[COURT OF APPEAL]

TCB LTD. v. GRAY

NOTE

1987 June 3, 4, 5, 8, 9, 10;
July 7

Purchas, Nicholls and Russell L.JJ.

APPEAL from Sir Nicolas Browne-Wilkinson V.-C.

The Court of Appeal dismissed the appeal of the defendant, Victor William Arthur Gray, from the decision of Sir Nicolas Browne-Wilkinson V.-C. [1986] Ch. 621; [1986] 2 W.L.R. 517, who had given judgment for the plaintiff, TCB Ltd., on its claim on a personal guarantee given by the defendant to secure loans to two companies. The Court of Appeal upheld the Vice-Chancellor's findings of fact that the defendant had known and accepted that the guarantee would be unlimited and that he had given specific authority for it to be made unlimited, and further upheld the contention raised in the plaintiff's respondent's notice that the Vice-Chancellor could not on the evidence have concluded, had he considered the question, that it had been a term of the agreement between the plaintiff and the defendant that the guarantee was to be conditional on the validity of the debenture granted by one of the companies. It was not therefore necessary for the Court of Appeal to consider the issues of law dealt with by Sir Nicolas Browne-Wilkinson V.-C. below, and it did not do so.

[Reported by CLIVE SCOWEN ESQ., Barrister-at-Law]

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A

[HOUSE OF LORDS]

OGWO RESPONDENT

AND

TAYLOR APPELLANT

B

1987 Oct. 22;
Nov. 19Lord Mackay of Clashfern L.C., Lord Bridge of
Harwich, Lord Elwyn-Jones, Lord Templeman
and Lord Ackner

Negligence—Duty of care to whom?—Fireman—Occupier's negligence causing fire—Fireman injured while attending fire—Injury from steam from water played onto fire—Whether occupier liable for damages

C

D

E

The occupier of a small terraced house was using a blow lamp to burn off paint from the fascia boards beneath the eaves of his house and in so doing set fire to the premises. The fire brigade were called. Having been unable to locate the fire from the outside one of the firemen entered the house wearing breathing apparatus and protective clothing. He squeezed through a narrow hatch into the roof space, where the fire was confined, and played the hose onto the fire. When the fire had been extinguished, the fireman discovered that he had serious burn injuries from the scalding steam which must have penetrated his protective clothing. He brought an action against the occupier for damages alleging that the fire had been started by the occupier's negligence and that he had been injured as a result of that negligence. Nolan J., dismissing the fireman's action, held that the occupier owed the fireman a duty of care and was in breach of that duty, but that the fireman's injuries were not a reasonably foreseeable consequence of the breach. On his appeal, the Court of Appeal held that the fireman's injuries were reasonably foreseeable and entered judgment in the agreed sum of £12,902 plus interest.

F

On appeal by the occupier:—

G

Held, dismissing the appeal, that there was no principle which precluded professional firemen from recovering damages, from a person who by his negligent act had started a fire, in respect of injuries received as a result of fighting the fire, in that fire out of control, whether described as ordinary or exceptional, was inherently dangerous even to men with special skills, training and equipment; that regardless of the fact that the nature and severity of the injuries might not have been foreseen, the occupier, in using a blow lamp on the wooden rafters must have foreseen that there was a real risk of fire developing whereby firemen would be called who might have to enter the narrow roof space where they would be subject to the risks of injury inherent in that situation, of which a scalding injury was one; that there being a clear duty of care on the part of the occupier, with no break in the chain of causation, the occupier was liable to the fireman for the injuries sustained (post, pp. 1146F–G, 1147H–1148C, F, 1149H–1150B, 1152B–D, 1146F, 1152B–D).

H

Salmon v. Seafarer Restaurants Ltd. [1983] 1 W.L.R. 1264 approved.

Per curiam. The American "firemen's rule" has no place in English law (post, pp. 1146F, 1152B–D).

Decision of the Court of Appeal [1987] 2 W.L.R. 988; [1987] 1 All E.R. 668 affirmed.

The following cases are referred to in their Lordships' opinions:

Donoghue v. Stevenson [1932] A.C. 562. H.L.(Sc.)

Flannigan v. British Dyewood Co. Ltd., 1969 S.L.T. 223

Hartley v. British Railways Board, The Times, 2 February 1981; Court of Appeal (Civil Division) Transcript No. 67 of 1981, C.A.

Hughes v. Lord Advocate [1963] A.C. 837; [1963] 2 W.L.R. 779; [1963] 1 All E.R. 705, H.L.(Sc.)

Krauth v. Geller (1960) 157 A. 2d 129

Merrington v. Ironbridge Metal Works Ltd. [1952] 2 All E.R. 1101

Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2)) [1967] 1 A.C. 617; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709, P.C.

Salmon v. Seafarer Restaurants Ltd. [1983] 1 W.L.R. 1264; [1983] 3 All E.R. 729

Walters v. Sloan (1977) 571 P. 2d 609

The following additional case was cited in argument:

Yuen Kun Yeu v. Attorney-General of Hong Kong [1987] 3 W.L.R. 776; [1987] 2 All E.R. 705, P.C.

APPEAL from the Court of Appeal.

This was an appeal by the defendant, Robert Arnold Taylor, against the order of the Court of Appeal (Dillon, Stephen Brown and Neill L.JJ.) [1987] 2 W.L.R. 988 allowing an appeal by the plaintiff, Michael Chiagoro Ogwo, from the judgment of Nolan J. on 25 November 1985 dismissing his claim against the defendant for damages for personal injuries sustained and losses and expenses incurred as a result of an accident which occurred at 91, Laburnum Avenue, Hornchurch, Essex on 11 August 1982.

The facts are stated in the opinion of Lord Bridge of Harwich.

William Crowther Q.C. and *Robert Moxon Browne* for the defendant.
B. A. Hytner Q.C., *John Leighton Williams Q.C.* and *Stephen Rubin* for the plaintiff.

Their Lordships took time for consideration.

19 November. LORD MACKAY OF CLASHFERN L.C. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge of Harwich. I agree that this appeal should be dismissed for the reasons which he gives. I am glad to note that my noble and learned friend's reasoning accords with the opinion of Lord Guthrie in *Flannigan v. British Dyewood Co. Ltd.*, 1969 S.L.T. 223.

LORD BRIDGE OF HARWICH. My Lords, I shall refer to the parties to the appeal before your Lordships as the plaintiff and the defendant. The defendant was the occupier of a small terrace house on two floors in Hornchurch. He attempted to burn off paint from the fascia boards beneath the eaves of his house with a blow lamp and in so doing set fire to the premises. The fire brigade were called and the plaintiff, an acting leading fireman, arrived with the first fire appliance. Smoke was coming from the house, but it was impossible to locate the seat of the fire from outside. The plaintiff and a colleague entered the house wearing

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A breathing apparatus and the usual fireman's protective clothing and armed with a hose. In due course they located the seat of the fire in the roof space. The rafters to the rear of the house were well alight from the eaves to the ridge. The two firemen were able, with the aid of a step-ladder, to squeeze through a small hatch to get into the roof space and in due course to bring the fire under control by playing their hose on it. The heat within the roof space was intense until they were able to relieve it by kicking out some of the roof tiles, as they had been trained to do in such a situation. The plaintiff, although he did not realise it until after he came down from the roof, suffered serious burn injuries to his upper body and face from scalding steam which must have penetrated his protective clothing.

C The plaintiff's claim for damages was tried by Nolan J. who had no difficulty in finding that the defendant had negligently started the fire, but nevertheless dismissed the plaintiff's claim on the ground that the injuries he sustained were not a reasonably foreseeable consequence of the defendant's negligence. The Court of Appeal [1987] 2 W.L.R. 988 (Dillon, Stephen Brown and Neill L.JJ.) reversed the judge and gave judgment for the plaintiff in the agreed sum, inclusive of interest to the date of judgment, of £14,402. The defendant appeals by leave of your Lordships' House.

D The finding of negligence is not challenged. Mr. Crowther for the defendant, expressly disclaimed any intention to rely on the defence of volenti and accepted that the appeal turned solely on the issues of foreseeability, proximity and causation. He relied on the judge's conclusion as a finding of fact which an appellate court should not disturb.

E I find it convenient to examine the issues first in the light of basic and well established principles of general application and only later to consider the authorities concerned specifically with injuries sustained by professional firemen performing their duties in fighting fires occasioned by negligence. It is important, however, to emphasise at the outset that no suggestion of any kind is made of fault on the part of the plaintiff and the chain of events leading to his injuries must accordingly be considered on the footing that he himself acted throughout precisely as was to be expected of a properly trained and properly equipped fireman in the circumstances which confronted him.

F The trial judge expressed his conclusion on foreseeability in the following passage:

G "The question here is whether it could be foreseen that Mr. Ogwo, going up into the roof and remaining there, in conditions of intense heat, would suffer *the burns from which he did suffer*, even though he was a trained fireman and had been sent to a fire without extraordinary features. Here it seems to me that the plaintiff cannot succeed, because it seems that neither the plaintiff himself nor his colleague were able to foresee, looking into that apparently ordinary loft of an ordinary house, the danger that confronted them to the the extent of the injuries caused. Of course they saw there was danger, but they did not anticipate that Mr. Ogwo would come out badly burned, as he was."

H The emphasis added is mine and the words emphasised demonstrate where the judge appears to me to have fallen into error. The proper question to be asked is not whether the particular injuries sustained by

the plaintiff were reasonably foreseeable, still less whether they were actually foreseen. As Lord Reid put it in *Hughes v. Lord Advocate* [1963] A.C. 837, 845, a negligent defendant "can only escape liability if the damage can be regarded as differing in kind from what was foreseeable." Of course, the plaintiff entering the loft did not foresee the nature or severity of the injuries he was going to suffer. As the judge said, he could see there was danger, but a man with the courage which a fireman must constantly be called on to show has no time in such a situation to reflect on the precise nature and extent of the risks he is running. Looked at, as it should be, from the point of view of the negligent defendant who started the fire in the loft, he could foresee that the fire brigade would be called, that firemen would use their skills to do whatever was both necessary and reasonably practicable to extinguish the fire and that, if this involved entering the loft and playing a hose on the fire, they would be subject to any risks inherent in that operation, of which the risk of a scalding injury was certainly one. This was a real risk occasioned by setting fire to the rafters of a small terrace house, a risk which the defendant could have avoided by elementary care and without difficulty or expense to himself and certainly not a risk which a reasonable man would brush aside as far fetched. It therefore satisfies the criterion of foreseeability posed as the test of remoteness by Lord Reid, delivering the judgment of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2))* [1967] 1 A.C. 617, 643-644.

Mr. Crowther also sought to argue that the defendant owed the plaintiff no duty of care. Here again, the case to me seems to fall clearly within the principle enunciated in the classic passage from the speech of Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580. The plaintiff was a person so closely and directly affected by the defendant's act that the defendant ought reasonably to have had him in contemplation as being so affected when directing his mind to the acts or omissions called in question, in this case using the blow lamp without taking care to avoid setting the rafters alight.

So far as causation is concerned, no more need be said than that the links in the chain of causation from the negligence which started the fire to the injuries which the plaintiff sustained were clearly continuous and unbroken.

On the face of it, therefore, this seems to me a straightforward case of a plaintiff to whom the defendant owed a duty of care suffering injury as a reasonably foreseeable consequence of a breach of that duty by the defendant.

The principal theme by which Mr. Crowther sought to avoid that conclusion was that, in the case of a professional fireman, a distinction could be drawn between the "ordinary" risks inherent in fire-fighting and "exceptional" risks created by some unusual feature of the fire which arises from the nature or condition of the premises where the fire occurs or in some other way. The submission, as I understand it, is that the party who negligently starts the fire is not liable to a professional fireman injured by the "ordinary" risks of fire-fighting, but only to one injured by an "exceptional" risk which the defendant could have foreseen and avoided by warning or otherwise. If the submission is well founded, Mr. Crowther has the advantage of a factual foundation for its application here in findings by the judge that there was nothing unusual about this fire, that there was no unusually combustible material in the

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A loft and that attending fires in terrace houses was a regular part of a fireman's duties.

B The first case relied on in support of the submission is *Merrington v. Ironbridge Metal Works Ltd.* [1952] 2 All E.R. 1101, a decision at first instance of Hallett J. This was a claim by a fireman injured in fighting a fire at a factory where the defendants had allowed large quantities of fine dust containing aluminium and carbon particles to accumulate. The plaintiff was injured by a dust explosion caused, as the judge held, by the defendants allowing their premises to be in a condition which created "exceptional and serious risks" of fire and explosion. Having considered and rejected a defence of volenti, Hallett J. said, at p. 1104:

C "This may be a convenient moment to say emphatically that I do not accept the submission of leading counsel for the plaintiff that, if a fireman sustains injury as the result of performing his duty at a fire, he ipso facto becomes entitled to recover compensation from any person whose carelessness has caused the fire in question."

D This is the cornerstone of Mr. Crowther's argument that negligence in starting a fire to which the fire brigade have to be called can never, per se, be sufficient to establish liability in damages to a fireman injured by a hazard of a kind to which the inherent dangers of the fireman's profession necessarily subject him. There must always, so it is argued, be some extraneous or exceptional feature in the circumstances of the fire which imposes an additional hazard for which the tortfeasor can be held responsible.

E Further support for this view is sought in the decision of the Court of Appeal in *Hartley v. British Railways Board*, *The Times*, 2 February 1981; Court of Appeal (Civil Division) Transcript No. 67 of 1981. There a railway servant, responsible for manning a station building, left it unattended without telling his employers that he was doing so and left a coal fire burning inside in an open stove. The stove was piled high with coal and a burning coal fell from it and set fire to the building. When the fire brigade were called by the railway authorities, they inquired whether the building was occupied and were told that it was. Consequently, on arrival at the scene, the plaintiff fireman was sent in to search the building for the servant believed to be still inside and in the course of the search he sustained the injuries which were the subject of the claim. The Court of Appeal, reversing the trial judge, held that the servant's negligence was responsible for the fire, but they founded their attribution of liability to the employers on the additional element of negligence on the part of the servant in failing to inform his employers that he was leaving the building unattended at a time when he was supposed to be on duty there. It was this failure, as the Court of Appeal held, which led foreseeably to the unnecessary search of the building by the plaintiff fireman and hence to his injury.

H Of course I accept that not everybody, whether professional fireman or layman, who is injured in a fire negligently started will necessarily recover damages from the tortfeasor. The chain of causation between the negligence and the injury must be established by the plaintiff and may be broken in a number of ways. The most obvious would be where the plaintiff's injuries were sustained by his foolhardy exposure to an unnecessary risk either of his own volition or acting under the orders of a senior fire officer. But, subject to this, I can see no basis of principle which would justify denying a remedy in damages against the tortfeasor

responsible for starting a fire to a professional fireman doing no more and no less than his proper duty and acting with skill and efficiency in fighting an ordinary fire who is injured by one of the risks to which the particular circumstances of the fire give rise. Fire out of control is inherently dangerous. If not brought under control, it may, in most urban situations, cause untold damage to property and possible danger to life. The duty of professional firemen is to use their best endeavours to extinguish fires and it is obvious that, even making full use of all their skills, training and specialist equipment, they will sometimes be exposed to unavoidable risks of injury, whether the fire is described as "ordinary" or "exceptional." If they are not to be met by the doctrine of *volenti*, which would be utterly repugnant to our contemporary notions of justice, I can see no reason whatever why they should be held at a disadvantage as compared to the layman entitled to invoke the principle of the so-called "rescue" cases.

Mr. Crowther suggested it would be anomalous that a fireman should recover damages for injuries sustained in fighting a fire caused by negligence when his colleague who suffers similar injuries in fighting another fire of which the cause is unknown has no such remedy. If this be an anomaly, it is one which is common to most, if not all, injuries sustained by accident and is inevitable under a system which requires proof of fault as the basis of liability. The existence of the suggested anomaly is the strongest argument advanced by those who support the introduction of a "no fault" system of compensation. But it has no special application to the case of firemen.

At the end of the day I am happy to find my views in full accord with those expressed in the latest authority directly in point, which is the decision at first instance of Woolf J. in *Salmon v. Seafarer Restaurants Ltd.* [1983] 1 W.L.R. 1264. The facts and the grounds of the decision are conveniently summarised in the headnote, which I quote:

"The plaintiff fireman attended a fire at the defendants' fish-and-chip shop, which had been caused by the failure of the defendants to put out a light under a chip fryer before closing the shop for the night. While in attendance at the fire, the plaintiff was ordered by a senior officer to use a ladder to obtain access to the second floor, via a flat roof. As the plaintiff stood footing the ladder on the flat roof an explosion occurred, caused by the heat from the fire melting seals on gas meters on the premises and allowing gas to escape. The explosion caused the plaintiff to be thrown to the ground and sustain injury. He brought an action for damages for personal injuries alleging that the fire had been started by the defendants' negligence and that he had been injured as a result of that negligence. The defendants denied that they owed a duty of care to the plaintiff. On the question as to the duty owed by an occupier to a fireman attending at his premises to put out a fire:—

"*Held*, that notwithstanding the special training received by firemen to deal with the dangers inherent in fires, the duty owed by an occupier causing fire on premises to a fireman attending that fire extended to the ordinary risks and dangers inherent in a fireman's occupation and was not limited to a requirement to protect the fireman only against special, exceptional, or additional risks; that the fireman's special skills and training were relevant in determining liability but, where it was foreseeable that a fireman exercising

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A those skills would be injured through the negligence of the occupier, the occupier was in breach of his duty of care; that as the fire had been caused by the defendants' negligence and since it was foreseeable that the plaintiff would be required to attend the fire and would be at risk of the type of injuries he received from the explosion which was caused by the negligence, the defendants were liable for those injuries and damages were recoverable by the plaintiff."

B

I would particularly wish to adopt and indorse a passage in the judgment where the judge said, at p. 1272:

C "Where it can be foreseen that the fire which is negligently started is of the type which could, first of all, require firemen to attend to extinguish that fire, and where, because of the very nature of the fire, when they attend they will be at risk even though they exercise all the skill of their calling, there seems no reason why a fireman should be at any disadvantage when the question of compensation for his injuries arises."

D There was some discussion in argument before your Lordships as to whether in the phrase "because of the very nature of *the* fire" the definite article which I have emphasised might not have been superfluous and unintended. It is perhaps arguable that any fire, once out of control, may put firemen at risk and that accordingly it is "the very nature of fire" which makes the risk foreseeable. But I prefer the view that the judge was using language with his usual precision and accuracy and recognising that there may be some fires which, although calling for the services of the fire brigade, pose no foreseeable risk to firemen acting with due skill and care.

E

F The appellant's written case indicated an intention to rely on what is known as the "fireman's rule" as applied in the jurisprudence of some of the states of the United States of America and cited as the rationale of the rule the following passage from the judgment of the Supreme Court of New Jersey delivered by Weintraub C.J. in *Krauth v. Geller* (1960) 157 A. 2d 129, 130-131:

G "That the misfortune here experienced by a fireman was well within the range of foreseeability cannot be disputed. But liability is not always co-extensive with foreseeability of harm. The question is ultimately one of public policy, and the answer must be distilled from the relevant factors involved upon an inquiry into what is fair and just. . . . it is the fireman's business to deal with that very hazard [the fire] and hence, perhaps by analogy to the contractor engaged as an expert to remedy dangerous situations, he cannot complain of negligence in the creation of the very occasion for his engagement. In terms of duty, it may be said there is none owed the fireman to exercise care so as not to require the special services for which he is trained and paid. Probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences."

H

In oral argument, however, Mr. Crowther did not feel able to derive any assistance from this source and, as I think prudently, did not pursue the matter.

In the Supreme Court of California in *Walters v. Sloan* (1977) 571 P. 2d 609 the "fireman's rule" was affirmed in the majority judgment delivered by Clark J., but was exhaustively analysed, criticised and rejected as unsound in the dissenting judgment of Tobriner Acting C.J. Having read those two judgments, I am left in no doubt whatever that the American "fireman's rule" has no place in English law.

I would accordingly dismiss the appeal.

LORD ELWYN-JONES. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons given by him I would dismiss this appeal.

LORD TEMPLEMAN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons given by him I would dismiss this appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Berryman; Robin Thompson & Partners, Ilford.

C. T. B.

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[HOUSE OF LORDS]

POLKEY APPELLANT
 AND
 A. E. DAYTON SERVICES LTD. RESPONDENTS

1987 Oct. 12, 13, 14; Lord Mackay of Clashfern L.C.,
 Nov. 19 Lord Keith of Kinkel, Lord Bridge of Harwich,
 Lord Brandon of Oakbrook and Lord Ackner

Employment—Unfair dismissal—Redundancy—Selection for redundancy—Failure to consult employee prior to dismissal—Whether employers acting reasonably—Whether dismissal unfair—Employment Protection (Consolidation) Act 1978 (c.44), s. 57(3)¹ (as amended by Employment Act 1980 (c. 42), s. 6)

The employee was one of four van drivers employed since 1978 by a company dealing with components for the motor industry. In 1982, the employers decided to replace the four van drivers with two van salesmen and a representative. Only one of the van drivers was considered suitable for transfer to the new duties, and it was then decided that the other three van drivers, including the employee, would have to be made redundant. Without prior warning, the employee was called into the branch manager's office and informed that he had been made redundant. He was handed a redundancy letter setting out the payments due to him and sent home. On his complaint that he had been unfairly dismissed because he had been made redundant without any consultation, the industrial tribunal held that the employers had been in breach of their obligation to consult the employee under the provision of the code of practice. They went on, however, to consider whether, if there had been consultation, the result would have been any different, concluded that the result would have been the same and dismissed the employee's complaint. The employee appealed, contending that the industrial tribunal had applied the wrong test in inquiring whether the employee would have been made redundant if he had been consulted. The appeal tribunal dismissed the appeal, and the Court of Appeal dismissed an appeal by the employee.

On appeal by the employee:—

Held, allowing the appeal, that the question that the industrial tribunal had to consider under section 57(3) of the Employment Protection (Consolidation) Act 1978 was whether the employer had been reasonable or unreasonable in deciding that his reason for dismissing his employee was a sufficient reason, not whether the employee would nevertheless have been dismissed even if there had been prior consultation or warning within the code of practice; that whether the employer could reasonably have concluded that consultation or warning would be useless so that his failure to consult or warn would not necessarily render dismissal unfair was a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time when he took his decision to dismiss; and that, accordingly, the matter should be remitted to a differently constituted industrial tribunal for consideration of the correct question (post, pp. 1156C–F, 1163E–F, H—1164A, E–G, 1165B–D, 1166E–F).

¹ Employment Protection (Consolidation) Act 1978, s.57(3) (as amended): see post, p. 1156A–C.

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W. Devis & Sons Ltd. v. Atkins [1977] A.C. 931, H.L.(E.)
and dicta of Browne-Wilkinson J. in *Sillifant v. Powell Duffryn Timber Ltd.* [1983] I.R.L.R. 91, 97, E.A.T. applied.

British Labour Pump Co. Ltd. v. Byrne [1979] I.C.R. 347, E.A.T. and *W. & J. Wass Ltd. v. Binns* [1982] I.C.R. 486, C.A. overruled.

Decision of the Court of Appeal [1987] 1 W.L.R. 1147; [1987] I.C.R. 301; [1987] 1 All E.R. 984 reversed.

The following cases are referred to in their Lordships' opinions:

British Labour Pump Co. Ltd. v. Byrne [1979] I.C.R. 347, E.A.T.

British United Shoe Machinery Co. Ltd. v. Clarke [1978] I.R.C. 70, E.A.T.

Devis (W.) & Sons Ltd. v. Atkins [1977] A.C. 931; [1977] 3 W.L.R. 214; [1977] I.C.R. 662; [1977] 3 All E.R. 40, H.L.(E.)

Earl v. Slater & Wheeler (Airlyne) Ltd. [1973] 1 W.L.R. 51; [1972] I.C.R. 508; [1973] 1 All E.R. 145, N.I.R.C.

Letts (Charles) & Co. Ltd. v. Howard [1976] I.R.L.R. 248, E.A.T.

Lowndes v. Specialist Heavy Engineering Ltd. [1977] I.C.R. 1, E.A.T.

Sillifant v. Powell Duffryn Timber Ltd. [1983] I.R.L.R. 91, E.A.T.

Vokes Ltd. v. Bear [1974] I.C.R. 1, N.I.R.C.

Wass (W. & J.) Ltd. v. Binns [1982] I.C.R. 486, C.A.

Williams v. Compair Maxam Ltd. [1982] I.C.R. 156, E.A.T.

The following additional cases were cited in argument:

Abbotts v. Wesson-Glynwed Steels Ltd. [1982] I.R.L.R. 51, E.A.T.

Clarkson International Tools Ltd. v. Short [1973] I.C.R. 191, N.I.R.C.

Freud v. Bentalls Ltd. [1983] I.C.R. 77, E.A.T.

Holden v. Bradville Ltd. [1985] I.R.L.R. 483, E.A.T.

Iceland Frozen Foods Ltd. v. Jones [1983] I.C.R. 17, E.A.T.

Smith v. City of Glasgow District Council [1987] I.R.L.R. 326, H.L.(Sc.)

Union of Construction, Allied Trades and Technicians v. Brain [1981] I.C.R. 542, C.A.

West Midlands Co-operative Society Ltd. v. Tipton [1986] A.C. 536; [1986] 2 W.L.R. 306; [1986] I.C.R. 192; [1986] 1 All E.R. 513, H.L.(E.)

APPEAL from the Court of Appeal.

This was an appeal by the employee, Dennis Polkey, by leave of the Court of Appeal (Neill and Nicholls L.JJ. and Sir George Waller) [1987] 1 W.L.R. 1147 from their decision on 22 October 1986 dismissing his appeal from the Employment Appeal Tribunal (Popplewell J., Mr. T. S. Batho and Mrs. M. L. Boyle) who on 2 October 1984 dismissed his appeal from an industrial tribunal. The industrial tribunal had dismissed his complaint that he had been unfairly dismissed as redundant by the respondent employers, A. E. Dayton Services Ltd. (formerly Edmunds Walker (Holdings) Ltd.).

The facts are set out in the opinion of Lord Mackay of Clashfern L.C.

Eldred Tabachnik Q.C. and *Robin Allen* for the employee.
Frederic Reynold Q.C. and *John Wardell* for the employers.

Their Lordships took time for consideration.

19 November. LORD MACKAY OF CLASHFERN L.C. My Lords, the appellant was employed by the respondents ("the employers") from 19

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A June 1978 until 27 August 1982 as a van driver. On that date he was dismissed as redundant. On 8 November 1982 he applied to an industrial tribunal to hold that he had been unfairly dismissed. On 23 February 1983 the industrial tribunal dismissed the application. It was accepted on behalf of the appellant before the industrial tribunal that at the time of his dismissal it was urgently necessary for the employers to reduce their overheads in their undertaking and that, in consequence, it was necessary to make certain of their van drivers redundant. They had three male van drivers and one female van driver and it was decided that for the future only two van salesmen should be appointed. The manager immediately responsible for the appellant decided that none of the three male van drivers was capable of performing the task of a van salesman but that the female van driver was so capable. Some four weeks after the appellant's dismissal a second van salesman was appointed from outside the employers' work-force. On 20 August the appellant's branch manager informed his superior of his decision and without any consultation with employees or their representative or earlier warning to the appellant his branch manager called him into his office on the afternoon of 27 August, told him quite out of the blue that he was redundant and handed to him his redundancy letter. The appellant was immediately driven home by a fellow employee. The industrial tribunal characterised this aspect of the appellant's dismissal by saying: "There could be no more heartless disregard of the provisions of the code of practice than that." The code of practice referred to is the statutory code presently in force under the Employment Protection Act 1975, Schedule 17, paragraph 4 in which paragraph 46 provides:

E "If redundancy becomes necessary, management in consultation, as appropriate, with employees or their representatives, should: (i) give as much warning as practicable to the employees concerned . . . ; (iii) establish which employees are to be made redundant and the order of discharge; . . ."

F The industrial tribunal further found: "There is nothing that excuses their failure to consult but"—this is the matter that gives rise to the point of principle in the present appeal—

G "at the end of the day we have no alternative but to find that in this case had they acted in accordance with the code of practice, as interpreted in the recent case [*Williams v. Compair Maxam Ltd.* [1982] I.C.R. 156], the result would not have been any different, and we have therefore unhappily to reject this application."

H The appellant appealed to the Employment Appeal Tribunal but on his behalf it was conceded that the appeal tribunal was bound by authority to dismiss the appeal. The only question the Employment Appeal Tribunal had to consider was whether to give leave to appeal which they did. The Court of Appeal, Neill and Nicholls L.JJ. and Sir George Waller [1987] 1 W.L.R. 1147, dismissed the appeal, held that they were bound by authority to do so, and granted leave to the appellant to appeal to this House.

This appeal raises an important question in the law of unfair dismissal. Where an industrial tribunal has found that the reason for an applicant's dismissal was a reason of a kind such as could justify the dismissal and has found that there has been a failure to consult or warn

the applicant in accordance with the code of practice, should the tribunal consider whether, if the employee had been consulted or warned before dismissal was decided upon, he would nevertheless have been dismissed? The answer depends upon the application to this situation of section 57(3) of the Employment Protection (Consolidation) Act 1978, as amended, which is in these terms:

“Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 58 to 62, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.”

Where there is no issue raised by sections 58 to 62 the subject matter for the tribunal’s consideration is the employer’s action in treating the reason as a sufficient reason for dismissing the employee. It is that action and that action only that the tribunal is required to characterise as reasonable or unreasonable. That leaves no scope for the tribunal considering whether, if the employer had acted differently, he might have dismissed the employee. It is what the employer did that is to be judged, not what he might have done. On the other hand, in judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as the consequence of not consulting or not warning.

If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee.

I turn to consider how these views accord with the decided cases. Very early in the history of this legislation and its statutory predecessors Sir John Donaldson in *Earl v. Slater & Wheeler (Airlyne) Ltd.* [1973] 1 W.L.R. 51, 57 said:

“With respect to the tribunal, we think that it erred in holding that an unfair procedure which led to no injustice is incapable of rendering unfair a dismissal which would otherwise be fair. The question in every case is whether the employer acted reasonably or unreasonably in treating the reason as sufficient for dismissing the employee and it has to be answered with reference to the circumstances known to the employer at the moment of dismissal. If an employer thinks that his accountant may be taking the firm’s money, but has no real grounds for so thinking and dismisses him for this reason, he acts wholly unreasonably and commits the unfair industrial practice of unfair dismissal, notwithstanding that it is later proved that the accountant had in fact been guilty of embezzlement. Proof of the embezzlement affects the amount of the compensation, but not the issue of fair or unfair dismissal.”

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A Again in *Vokes Ltd. v. Bear* [1974] I.C.R. 1, 5 Sir Hugh Griffiths, referring to the statutory predecessor of this section, said:

B “We are unable to accept the submission that ‘the circumstances’ are limited to those directly affecting the ground of dismissal, in the sense submitted by [counsel for the employers]. ‘The circumstances’ embrace all relevant matters that should weigh with a good employer when deciding at a given moment in time whether or not he should dismiss his employee. [Section 24(6) of the Industrial Relations Act 1971] is focusing the tribunal’s attention upon ‘the dismissal’, that is, the dismissal on March 2. The question they have to ask themselves is whether on March 2 the employers were acting reasonably in treating redundancy as a sufficient reason for dismissing the employee on that date. The tribunal are entitled to take into account all the circumstances affecting both the employers and the employee at the time of the dismissal. In the present case, no doubt the time would have come when the employers would have to dismiss the employee for redundancy for the good of the company as a whole, but the tribunal were fully entitled to take the view that that moment had not yet arrived by March 2. The employers had not yet done that which in all fairness and reason they should do, namely, to make the obvious attempt to see if the employee could be placed somewhere else within this large group. The position is somewhat analogous to the case of a warning. An employer may have good grounds for thinking that a man is not capable of doing his job properly, but in the general run of cases it will not be reasonable for him to regard that lack of capability as a sufficient reason for dismissing him until he is given a warning so that the man has the chance to show if he can do better. So in this case there was a redundancy situation but there was no compelling reason why the axe should fall until the employers had done their best to help the employee. It is therefore with satisfaction that we find that there is nothing in the wording of section 24(6) of the Act of 1971 which compels us to take the view that behaviour which we think most people would consider manifestly unfair is nevertheless to be deemed fair under the Act. If the employers had made all reasonable attempts to place the employee in the group and had failed, then the time might have come when it would be reasonable for them to regard the redundancy as a sufficient reason for the dismissal, but until that moment had come the tribunal were entitled to take the view that it was not reasonable to dismiss for redundancy and accordingly that it was unfair.”

H This approach to the legislation was endorsed in this House in *W. Devis & Sons Ltd. v. Atkins* [1977] A.C. 931. Viscount Dilhorne, in a speech with which the other members of the House sitting on the appeal agreed, said of the statutory predecessor of section 57(3), at p. 952:

“[Paragraph 6(8) of Schedule 1 to the Trade Union and Labour Relations Act 1971] appears to me to direct the tribunal to focus its attention on the conduct of the employer and not on whether the employee in fact suffered any injustice.”

After quoting, with approval, the principal part of the passage I have already cited from Sir John Donaldson in *Earl v. Slater & Wheeler (Airlyne) Ltd.* [1973] 1 W.L.R. 51 and after referring to the statutory

provision then entitling the tribunal to take the code into account
Viscount Dilhorne said, at p. 955:

"It does not follow that non-compliance with the code necessarily renders a dismissal unfair, but I agree with the view expressed by Sir John Donaldson in *Earl v. Slater & Wheeler (Airlyne) Ltd.* [1973] 1 W.L.R. 51 that a failure to follow a procedure prescribed in the code may lead to the conclusion that a dismissal was unfair, which, if that procedure had been followed, would have been held to have been fair."

So far, the current of decision is entirely in accordance with the views I have expressed, but the tribunal in the present case were bound by a stream of authority applying the so-called *British Labour Pump* principle [*British Labour Pump Co. Ltd. v. Byrne* [1979] I.C.R. 347].

Browne-Wilkinson J. in *Sillifant v. Powell Duffryn Timber Ltd.* [1983] I.R.L.R. 91 thus described the principle, at p. 92:

"even if, judged in the light of the circumstances known at the time of dismissal, the employer's decision was not reasonable because of some failure to follow a fair procedure yet the dismissal can be held fair if, on the facts proved before the industrial tribunal, the industrial tribunal comes to the conclusion that the employer could reasonably have decided to dismiss if he had followed a fair procedure."

It is because one of its statements is contained in *British Labour Pump Co. Ltd. v. Byrne* that it has been called the *British Labour Pump* principle although it did not originate in that decision. In *Sillifant's* case the Employment Appeal Tribunal were urged to hold that the principle was unsound and not to give effect to it. After referring to the cases which introduced this principle, namely *Charles Letts & Co. Ltd v. Howard* [1976] I.R.L.R. 248, a decision relating only to compensation, *Lowndes v. Specialist Heavy Engineering Ltd.* [1977] I.C.R. 1, *British United Shoe Machinery Co. Ltd. v. Clarke* [1978] I.C.R. 70 and the *British Labour Pump* case itself, Browne-Wilkinson J. continued, at p. 97:

"Apart therefore from recent Court of Appeal authority and the *Lowndes* case, the *British Labour Pump* principle appears to have become established in practice without it being appreciated that it represented a fundamental departure from both basic principle and the earlier decisions. If we felt able to do so we would hold that it is wrong in principle and undesirable in its practical effect. It introduces just that confusion which *Devis v. Atkins* was concerned to avoid between the fairness of the dismissal (which depends solely upon the reasonableness of the employer's conduct) and the compensation payable to the employee (which takes into account the conduct of the employee whether known to the employer or not). In our judgment, apart from the authority to which we are about to refer, the correct approach to such a case would be as follows. The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An industrial tribunal is not bound to hold that *any* procedural failure by the employer renders the dismissal unfair: it is one of the factors to be weighed by the industrial tribunal in deciding whether or not the dismissal

A was reasonable within section 57(3). The weight to be attached to
such procedural failure should depend upon the circumstances
known to the employer at the time of dismissal, not on the actual
consequence of such failure. Thus in the case of a failure to give an
opportunity to explain, except in the rare case where a reasonable
employer could properly take the view on the facts known to him at
B the time of dismissal that no explanation or mitigation could alter
his decision to dismiss, an industrial tribunal would be likely to hold
that the lack of 'equity' inherent in the failure would render the
dismissal unfair. But there may be cases where the offence is so
heinous and the facts so manifestly clear that a reasonable employer
could, on the facts known to him at the time of dismissal, take the
view that whatever explanation the employee advanced it would
C make no difference: see the example referred to by Lawton L.J. in
Bailey v. B. P. Oil (Kent Refinery) Ltd. [1980] I.C.R. 642. Where,
in the circumstances known at the time of dismissal, it was not
reasonable for the employer to dismiss without giving an opportunity
to explain but facts subsequently discovered or proved before the
industrial tribunal show that the dismissal was in fact merited,
D compensation would be reduced to nil. Such an approach ensures
that an employee who could have been fairly dismissed does not get
compensation but would prevent the suggestion of 'double standards'
inherent in the *British Labour Pump* principle. An employee
dismissed for suspected dishonesty who is in fact innocent has no
redress: if the employer acted fairly in dismissing him on the facts
and in the circumstances known to him at the time of dismissal the
employee's innocence is irrelevant. Why should an employer be
E entitled to a finding that he acted fairly when, on the facts known
and in the circumstances existing at the time of dismissal, his actions
were unfair but which facts subsequently coming to light show did
not cause any injustice? The choice in dealing with section 57(3) is
between looking at the reasonableness of the employer or justice to
the employee. *Devis v. Atkins* shows that the correct test is the
F reasonableness of the employer: the *British Labour Pump* principle
confuses the two approaches."

I gratefully adopt that analysis. The Employment Appeal Tribunal,
however, went on to hold that they were bound by the decision of the
Court of Appeal in *W. & J. Wass Ltd. v. Binns* [1982] I.C.R. 486 which
G held that the *British Labour Pump* principle is good law and to that
decision of the Court of Appeal I must now turn.

H In that case an employee was dismissed for misconduct which had
occurred on the morning of the day on which he was dismissed. There
was evidence of previous misbehaviour by the employee but the
industrial tribunal held that the case had to be determined on the basis
of what had happened on that morning and that the employers had
acted reasonably and had fairly dismissed the employee even though
they had not warned him about his previous misbehaviour or given him
an opportunity to explain his conduct on that morning. The industrial
tribunal decided that even if there had been an investigation the
employee would still have been dismissed because on the balance of
probabilities the employers would not have accepted his explanation and
the dismissal was therefore fair. The Employment Appeal Tribunal
reversed the decision of the industrial tribunal but the Court of Appeal,

Waller and O'Connor L.JJ. and Sir George Baker, Sir George Baker dissenting, restored the decision of the industrial tribunal. Waller L.J. said, at p. 493:

"[Counsel for the employer] submitted that the test in the *British Labour Pump* case goes further than section 57(3) of the Employment Protection (Consolidation) Act 1978 requires, and submits that it is the statutory test which must be complied with. This in my opinion is strictly correct, and if the employer and the industrial tribunal are satisfied in an exceptional case that no opportunity to explain need be offered and that the employer in the circumstances acted reasonably in accordance with equity and the substantial merits of the case, the test would not apply. But since in the majority of cases fairness would require an opportunity to explain, as indeed many industrial contracts provide, then in such cases the *British Labour Pump* case provides useful guidelines. It was argued by [counsel for the employee] that the *British Labour Pump* case was itself not in accordance with the observations of Viscount Dilhorne in *W. Devis & Sons Ltd. v. Atkins* [1977] A.C. 931, 949-958. That case was dealing with a different point, namely, whether a dismissal can be justified as fair when the fact, or facts, are not known at the time of dismissal but are discovered afterwards. I do not find anything in the speech of Viscount Dilhorne which throws doubt on the reasoning of the decision in the *British Labour Pump* case."

O'Connor L.J. after holding that the employee's conduct on the morning of dismissal justified summary dismissal went on to consider the industrial tribunal's finding that the explanation proffered by the employee was not acceptable. He said, at p. 496:

"For my part I think that once the industrial tribunal made that finding they would have been entitled to say that the employee had not been prejudiced in any way by not being asked to explain his conduct and that the dismissal was fair. The industrial tribunal in fact applied the *British Labour Pump Co. Ltd. v. Byrne* test and found in favour of the employers. I can find no ground for disturbing that finding. I do not think that any question of law was raised before the Employment Appeal Tribunal. I am satisfied that the decision of the industrial tribunal was not perverse. I see no reason for disturbing it."

Sir George Baker said, at pp. 498-499:

"the failure to give the employee any opportunity to explain why he should not be dismissed seems to me to be in the circumstances of this case a denial of natural justice which eliminated equity or fair play. There are cases where instant dismissal without an opportunity of explaining would be fair. . . . Then there must be many cases where it is clearly for the tribunal to decide whether, in the words of Stephenson L.J. in *W. Weddell & Co. Ltd. v. Tepper* [1980] I.C.R. 286, 297, the employers have acted 'without making the appropriate inquiries or giving the employee a fair opportunity to explain himself. . . .' Viscount Dilhorne in his speech in *W. Devis & Sons Ltd. v. Atkins* [1977] A.C. 931. . . said, at p. 953: 'If, however, the reasons shown appear to have been a sufficient reason, it cannot, in my opinion, be said that the employer acted reasonably

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A in treating it as such if he only did so in consequence of ignoring
B matters which he ought reasonably to have known and which would
have shown that the reason was insufficient.' Like Waller L.J. I do
not think that this throws any doubt on the reasoning in the later
decision of the Employment Appeal Tribunal (Slynn J.) in *British
Labour Pump Co. Ltd. v. Byrne* [1979] I.C.R. 347 which the
industrial tribunal in the present case purported to apply as the
right test."

C He went on to conclude on the evidence, differing in this respect
from his colleagues, that the evidence did not show that after the
employee had given his explanation the employers would probably still
have dismissed him and for this reason he held the dismissal was unfair.
The opinions of the Court Appeal thus do not add to the reasoning in
the cases examined by Browne-Wilkinson J. in *Sillifant*.

D The only other Court of Appeal decision remaining for consideration
that supports the *British Labour Pump* principle is that in the
present case. The Court of Appeal [1987] 1 W.L.R. 1147 held themselves
bound by the decision in *W. & J. Wass Ltd. v. Binns* and, in my
opinion, they were clearly right in that aspect of their decision. Neill
L.J., taking up the point which had been described by Browne-
Wilkinson J. as the double standards aspect of the *British Labour Pump*
principle, said, at pp. 1153-1154:

E "The question can then be asked: if an employer cannot justify
dismissal and if an employee cannot complain of a dismissal on the
basis of facts not known to the employer at the time of dismissal,
how can it be right for an industrial tribunal to embark on the
speculative exercise of examining facts which were not known to the
employer at the time of dismissal in order to decide whether a
procedural defect made any difference? At first sight, this question
appears to require the answer that such an exercise would be
contrary to the decision in *W. Devis & Sons Ltd. v. Atkins* [1977]
A.C. 931 because it would allow an employer to rely on facts not
known to him at the time of dismissal, or, where an internal appeal
procedure has been put in operation, not known to him at the time
when the final decision to uphold the dismissal was taken. On
further analysis, however, it seems to me that an answer on these
lines overlooks the crucial distinction between the reason for a
dismissal and the manner in which the dismissal is effected."

G After reference to the statutory provision he went on, at pp. 1154-
1156:

H "It will be seen therefore that a complaint of unfair dismissal will
succeed where the employer fails to establish that the reason for
dismissal was one of those specified in section 57(2) or where the
tribunal reaches the conclusion that even though the employer has
fulfilled the requirements of section 57(1) he acted unreasonably in
treating the reason shown by him as a sufficient reason for dismissing
the employee. But, on the other hand, a complaint of unfair
dismissal will not succeed *merely* because of the manner in which
the dismissal was carried out. A failure to observe a proper
procedure may make a dismissal unfair, but this is not because such
failure by itself makes the dismissal unfair, but because the failure,
for example, to give an employee an opportunity to explain, may

lead the tribunal to the conclusion that the employer, in the circumstances, acted unreasonably in treating the reason for dismissal as a sufficient reason. The tribunal will look at the practical effect of the failure to observe the proper procedure in order to decide whether or not the dismissal was unfair. Where an employee is dismissed for alleged misconduct and he then complains that he was unfairly dismissed, it is to be anticipated that the industrial tribunal will usually need to consider (a) the nature and gravity of the alleged misconduct; (b) the information on which the employer based his decision; (c) whether there was any other information which the employer could or should have obtained or any other step which he should have taken before he dismissed the employee. Similarly, in a case of alleged redundancy, it is to be anticipated that the industrial tribunal will usually need to consider (a) the information on which the employer based his decision to dismiss the employee as redundant and the method of selection which he used and (b) whether there was any other information which the employer could or should have obtained or any other step which he should have taken before he dismissed the employee. In some cases of misconduct, however, the misconduct may be so grave and the information available to the employer so clear that the tribunal will be likely to conclude that no further inquiries by the employer were necessary But in many cases of misconduct, the tribunal will need to consider whether the employer, either in accordance with some disciplinary procedure or otherwise, should have taken steps to obtain further information either from the employee or from elsewhere because such information might throw light on the sufficiency of the employer's reason for dismissal. But the failure to obtain this information does not ipso facto render the dismissal unfair, and it seems to me to be both logical and desirable to require the industrial tribunal to try to evaluate the effect in practice of the failure. Thus, as [counsel for the employees] acknowledged, there may be cases where the evidence of misconduct is not so clear as to justify instant dismissal and which *could* be capable of explanation, but where on examination, the employee has no explanation to put forward. In such a case, the failure to seek an explanation from the employee, which fairness would in principle require, will not make any difference. In a case where dismissal is on the ground of redundancy, the matter may have to be looked at rather differently because the system adopted for the selection of the individual for redundancy may be at the very centre of the inquiry when the tribunal comes to determine whether the employer has acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the employee concerned. The decision of the appeal tribunal in *Williams v. Compair Maxam Ltd.* [1982] I.C.R. 156 demonstrates the importance of the use of a fair system. Furthermore, it is to be noted that section 59 of the Act of 1978 contains special provisions rendering dismissal on the ground of redundancy unfair But where section 59 does not apply, it seems to me to be proper and indeed necessary for the tribunal to investigate the effect of the failure to consult the employee or to warn him or to hold discussions or as the case may be. In some cases, the facts may show beyond peradventure that no discussions or other steps could have made any difference whatever because the

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3 W.L.R.

Polkey v. Dayton Ltd. (H.L.(E.))

Lord Mackay
of Clashfern

A state of the company was so grave. In other cases, the matter will be more evenly balanced. But, for my part, I can see no objection in principle to the tribunal seeking to evaluate the effect in practice of any failure by the employer to observe the provisions of a code of practice or of the guidelines prescribed in cases such as *Williams v. Compair Maxam Ltd.* . . . Prima facie, as the reason for dismissal was redundancy, the reason was a valid reason. The failure to consult did not automatically render the dismissal unfair; it was for the tribunal to determine whether that failure showed that the employers had acted reasonably or unreasonably in treating redundancy as a sufficient reason for the dismissal of the employee. For that purpose, they had to look at all the circumstances including the consequences of the failure."

C In my opinion, Neill L.J.'s answer on first sight was correct. With much of what he says I would respectfully agree but I cannot accept it all. For example in referring to a case of dismissal for misconduct where the evidence of misconduct could be capable of explanation and no explanation has been invited before dismissal the examination of which Neill L.J. speaks is an examination of matters other than the employer's conduct which could not be known to the employer until after the decision to dismiss had been reached and therefore were not available to the employer at the time he reached that decision. Perhaps the point is highlighted most plainly in the very last sentence which I have quoted. The consequences of the failure determine whether or not the employee suffered an injustice. This is not to be confused with the question whether the employer acted reasonably.

E Further, in my opinion, the statutory test shows that at least some aspects of the manner of dismissal fall to be considered in considering whether a dismissal is unfair since the action of the employer in treating the reason as sufficient for dismissal of the employee will include at least part of the manner of the dismissal. Accordingly, it is not correct to draw a distinction between the reason for dismissal and the manner of dismissal as if these were mutually exclusive, with the industrial tribunal limited to considering only the reason for dismissal. Nicholls L.J. agreed with Neill L.J. as did Sir George Waller. Sir George, however, added some observations. He said, at p. 1156:

G "The industrial tribunal, having inquired into what would have happened if the code of practice had been complied with, came to the conclusion that it would have made no difference. In other words, the employers acted reasonably in treating redundancy as a sufficient reason for dismissing the employee."

H In my view, with great respect, these two sentences show that Sir George was treating the question whether the employee had suffered injustice as the same question as whether the employer had acted reasonably.

In my opinion, therefore, the additional reasons given by the Court of Appeal in the present case for supporting the *British Labour Pump* principle involve an impermissible reliance upon matters not known to the employers before the dismissal and a confusion between unreasonable conduct in reaching the conclusion to dismiss, which is a necessary ingredient of an unfair dismissal, and injustice to the employee which is

not a necessary ingredient of an unfair dismissal, although its absence will be important in relation to a compensatory award.

It follows that I do not agree with the decision of the Court of Appeal in the present case and this appeal should be allowed, the *British Labour Pump* principle and all decisions supporting it are inconsistent with the relevant statutory provision and should be overruled and, in particular, the decision of the Court of Appeal in *W. & J. Wass Ltd. v. Binns* [1982] I.C.R. 486 should be overruled.

That leaves for consideration the appropriate form of order to be made by the House. Counsel for the appellant asked that the House should hold that the appellant's dismissal had been unfair and remit the case to the tribunal to consider remedy. Counsel for the employers, while accepting that the *British Labour Pump* principle and *W. & J. Wass Ltd. v. Binns* were wrong and that accordingly the industrial tribunal had applied the wrong test in coming to its conclusion, submitted that on the findings of the tribunal supplemented by the evidence the tribunal were bound to hold that the dismissal was fair since a reasonable employer considering the facts known to this employer at the date of the dismissal could reasonably have concluded that observance of the code would make no difference to the conclusion.

The notes of evidence available to your Lordships are necessarily only a brief summary and the tribunal's findings do not deal exhaustively with all the matters that appear to have been raised in the evidence; in particular they do not deal with the evidence that appears to have related to an appeal by the appellant to the employers to rescind the dismissal. In these circumstances I consider that no adequate basis exists for your Lordships to determine whether this dismissal was fair or unfair. The industrial tribunal asked themselves the wrong question when they applied the *British Labour Pump* principle. It is not apparent what their answer would have been if they had asked themselves the correct question. In my opinion the proper course is to remit this case to a new industrial tribunal for consideration in the light of your Lordships' judgment. The respondents must bear the appellant's costs in the Court of Appeal and in this House.

LORD KEITH OF KINKEL. My Lords, I have had the opportunity of considering in draft the speech delivered by my noble and learned friend on the Woolsack. I agree with it, and for the reasons he gives would allow the appeal and remit the case to an industrial tribunal differently constituted.

LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend the Lord Chancellor and I agree with it. I add some short observations of my own because of the importance of the case.

Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by section 57(2)(a), (b) and (c) of the Employment Protection (Consolidation) Act 1978. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently

A classified in most of the authorities as “procedural,” which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is *not* permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied.

E My Lords, I think these conclusions are fully justified by the cogent reasoning of Browne-Wilkinson J. in *Sillifant v. Powell Duffryn Timber Ltd.* [1983] I.R.L.R. 91 to which my noble and learned friend the Lord Chancellor has already drawn attention.

F If it is held that taking the appropriate steps which the employer failed to take before dismissing the employee would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus in *Earl v. Slater & Wheeler (Airlyne) Ltd.* [1973] 1 W.L.R. 51 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the National Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called *British Labour Pump* principle [1979] I.C.R. 347 tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J. in *Sillifant's* case, if the industrial tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the *British Labour Pump* principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J. put it in *Sillifant's* case, at p. 96:

"There is no need for an 'all or nothing' decision. If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

The second consideration is perhaps of particular importance in redundancy cases. An industrial tribunal may conclude, as in the instant case, that the appropriate procedural steps would not have avoided the employee's dismissal as redundant. But if, as your Lordships now hold, that conclusion does not defeat his claim of unfair dismissal, the industrial tribunal, apart from any question of compensation, will also have to consider whether to make any order under section 69 of the Act of 1978. It is noteworthy that an industrial tribunal may, if it thinks fit, make an order for re-engagement under that section and in so doing exercise a very wide discretion as to the terms of the order. In a case where an industrial tribunal held that dismissal on the ground of redundancy would have been inevitable at the time when it took place, even if the appropriate procedural steps had been taken, I do not, as at present advised, think this would necessarily preclude a discretionary order for re-engagement on suitable terms, if the altered circumstances considered by the tribunal at the date of the hearing were thought to justify it.

For these reasons and for those given by my noble and learned friend the Lord Chancellor I would allow the appeal and remit the case to be heard by another industrial tribunal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend on the Woolsack. I agree with it, and for the reasons which he gives I would allow the appeal and remit the case to a new industrial tribunal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend on the Woolsack. I agree with it, and for the reasons which he gives I would allow the appeal and remit the case to a new industrial tribunal.

*Appeal allowed with costs in House
of Lords and Court of Appeal.
Decision of industrial tribunal set aside
and cause remitted to differently
constituted tribunal.*

Solicitors: Gregsons, Nottingham; Gorna & Co., Manchester.

M. G.

3 W.L.R.

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[COURT OF APPEAL]

KUMAR v. DUNNING AND ANOTHER

1987 Feb. 24, 25, 26;
April 15Sir Nicolas Browne-Wilkinson V.-C.,
Croom-Johnson and Neill L.JJ.

B

*Landlord and Tenant—Assignment of lease or underletting—Effect of assignment—Sureties covenanting to pay tenant's unpaid rent—Landlord assigning reversion without expressly assigning surety covenant—Whether assignee of reversion entitled to benefit of surety covenant—Law of Property Act 1925 (15 & 16 Geo. 5, c. 20), s. 62(1)*¹

C

The plaintiff assigned the unexpired residue of his underlease of business premises. The assignee covenanted with the head lessee to pay the rent and perform and observe the underlessee's covenants. Two sureties entered into a covenant with the head lessor to pay all losses, costs, damage and expenses occasioned to the head lessor by the non-payment of rent or breach of any obligation by the assignee. The head lessor subsequently sold the head lease without expressly assigning the benefit of the surety covenant. In 1982 the assignee went into liquidation and stopped paying the rent. The new head lessor demanded from the plaintiff the arrears of rent which had accrued since the assignee went into liquidation. The plaintiff paid that sum to the new head lessor and sought to recover it from the defendants, one of the sureties and the executor of the estate of the other surety, by commencing an action. The judge dismissed the plaintiff's claim.

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On the plaintiff's appeal:—

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Held, allowing the appeal, that the question whether, in the absence of express assignment, a benefit under a covenant (including the payment of money), could be enforced by the assignee of the immediate reversion, depended on whether the covenant touched and concerned the land or was merely collateral; that a benefit under a covenant was not collateral if the covenant was beneficial to the owner for the time being of the covenantee's land and to no one else; that, since the covenant by the sureties guaranteeing the performance of the tenant's covenants which touched and concerned the land was beneficial to no one but the owner for the time being of the covenantee's land, and the existence of that covenant and the right to payment thereunder increased the value of the landlord's reversion, that covenant itself touched and concerned the land and was enforceable by the new head lessor against the defendants; and that, accordingly, the plaintiff was entitled to be subrogated to the rights of the new head lessor and to recover from the defendants the sums paid as arrears of rent (post, pp. 1174c–d, 1175g–1176a, c, 1177d–h, 1180b–c, d–e).

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Vernon v. Smith (1821) 5 B. & Ald. 1 and *Dyson v. Forster* [1909] A.C. 98, H.L.(E.) applied.

Dewar v. Goodman [1909] A.C. 72, H.L.(E.) distinguished. *Pinemain Ltd. v. Welbeck International Ltd.* (1984) 272 E.G. 1166 and *In re Distributors and Warehousing Ltd.* (1986) 278 E.G. 1363 doubted.

Decision of Tucker J. reversed.

¹ Law of Property Act 1925, s. 62(1): see post, p. 1172A.

Kumar v. Dunning (C.A.)**[1987]**

The following cases are referred to in the judgment:

Coastplace Ltd. v. Hartley [1987] 2 W.L.R. 1289

Congleton Corporation v. Pattison (1808) 10 East 130

Consolidated Trust Co. Ltd. v. Naylor (1936) 55 C.L.R. 423

Dewar v. Goodman [1909] A.C. 72, H.L.(E.)

Distributors and Warehousing Ltd., In re (1986) 278 E.G. 1363

Downer Enterprises Ltd., In re [1974] 1 W.L.R. 1460; [1974] 2 All E.R. 1074

Forster v. Elvet Colliery Co. Ltd. [1908] 1 K.B. 629, C.A.; sub nom. *Dyson v. Forster* [1909] A.C. 98, H.L.(E.)

Grant v. Edmondson [1931] 1 Ch. 1

Griffith v. Pelton [1958] Ch. 205; [1957] 3 W.L.R. 522; [1957] 3 All E.R. 75, C.A.

Hua Chiao Commercial Bank Ltd. v. Chiaphua Industries Ltd. [1987] A.C. 99; [1987] 2 W.L.R. 179; [1987] 1 All E.R. 1110, P.C.

Parker v. Webb (1822) 3 Salk. 4

Pinemain Ltd. v. Tuck (unreported), 4 March 1986, Michael Wheeler Q.C.

Pinemain Ltd. v. Welbeck International Ltd. (1984) 272 E.G. 1166

Rogers v. Hosegood [1900] 2 Ch. 388, C.A.

Sacher Investments Pty. Ltd. v. Forma Stereo Consultants Pty. Ltd. [1976] 1 N.S.W.L.R. 5

Smith v. River Douglas Catchment Board [1949] 2 K.B. 500; [1949] 2 All E.R. 179, C.A.

Thomas v. Hayward (1869) L.R. 4 Ex. 311

Vernon v. Smith (1821) 5 B. & Ald. 1

Vyvyan v. Arthur (1823) 1 B. & C. 410

Woodall v. Clifton [1905] 2 Ch. 257, C.A.

No additional cases were cited in argument.

APPEAL from Tucker J.

By statement of claim dated 28 September 1984 the plaintiff, Kerten Surendra Kumar, claimed against the first defendant, Kevin Edward Dunning and the second defendant, Pauline Marian Powell (sued as executrix of the estate of Brian Stanley Powell) and each of them, the sum of £6,461.04, being arrears of rent between 29 September 1982 and 25 March 1984 in respect of premises at 198/200, Earls Court Road, London S.W.5, interest thereon and costs. Each defendant denied that the plaintiff was entitled to the relief claimed or any relief. On 23 May 1986 Tucker J. dismissed the plaintiff's action.

By notice of appeal dated 25 July 1986 the plaintiff appealed on the grounds, inter alia, that the judge was wrong in law in holding that the plaintiff was not entitled to recover the moneys claimed from the defendants either by way of indemnity or under the doctrine of subrogation, and that the judge was wrong in law in holding that the defendants' covenant did not touch and concern the land since the covenant inherently affected the value of the land and increased and enhanced the marketability of the lessee's interest in the land.

The facts are stated in the judgment of Sir Nicolas Browne-Wilkinson V.-C.

Norman Primost for the plaintiff.

Wayne Clark for the first defendant.

W. A. Blackburne Q.C. and *Robin Knowles* for the second defendant.

Cur. adv. vult.

15 April. The following judgments were handed down.

3 W.L.R.

Kumar v. Dunning (C.A.)

A SIR NICOLAS BROWNE-WILKINSON V.-C. This appeal raises the question whether an assignee of the reversion on a lease can enforce the payment of rent by those who have entered into surety covenants guaranteeing performance of the tenant's obligations under the lease. The question has been raised in a number of recent cases at first instance. This is the first time it has come before this court.

B By a head lease dated 30 April 1970 the then freeholder demised to Old Kentucky Restaurants Ltd. ("O.K.") the premises 198/200, Earls Court Road, London S.W.5 for a term of 42 years. By an underlease dated 9 October 1970 O.K. demised part of the premises to the plaintiff for a term of 21 years from 30 April 1970 at an initial rent of £2,500 per annum with provisions for review. O.K. was defined as

C "the lessor which expression where the context admits includes the owner from time to time entitled in reversion immediately expectant on the determination of the term hereby granted."

The plaintiff was defined as "the lessee which expression where the context admits includes his successors in title." Clause 2(10) of the underlease contained a covenant against assigning or parting with possession of the premises in terms which were subsequently amended by agreement. As amended clause 2(10)(b) included a covenant against assigning or underletting the whole of the demised premises without the consent of the lessor and the superior lessor. Clause 2(10)(d) then provided:

E "For the purpose of such clause (10)(b) above the lessor may require the proposed assignee or under tenant to enter into direct covenants with the lessor and the superior lessor to perform and observe all the covenants and conditions herein contained on the lessee's part to be performed and observed."

F On 31 May 1978 the plaintiff assigned the unexpired residue of the underlease to Sundowners Ltd. ("Sundowners"). The licence to make such assignment was dated 7 June 1978 and is the critical document in this case. The licence is made between the then freeholder (defined simply as "the lessor") of the first part, O.K. (defined as "the lessee") of the second part, the plaintiff (defined as "the underlessee") of the third part, Sundowners (defined as "the assignee") of the fourth part and a Mr. Dunning and a Mr. Powell (defined as "the sureties") of the fifth part. Clauses 3 and 4 of the licence provide:

G "3. The assignee hereby covenants with the lessee that henceforth during the remainder of the term created by the underlease the assignee will pay the rent and perform and observe the covenants on the part of the underlessee and the conditions therein contained . . . 4. In consideration of the licence hereinbefore contained the sureties hereby jointly and severally covenant with and guarantee to the lessor and the lessee and with and to each of them as follows that is to say: (i) that the assignee shall at all times during the term created by the underlease duly pay the rent and will perform and observe all the covenants on the part of the underlessee therein contained, (ii) that the sureties will at all times hereafter so long as aforesaid pay and make good to the lessor and the lessee or either of them all losses costs damage and expenses occasioned to the lessor and the lessee or either of them by the non-payment of the

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said rents or any of them or any part thereof or the breach non-observance or non-performance of any of the covenants or conditions as aforesaid including the covenants hereinbefore contained . . .”

The defendants in this action are Mr. Dunning and the executor of Mr. Powell, the sureties under the licence. It is to be noted that neither Sundowners nor the sureties entered into any direct covenant with the plaintiff to perform the covenants in the underlease.

Sundowners went into liquidation on 24 November 1982 and has paid no rent since that date. At a date which is not known, O.K. assigned the head lease to Hedges and Butler Ltd. (“H. & B.”). The assignment of the head lease is not in evidence. The argument has, therefore, proceeded on the footing that there was no express assignment to H. & B. of the benefit of the surety covenants.

H. & B. demanded from the plaintiff, as the original underlessee, payment of rent accruing due since the winding up of Sundowners totalling £23,401.96. The plaintiff, having paid this sum to H. & B., in this action seeks to recover it from the sureties. The judge dismissed the plaintiff’s claim.

There is a substantial measure of agreement between the parties as to the relevant law. Mr. Blackburne, for the defendants, accepts (1) that the plaintiff, as the original underlessee, was liable to pay the rent to H. & B. as assignees of the reversion, notwithstanding the fact that the rent was largely in respect of a period before the assignment of the reversion to H. & B.; (2) that the plaintiff, having paid the rent, is entitled to be subrogated to the rights of H. & B.: *In re Downer Enterprises Ltd.* [1974] 1 W.L.R. 1460; (3) accordingly, the plaintiff is entitled to succeed if, but only if, H. & B. as assignee of the immediate reversion were entitled to recover the rent from the sureties. Therefore, the only question we have to decide is whether, in the absence of any express assignment to H. & B. of the benefit of the surety covenants contained in the licence, H. & B. as assignee of the immediate reversion on the underlease is entitled to enforce the surety covenants in the licence.

Mr. Blackburne first argues that the surety covenants are purely personal covenants between the sureties on the one hand and O.K. on the other. As such, he submits, they were incapable of assignment either expressly or by operation of law. He relies primarily on the fact that, in the licence, “the lessor” and “the lessee” are defined as meaning simply the freeholder and the headlessee, O.K., respectively. He emphasises that, in contradistinction to the definitions in the underlease itself, in the licence there is no provision extending the definition of “the lessee” to mean the owner for the time being of the immediate reversion on the underlease. Therefore, he submits, the covenant by the sureties with “the lessee” is simply a covenant for the benefit of O.K. and was not intended to be capable of assignment to, or enforcement by, anyone other than O.K.

I have no hesitation in rejecting this argument. The benefit of a surety contract, like the benefit of any other contract, is normally assignable. The burden lies on Mr. Blackburne to show clear indications that in this case it was intended, contrary to the general rule, that only O.K. should have the benefit. I do not think the mere nature of the definitions by itself would be sufficient for that purpose. But, as Mr. Primost for the plaintiff has demonstrated, there are clear

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Kumar v. Dunning (C.A.)

Sir Nicolas
Browne-Wilkinson V.-C.

A indications that the surety covenant was intended to be for the benefit of the reversioners for the time being. The licence contains a recital that the consent of O.K. to the assignment was required "by reason of the covenant to that effect contained in the . . . underlease." Accordingly, the licence was entered into pursuant to clause 2(10) of the underlease, subclause (d) of which entitled "the lessor" (as defined by the underlease) to require an assignee to enter into a direct

B covenant with "the lessor" (as so defined) to perform the covenants in the underlease. Given the definition of "the lessor" as including the owner from time to time of the immediate reversion on the underlease, one would therefore expect clause 3 of the licence to be a covenant with "the lessor" as defined by the underlease, i.e. as including the owners from time to time of the reversion on the underlease. By

C clause 3 of the licence the assignee covenants "during the remainder of the term created by the underlease" to pay the rent and perform the covenants in the underlease. Accordingly, on its proper construction, clause 3 imposed on Sundowners, as assignee, an obligation to perform the tenant's covenants throughout the term of the underlease. In my judgment, it must have been intended that that obligation was to be for the benefit of the person who was for the

D time being entitled to the reversion on the underlease. When one turns to the surety covenant in clause 4 of the licence, one finds the sureties guaranteeing to "the lessee" that the assignee will perform the covenants "at all times during the term created by the underlease" and "at all times hereafter so long as aforesaid." In my judgment, it is clear that the intention was to guarantee performance of the covenants throughout the term, whoever was the reversioner. There is no

E ground for saying that the intention was that the liability under the surety covenant was to last only so long as O.K. was entitled to the immediate reversion.

For these reasons, in my judgment, the surety covenant was capable of assignment, and was not a covenant intended to be for the benefit of O.K. alone.

F The crucial question is whether the benefit of the surety covenant has become vested in H. & B. as assignee of the reversion on the underlease. There is no privity of contract or estate between H. & B. and the sureties. Nor, it must be assumed, has there been any express assignment to H. & B. of the benefit of the surety covenant. How, then, can H. & B. enforce the surety covenant against the sureties?

G Mr. Primost puts his case in four different ways: (1) that, whatever the terms of the assignment of the reversion by O.K. to H. & B., section 62 of the Law of Property Act 1925 operated to assign to H. & B. the benefit of the covenant as being a right "appertaining or reputed to appertain" to the land; (2) that section 189(2) of the Law of Property Act 1925 annexed the benefit of the surety covenant to the land; (3) that the surety covenant touches and concerns the land and accordingly the

H benefit of the covenant passed with the reversion to H. & B.; (4) the principle in *Griffith v. Pelton* [1958] Ch. 205 enables H. & B. to enforce the covenant. I will deal with these submissions in turn.

(1) Section 62 of the Law of Property Act 1925

Section 62 has the side heading "General words implied in conveyances." Subsection (1) reads:

"A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

The main intention of section 62 was to provide a form of statutory shorthand rendering it unnecessary to include such words expressly in every conveyance. It is a matter of debate whether, in the context of the section, the words "rights . . . appertaining to the land" include rights arising under covenant as opposed to strict property rights. However, I will assume, without deciding, that rights under covenant are within the words of the section. Even on that assumption, it still has to be shown that the right "appertains to the land." In my judgment, a right under covenant cannot appertain to the land unless the benefit is in some way annexed to the land. If the benefit of a covenant passes under section 62 even if not annexed to the land, the whole modern law of restrictive covenants would have been established on an erroneous basis. Section 62(1) replaces section 6(1) of the Conveyancing Act 1881. If the general words "rights . . . appertaining to land" operate to transfer the benefit of a negative restrictive covenant, whether or not such benefit was expressly assigned, it would make all the law developed since 1881 unnecessary. It is established that, in the absence of annexation to the land or the existence of a building scheme, the benefit of a restrictive covenant cannot pass except by way of *express* assignment. The law so established is inconsistent with the view that a covenant, the benefit of which is not annexed to the land, can pass under the general words in section 62.

Therefore, in my judgment, the plaintiff cannot rely on section 62 unless, at the least, he can show that the surety covenant touches and concerns the land so as to be capable of annexation, a point which I consider at (3) below.

(2) *Section 189(2) of the Law of Property Act 1925*

The subsection reads:

"The benefit of all covenants and powers given by way of indemnity against a rent or any part thereof payable in respect of land, or against the breach of any covenant or condition in relation to land, is and shall be deemed always to have been annexed to the land to which the indemnity is intended to relate, and may be enforced by the estate owner for the time being of the whole or any part of that land, notwithstanding that the benefit may not have been expressly apportioned or assigned to him or to any of his predecessors in title."

The plaintiff submits that the surety covenant in this case is a covenant "by way of indemnity against a rent . . . payable in respect of land" and, therefore, the benefit of such covenant, being annexed to the land, has passed to H. & B. There is a question whether a surety covenant guaranteeing to A performance by B of B's covenant to A is an "indemnity" to A within the meaning of the section. But, in any

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A event, Mr. Blackburne has satisfied me that section 189(2) is not of
general application but is directed only to a specific type of case, i.e., a
case where land charged with a rent has been divided. In the absence of
provision to the contrary, on the division of land subject to a charge for
rent each part of the land remains liable to the person to whom the rent
is payable for the whole amount of the rent. Before 1925 in such a case
B those liable for the rent used to agree an apportionment of the liability
between them similar to those now implied by the Law of Property Act
1925, section 77 and Schedule 2. After 1925, the benefit of such implied
covenants for indemnity arising on the severance of land charged with
the rent is annexed to the land of the covenantee: see section 77(5).
C Section 189(2) produces the same annexation where, on the severance of
the land charged, the indemnities have been given expressly and not
merely by way of implication. In my judgment, read in the context of
the Act as a whole, the effect of section 189(2) is limited to those
indemnities against liability to pay a rent where land subject to a single
rent has been divided. The section, therefore, does not touch the
present case.

D 3. *Does the surety covenant touch and concern the land?*

Mr. Primost submits that the surety covenant “touches and concerns”
the reversion to the underlease in consequence of which the benefit of
such covenant passed to H. & B. automatically on the assignment of the
reversion. As a result, he submits, H. & B. is entitled to sue the
sureties.

E It must be noted that there is no privity of contract between H. & B.
and the sureties. Nor is there privity of estate. Accordingly, the Grantees
of Reversions Act 1540 (now sections 141 and 142 of the Law of
Property Act 1925) is not directly in point. Those provisions only apply
F to covenants between landlord and tenant. Where there is neither privity
of contract nor privity of estate, the benefit of a covenant runs with the
land of the covenantee at law if, but only if, the covenant touches and
concerns the land of the covenantee: *Megarry and Wade, The Law of*
Real Property, 5th ed. (1984), pp. 764–765. Such a covenant, if it does
touch and concern the land, is enforceable by an assignee of the land
against the covenantor, whether or not the covenantor has any land:
G *Smith v. River Douglas Catchment Board* [1949] 2 K.B. 500. Although
this case is not concerned directly with covenants between landlord and
tenant, authorities on the latter type of case are in point: as between
landlord and tenant only covenants which touch and concern the land
are enforceable.

H The test whether a covenant touches and concerns land is that
formulated by Bayley J. in *Congleton Corporation v. Pattison* (1808) 10
East 130 and adopted by Farwell J. in *Rogers v. Hosegood* [1900] 2 Ch.
388, 395:

“the covenant must either affect the land as regards mode of
occupation, or it must be such as per se, and not merely from
collateral circumstances, affects the value of the land.”

But although the test is certain, its exact meaning when applied to
different sets of circumstances is very obscure. In *Grant v. Edmondson*
[1931] 1 Ch. 1, 28 Romer L.J. said:

"In connection with the subject of covenants running with land, it is impossible to reason by analogy. The established rules concerning it are purely arbitrary, and the distinctions, for the most part, quite illogical."

Before seeking to analyse the authorities, I will first state how the matter strikes me as a matter of impression. The surety covenant is given as a support or buttress to covenants given by a tenant to a landlord. The covenants by the tenant relate not only to the payment of rent, but also to repair, insurance and user of the premises. All such covenants by a tenant in favour of the landlord touch and concern the land, i.e., the reversion of the landlord. The performance of some covenants by tenants relates to things done on the land itself (e.g., repair and user covenants). Other tenants' covenants (e.g., payment of rent and insurance) require nothing to be done on the land itself. They are mere covenants for the payment of money. The covenant to pay rent is the major cause of the landlord's reversion having any value during the continuance of the term. Where there is privity of estate, the tenants' covenant to pay rent touches and concerns the land: *Parker v. Webb* (1822) 3 Salk. 4. As it seems to me, in principle a covenant by a third party guaranteeing the performance by the tenant of his obligations should touch and concern the reversion as much as do the tenants' covenants themselves.

This view accords with what, to my mind, is the commercial common sense and justice of the case. When, as in the present case, the lease has been assigned on the terms that the sureties will guarantee performance by the assignee of the lease, justice and common sense ought to require the sureties, not the original tenant, to be primarily liable in the event of default by the assignee. So long as the reversion is not assigned, that will be the position. Why should the position between the original tenant and the sureties be rendered completely different just because the reversion has been assigned, a transaction wholly outside the control of the original tenant and the sureties?

Yet in all save one of the cases decided at first instance, the court has held that the surety covenant does not touch and concern the land. The exception is *Pinemain Ltd. v. Tuck* (unreported), 4 March 1986, a decision of Michael Wheeler Q.C. where the question was left open. In *Pinemain Ltd. v. Welbeck International Ltd.* (1984) 272 E.G. 1166, Edward Nugee Q.C., sitting as a deputy High Court judge, held that the surety covenant did not touch and concern the land. He held that for a positive covenant to run at law (as opposed to a negative covenant running with the land in equity) it was necessary that the covenant should require something to be done which affected the land itself, not merely its value. I find this view difficult to reconcile with those cases which establish that a tenant's covenant to pay rent and to insure touch and concern the land. Moreover, Mr. Nugee's view is, to my mind, inconsistent with the decision in *Dyson v. Forster* [1909] A.C. 98 which I will mention later.

In *In re Distributors and Warehousing Ltd.* (1986) 278 E.G. 1363 Walton J. held that a surety covenant did not touch and concern the land. He pointed out that payment by a surety does not constitute payment of rent by the tenant. He held that the subject matter of the surety covenant was not the land, but the tenant's covenants themselves. He held, in the absence of authority being cited to him, that a covenant

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A at "this double remove" could not itself touch and concern the land. In the present case, Tucker J. followed this reasoning. I will refer later to certain authorities not cited to Walton J. which might well have led him to a different conclusion.

B In *Coastplace Ltd. v. Hartley* [1987] 2 W.L.R. 1289 French J. held that the surety covenant did not touch and concern the land because it affected the value of the land not per se but by a collateral circumstance. He held that as the value of the surety covenant depended on the ability of the surety to meet his obligations, which might vary from time to time, the value of the covenant was due to a collateral matter. I cannot agree that the variations in the surety's ability to meet his liability necessarily lead to the conclusion that the value of the covenant to the land is collateral. Exactly the same can be said of the tenant's own
C covenant to pay rent. Yet such covenants do touch and concern the land and, therefore, cannot be said merely to affect the value collaterally.

Reverting to the test laid down in *Congleton Corporation v. Pattison*, 10 East 130, it is clear that the surety covenant in the present case does not "affect the land as to the mode of occupation." The question is whether it affects the value of the reversion "per se and not merely from collateral circumstances." The meaning of those latter words has been
D expounded in a number of cases which have not often been cited subsequently. In *Vernon v. Smith* (1821) 5 B. & Ald. 1 the question was whether a covenant by the tenant to insure the demised premises was enforceable by the assignee of the reversion. Although the case was one of privity of estate, the enforceability of the covenant depended on whether the covenant touched and concerned the land. It was argued that the covenant was merely to pay money to a third party. The
E majority of the court decided that the covenant was enforceable on the narrow point that the assignee of the reversion would have an interest in the insurance money. Best J., whilst agreeing on that point, also held that apart from that special factor, the insurance covenant touched and concerned the land. He said, at p. 9:

F "A covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned. If this were not the law, the tenant would hold the estate discharged from the performance of one of the conditions on which it was granted to him. The original covenantee could not avail himself of this
G covenant: he sustains no loss by the destruction of the buildings, and therefore has no interest to have them insured."

Later he said, at p. 10:

"If a court of equity will not interfere, either for the one or the other, still this covenant is as beneficial to an assignee as it was to the covenantee. It secures to the tenant the means of performing his covenant, and to the landlord, a solvent instead of a ruined tenant. It is a covenant beneficial, to the owner of the estate, and to no one
H but the owner of the estate; and therefore may be said to be *beneficial to the estate*, and so directly within the principle on which covenants are made to run with the land."

Finally he said, at p. 11:

"The covenant here mentioned is not beneficial to the estate granted, in the strictest sense of the words, because it has no effect

until that estate is at an end, but it is beneficial to the owner, as owner, and to no other person. By the terms *collateral covenants*, which do not pass to the assignee, are meant such as are beneficial to the lessor without regard to his continuing the owner of the estate. This principle will reconcile all the cases.”

In *Vyvyan v. Arthur* (1823) 1 B. & C. 410, 417 Best J. repeated this test in the following words:

“The general principle is, that if the performance of the covenant be beneficial to the reversioner, in respect of the lessor’s demand, and to no other person, his assignee may sue upon it; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue.”

The test laid down by Best J. is, in my judgment, a sound one which in the normal case will provide a satisfactory yardstick for differentiating between those covenants which touch and concern the land in the true sense and those which are merely collateral.

The test has received the approval of the Court of Appeal and the House of Lords in *Forster v. Elvet Colliery Co. Ltd.* [1908] 1 K.B. 629, affirmed sub nom. *Dyson v. Forster* [1909] A.C. 98. In that case, the owner of minerals, who did *not* own the surface, granted a lease of the minerals. The lease contained a covenant by the tenant with the lessor and with the owners or occupiers for the time being of the surface, to pay compensation for damage caused to the surface by working the minerals. The defendant was the assignee of the term: the plaintiffs included persons who were for the time being surface owners but who had acquired their land since the date of the lease. The case, therefore, was like the present in that there was privity of neither contract nor estate between the plaintiffs and the defendant. Moreover, the covenant did not require the doing of any work but merely the payment of compensation for damage done to land which was not the land of the landlord. It was held that the surface owners were entitled to enforce the covenant against the defendant. In the Court of Appeal Cozens-Hardy M.R. said, at p. 635:

“It is old law that in cases not between lessor and lessee the benefit of a covenant will pass if and in so far as it necessarily affects the value of the land, in this sense, that the owner of the land would get more for his land by reason of the covenant being attached to and annexed to it. . . . I see no reason why the covenant to pay compensation for damage caused by the subsidence of the surface should not be a covenant to which this principle applies. The analogy of a covenant to insure against fire, which has been held to be a covenant which runs with the land as between lessor and lessee—*Vernon v. Smith*, 5 B. & Ald. 1—seems to be rather close.”

Farwell L.J. said, at p. 640:

“I am further of opinion that the benefit of these covenants as between the present plaintiffs and the present defendants in all the actions does run with the land. They certainly fulfil the first requisite—namely, they are ‘such as per se and not merely from collateral circumstances affect the value of the land’: *Congleton*

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A *Corporation v. Pattison*, 10 East 130, 138. There is nothing in the fact that the covenant sounds in damages to prevent it from so running—see *The Prior's Case*, Co. Litt. 385a where it was said that ‘the remedie by covenant doth runne with the land to give dammages to the partie grieved’ . . . and all the covenants for title and quiet enjoyment sound in damages and run with the land.”

B In the House of Lords, Lord Macnaghten in his speech, with which the other members of the House concurred, said [1909] A.C. 98, 102:

C “The question is, Does this covenant affect the nature, quality, or value of the land, or is it a covenant simply collateral? It is not, I think, simply collateral, for one reason which is sometimes proposed as a test for the purpose of determining whether a covenant runs with the land or not. It is beneficial to the surface owner and beneficial to no one else: see *Vyvyan v. Arthur*, 1 B. & C. 410, 417, per Best J. . . . I also think that the covenant affects the value of the land in respect of which it was given. Suppose the land, being properly drained, were to be let for agricultural purposes, a tenant, I should suppose, would be more likely to take it and would probably give more for it if he were assured that compensation would be payable in the event of the drainage system being dislocated by subsidence. Similar considerations would apply if the land were to be let for building purposes.”

E It is clear, therefore, that the House of Lords was accepting the test of what was collateral laid down by Best J. in *Vyvyan v. Arthur*, 1 B. & C. 410.

F From these authorities I collect two things. First, that the acid test whether or not a benefit is collateral is that laid down by Best J., namely, is the covenant beneficial to the owner for the time being of the covenantee’s land, and to no one else? Secondly, a covenant simply to pay a sum of money, whether by way of insurance premium, compensation or damages, is a covenant capable of touching and concerning the land provided that the existence of the covenant, and the right to payment thereunder, affects the value of the land in whomsoever it is vested for the time being. Therefore, in my judgment, these cases (which were not cited to Walton J.) show that he was in error in holding that a covenant at double remove could not touch and concern the land.

G Applying the test laid down by Best J., a covenant by a surety securing the performance of a tenant’s covenants in a lease satisfies it. The surety covenant increases the value of the reversion in that the landlord can look not only to the tenant but also to the sureties for the payment of a sum equal to the rent and for damages for failure to comply with the other tenant’s covenants. Such surety covenant is of value to no one other than the owner for the time being of the reversion

H since it is in support of the tenant’s covenants and the tenant’s covenants can only be enforced by the reversioner for the time being. Once the lease has been assigned, the assignor cannot enforce the tenant’s covenants in respect of breaches occurring after the date of assignment and a fortiori cannot enforce the surety covenant. No one other than the landlord can enforce the surety covenant. The fact that it is a covenant only to pay a sum of money or damages is not inconsistent with it touching and concerning the land.

Mr. Blackburne cited a number of cases which, he submitted, were inconsistent with this conclusion. He submitted, in reliance on *Woodall v. Clifton* [1905] 2 Ch. 257, that an option to purchase the freehold contained in a lease did not run with the land. In that case, an assignee of the lease sought to exercise an option to purchase the freehold against the assignee of the reversion. This court held that the action failed because the option to purchase the freehold did not touch and concern the land in question. They identified the land to be touched and concerned as being the term granted by the lease: see p. 279. In my judgment, that decision does not impinge on the present case but depends wholly on the fact that the court held that the land to be touched and concerned had to be the term of years: the right to purchase the freehold could not touch and concern the term of years: it was "something wholly outside the relation of landlord and tenant."

In *Thomas v. Hayward* (1869) L.R. 4 Ex. 311 a covenant by the lessor of a public house not to use adjoining land for the sale of liquor was held not to touch and concern the land because its value to the tenant was collateral: it related to the business he carried on, not to the land itself. The decision was a hard one and is to be treated as authority for no more than that a covenant the value of which is wholly dependent on the use of the land for a specific business is collateral.

Next Mr. Blackburne relied on *Dewar v. Goodman* [1909] A.C. 72. In that case, a head lease contained a covenant by the head lessee to repair all buildings erected on the land, which numbered some 211 in total. The head lessee granted an underlease of two of the houses and covenanted with the underlessee to perform the covenants in the head lease so far as they related to premises not comprised in the underlease. The plaintiff was the assignee of the underlease: the defendant was the assignee of the head lease. Because of a breach of the covenant to repair in the head lease, the freeholder forfeited the head lease and ejected the plaintiff. The plaintiff sued the defendant for damages for breach of the lessor's covenant to perform the covenants in the head lease did not touch and concern the land in the underlease because it did not require anything to be done on the land demised: the covenant related to the buildings other than those contained in the underlease. Surprisingly, there is little discussion of the second limb of the test in *Congleton Corporation v. Pattison* (1808) 10 East 130, i.e., that it is sufficient if the covenant per se affects the value of the land even though this does not involve doing anything on the land of the covenantee itself. Even more surprisingly, although both cases were decided within months of each other and the argument and decision in the House of Lords in *Dewar v. Goodman* [1909] A.C. 72 was given after the argument in the House of Lords in *Dyson v. Forster* [1909] A.C. 98, in neither case is the other referred to, although Lord Loreburn L.C. was party to both decisions.

I find the two cases very difficult, if not impossible, to reconcile. The performance of the covenant by the head lessee in *Dewar v. Goodman* [1909] A.C. 72 was manifestly of value to the underlessee for the time being and to no one else. Yet this point is not dealt with in the judgment. The distinction may lie in this. In *Dewar v. Goodman* the doing of the covenanted act did not benefit the land of the covenantee as such but only his estate in it. The covenant was to repair adjoining premises: the breach of the covenant did not affect the land comprised in the underlease but merely led to a forfeiture of the estate in the land.

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A In *Dyson v. Forster* [1909] A.C. 98 on the other hand, the covenant benefited the owner of the surface land whatever his estate in it, e.g. it enabled him to let the land at a better price. The distinction, if any, is therefore between a covenant which operates only to protect the estate or interest in the covenantee's land (which does not touch and concern the land) and a covenant which affects the value of the land as such. If this is a valid distinction, then a surety covenant falls squarely on the

B *Dyson v. Forster* side of the line: it increases the value of the landlord's reversion as such, whatever his estate. If, as I suspect, the two decisions are in fact irreconcilable, I am free to choose between them. I prefer to follow *Dyson v. Forster* which gives effect to the second limb in the *Congleton* test, 10 East 130, 138 (which everyone has treated as the true basic test) whereas *Dewar v. Goodman* appears to ignore the second limb completely.

C Mr. Blackburne also relied on *Hua Chiao Commercial Bank Ltd. v. Chiaphua Industries Ltd.* [1987] A.C. 99. In that case a lease provided that at the commencement of the term the tenant should pay to the landlord a substantial security deposit on the terms that it would be repayable at the end of the term if there was no breach of the tenant's covenants. The landlord mortgaged the reversion to the defendant bank, which went into possession. The tenant committed no breach of covenant during the term and sought to recover the security deposit from the bank, claiming that the provisions as to the deposit touched and concerned the land.

D The Privy Council dismissed the claim, holding that the covenant did not touch and concern the land. Lord Oliver of Aylmerton, giving the judgment on behalf of the Judicial Committee, plainly rejected any

E general rule that every covenant which is related, however obliquely, to some other obligation which touches and concerns the land itself necessarily touches and concerns the land: see p. 107c. But he did not rule out the possibility that a covenant closely connected and bound up with a covenant which does touch and concern the land can itself touch and concern the land. The ratio of the decision, in my judgment, is to

F be found at p. 187F-H. Lord Oliver points out that the assignee of the reversion was not entitled to receive the deposit from the original lessor on the assignment of the reversion: nor was an assignee of the term entitled to recover it at the end of the term. The liability to repay the deposit at the end of the term remained throughout on the original landlord and was an obligation to repay to the original tenant. So

G viewed, the decision is entirely consistent with the test laid down by Best J. The benefit of the covenant to repay could not touch and concern the land because someone other than the owner for the time being of the term could take the benefit of it.

H Finally, Mr. Blackburne relied on two Australian cases. The first, *Consolidated Trust Co. Ltd. v. Naylor* (1936) 55 C.L.R. 423, was a decision that under certain Australian statutory provisions an assignment of a mortgage did not operate to transfer the benefit of the covenant by a surety that the borrower would repay the principal debt. I do not myself gain any assistance from that decision. A surety for a mortgage debt is a surety for the payment of the principal debt. The borrower's own covenant to pay the principal has nothing to do with the land and cannot touch and concern the land: there is, therefore, no reason why a covenant by way of surety for such a payment should touch and concern the land. It is quite different from a surety for the performance of a

tenant's covenant which does touch and concern the land: such a surety covenant is necessarily and inextricably bound up with the tenant's obligations.

The other case, *Sacher Investments Pty. Ltd. v. Forma Stereo Consultants Pty. Ltd.* [1976] 1 N.S.W.L.R. 5, was concerned with the assignment of the benefit of a covenant guaranteeing performance of tenant's covenants. But no argument appears to have been advanced that such covenant touched and concerned the land. It therefore does not provide any assistance.

For these reasons, in my judgment, it is consistent with both principle and authority to hold that a covenant by a surety, guaranteeing performance of covenants by a tenant which touch and concern the land, itself touches and concerns the land and is enforceable by an assignee of the reversion. It follows that H. & B. could have enforced the surety covenant against the defendants and that, accordingly, the plaintiff is entitled to be subrogated to the rights of H. & B. and recover from the defendants the sums he has paid to H. & B.

(4) *The principle in Griffith v. Pelton* [1958] Ch. 205

In the light of my decision on the third issue, it is not necessary to consider this principle. Since I have considerable difficulty in understanding what *Griffith v. Pelton* did decide, I express no view on it.

In my opinion the appeal should be allowed and judgment entered for the plaintiff.

CROOM-JOHNSON L.J. I agree.

NEILL L.J. I also agree. Though we are differing from the decision of the judge, the matter has been so fully dealt with in the judgment of Sir Nicolas Browne-Wilkinson V.-C. that there is nothing that I can usefully add.

*Appeal allowed.
Leave to appeal.*

Solicitors: How Davey & Lewis; Trower Still & Keeling; Milners Curry & Gaskell.

S. H.

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A

[HOUSE OF LORDS]

COLTMAN AND ANOTHER APPELLANTS

AND

BIBBY TANKERS LTD. RESPONDENTS

B

1987 Oct. 26, 27; Lord Keith of Kinkel, Lord Roskill,
Dec. 3 Lord Griffiths, Lord Oliver of Aylmerton
and Lord Goff of Chieveley

C

*Health and Safety—Employer's liability—Ship—Vessel lost at sea with
all hands—Dependants' claim based on defective construction of
ship—Whether vessel "equipment"—Employer's Liability (Defec-
tive Equipment) Act 1969 (c. 37), s. 1(1)(a), (3)
Ships' Names—Derbyshire*

D

In September 1980, the bulk carrier *Derbyshire* sank off the coast of Japan with the loss of all hands. The plaintiffs, the administratrices of the estate of the third engineer, issued a writ seeking damages from the defendants, the owners of the *Derbyshire*, on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934 and on behalf of the dependants under the Fatal Accidents Act 1976. They alleged that the design and construction of the vessel had been defective so that she had been unseaworthy and that the deceased had lost his life in the course of his employment in consequence of a defect in equipment provided by the defendants for the purposes of their business and that that defect was attributable to their negligence within the meaning of section 1 of the Employer's Liability (Defective Equipment) Act 1969.¹ On a preliminary issue, Sheen J. held that the vessel was "equipment," within the meaning of the Act, that had been provided by the defendants for the purposes of their business. The Court of Appeal by a majority allowed an appeal by the defendants.

E

On appeal by the plaintiffs:—

F

Held, allowing the appeal, that "equipment" in the phrase "equipment provided by his employer for the purposes of the employer's business" in section 1(1)(a) of the Employer's Liability (Defective Equipment) Act 1969, in the context of an Act imposing vicarious liability on an employer for a defective article, was wide enough to include a ship of whatever size provided by an employer for the purposes of his business; that the inclusion of vehicles and aircraft in the definition of equipment in section 1(3) was for the purpose of clarity and did not cut down its meaning as used in the phrase in subsection (1); and that, accordingly, the *Derbyshire* had been equipment for the purposes of section 1(1)(a) and the plaintiffs were entitled to succeed (post, pp. 1182E, H—1183B, 1184H, 1185D—E, 1186G, H—1187A, H, 1188G—1189A, B, 1190A—C).

G

Decision of the Court of Appeal [1987] 2 W.L.R. 1098; [1987] 1 All E.R. 932 reversed.

H

The following cases are referred to in the opinion of Lord Oliver of Aylmerton:

Davie v. New Merton Board Mills Ltd. [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 356, H.L.(E.)

¹ Employer's Liability (Defective Equipment) Act 1969, s.1: see post, p. 1184D—H.

Munby v. Furlong [1977] Ch. 359; [1977] 3 W.L.R. 270; [1977] 2 All E.R. 953, C.A. A

Yarmouth v. France (1887) 19 Q.B.D. 647, D.C.

The following additional case was cited in argument:

Inland Revenue Commissioners v. Parker [1966] A.C. 141; [1966] 2 W.L.R. 486; [1966] 1 All E.R. 399, H.L.(E.) B

APPEAL from the Court of Appeal.

This was an appeal by the plaintiffs, Eugenia Margaret Coltman and Alisa Elizabeth Martin, administratrices of the estate of Leo Thomas Mackenzie Coltman deceased, by leave of the Court of Appeal (O'Connor, Lloyd and Glidewell L.JJ.) [1987] 2 W.L.R. 1098 from their decision on 27 January 1987 by which by a majority (Lloyd L.J. dissenting) they allowed an appeal by the defendants, Bibby Tankers Ltd., from the judgment of Sheen J. [1986] 1 W.L.R. 751 given on 14 March 1986. By his judgment, on a preliminary issue, Sheen J. declared in favour of the plaintiffs that the *Derbyshire*, a cargo carrier that had sunk with the loss of all hands, including the deceased, had been equipment provided by the defendants within the meaning of section 1 of the Employer's Liability (Defective Equipment) Act 1969. C

The facts are set out in the opinion of Lord Oliver of Aylmerton. D

Geoffrey Brice Q.C. and *Belinda Bucknall* for the plaintiffs.

Kenneth Rokison Q.C. and *Robin Hay* for the defendants.

Their Lordships took time for consideration. E

3 December. LORD KEITH OF KINKEL. My Lords, I have had the benefit of considering in draft the speech to be delivered by my noble and learned friend, Lord Oliver of Aylmerton. I agree with it, and for the reasons he gives would allow the appeal and restore the declaration of Sheen J. F

LORD ROSKILL. My Lords, I must confess that I have found the problem of construction to which this appeal gives rise more difficult than have your Lordships. The marked difference of opinion in the courts below between O'Connor and Glidewell L.JJ., on the one hand, and Lloyd L.J. and Sheen J., on the other, shows how difficult the problem is. For most of the argument I was disposed to share the views of the majority in the Court of Appeal because I found it difficult to accept that if Parliament in enacting the Employer's Liability (Defective Equipment) Act 1969 had intended that Act to embrace merchant ships in the word "equipment" in section 1(1)(a) that word would have been defined in section 1(3) in a manner which includes vehicles and aircraft but does not include merchant ships. But I recognise the strength of the submission that if the main engines of merchant ships are included in the definition, for they are clearly machinery, it is difficult to deduce any rational reason for excluding the hulls of such ships. Moreover, the derricks and winches of a merchant ship must surely be "equipment" within the ordinary meaning of that word irrespective of the definition in section 1(3). G

Ultimately, therefore, I have found the reasoning in the speech of my noble and learned friend, Lord Oliver of Aylmerton, which I have H

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Lord Roskill

A had the benefit of reading in advance, compelling. I therefore agree that the appeal must be allowed and the question answered in the same sense as that in which it was answered by Lloyd L.J. and Sheen J.

B LORD GRIFFITHS. My Lords, I have had the advantage of reading in advance the speech of my noble and learned friend, Lord Oliver of Aylmerton, and I agree that for the reasons he gives the appeal must be allowed and the question answered in the same sense as that in which it was answered by Lloyd L.J. and Sheen J.

C LORD OLIVER OF AYLERTON. My Lords, the appellants in this appeal ("the plaintiffs") are the personal representatives of Leo Thomas Mackenzie Coltman deceased who was, at the date of his death, employed by the respondent company ("the defendants") as third engineer aboard the carrier *Derbyshire*. *Derbyshire* was a vessel of some 90,000 tons which sank off the coast of Japan on 9 September 1980 with the loss of all hands whilst on a voyage from Canada to Japan with a cargo of iron ore. On 5 February 1982 the plaintiffs commenced proceedings in the Admiralty Court claiming damages under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 and alleging that the sinking of the vessel and the death of the deceased had been caused by the negligence of the defendants. The particulars of negligence included allegations of defective construction and design of the vessel rendering her unseaworthy. Paragraphs 7 and 8 of the statement of claim contain a plea that the defects, which are said to be attributable wholly or in part to fault on the part of the manufacturers of the vessel, were defects in "equipment" provided by the defendants for the purposes of their business within the meaning of the Employer's Liability (Defective Equipment) Act 1969 and were thus deemed to be attributable to the negligence of the defendants. The defendants by their defence denied that the vessel constituted "equipment" within the meaning of that Act. Accordingly, on 13 February 1986 the Admiralty Registrar ordered by consent that there be determined as a preliminary point the question whether the vessel was equipment provided by the defendants within the meaning of section 1 of the Act. On the trial of the preliminary point on 14 March 1986 Sheen J. [1986] 1 W.L.R. 751 answered the question in the affirmative but on 27 January 1987 the Court of Appeal by a majority (Lloyd L.J. dissenting) [1987] 2 W.L.R. 1098 allowed an appeal by the defendants declaring that the vessel was not equipment provided by the defendants within the meaning of the Act and gave leave to appeal to your Lordships' House.

H My Lords, it is common ground that the Act of 1969 was introduced with a view to rectifying what was felt to be the possible hardship to an employee resulting from the decision of this House in *Davie v. New Merton Board Mills Ltd.* [1959] A.C. 604. In that case an employee was injured by a defective drift supplied to him by his employers for the purpose of his work. The defect resulted from a fault in manufacture but the article had been purchased by the employers without knowledge of the defect from a reputable supplier and without any negligence on their part. It was held that the employers' duty was only to take reasonable care to provide a reasonably safe tool and that that duty had been discharged by purchasing from a reputable source an article whose latent defect they had no means of discovering. Thus the action against

them failed although judgment was recovered against the manufacturer. Clearly this opened the door to the possibility that an employee required to work with, on or in equipment furnished by his employer and injured as a result of some negligent failure in design or manufacture might find himself without remedy in a case where the manufacturer and the employer were, to use the words of Viscount Simonds, at pp. 620-621, "divided in time and space by decades and continents" so that the person actually responsible was no longer traceable or, perhaps, was insolvent or had ceased to carry on business. Parliament accordingly met this by imposing on employers a vicarious liability and providing, in a case where injury was due to a defect caused by the fault of the third party, that the employer should, regardless of his own conduct, be liable to his employee as if he had been responsible for the defect, leaving it to him to pursue against the third party such remedies as he might have whether original or by way of contribution.

The purpose of the Act, as set out in the long title, is:

"to make further provision with respect to the liability of an employer for injury to his employee which is attributable to any defect in equipment provided by the employer for the purposes of the employer's business; and for purposes connected with the matter aforesaid."

The relevant provisions of the Act, for present purposes, are contained in subsections (1) and (3) of section 1 and are as follows:

"(1) Where after the commencement of this Act—(a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not), the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury. . . (3) In this section—'business' includes the activities carried on by any public body; 'employee' means a person who is employed by another person under a contract of service or apprenticeship and is so employed for the purposes of a business carried on by that other person, and 'employer' shall be construed accordingly; 'equipment' includes any plant and machinery, vehicle, aircraft and clothing; 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland; and 'personal injury' includes loss of life, any impairment of a person's physical or mental condition and any disease."

My Lords, if subsection (1) stood alone and without such assistance as is provided by subsection (3), I would not, for my part, have encountered any difficulty in concluding that, in the context of this Act, a ship was part of the "equipment" of the business of a shipowner. In the Court of Appeal, O'Connor L.J. [1987] 2 W.L.R. 1098, 1100, expressed the view that the word in its natural meaning denoted something ancillary to something else and an echo of this is to be found in the judgment of

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- A Glidewell L.J. Thus both Lords Justices would, I think, regard machinery attached to a ship as “equipment,” because it would be ancillary to the main object, the vessel, but both regarded the word as inappropriate to describe the vessel itself. I do not doubt that the word is frequently and quite properly used to describe the appurtenances of some larger entity, but I can see no reason either in logic or as a matter of language why its use should be so confined. Indeed, there is nothing
- B in the entry in *The Oxford English Dictionary* quoted by O'Connor L.J. which necessarily imports that “equipment” is restricted to parts of a larger whole. The meaning is given as “anything used in equipping; furniture; outfit; warlike apparatus; necessities for an expedition or voyage.” Moreover, your Lordships are concerned not with the meaning of “equipment” simpliciter but of the composite phrase, “equipment
- C provided by his employer for the purposes of the employer’s business.” Speaking for myself, I can think of no more essential equipment for the setting up and carrying on of the business of a shipowner than the ship or ships with which the business is carried on. This involves, in my judgment, no misuse of language. As Lloyd L.J. observed in his dissenting judgment in the Court of Appeal, at p. 1104, one would talk naturally of a fleet being “equipped” with battleships, cruisers and
- D destroyers or of the “equipment” of an expedition as including supply ships. In my judgment, a shipowner’s fleet of ships is properly described as the equipment of his business. They are, in truth, the tools of his trade and I can see no ground for treating the word “equipment” in subsection (1)(a)—leaving aside for the moment the more difficult questions posed by subsection (3)—as excluding this particular type of
- E chattel as opposed to other articles, of whatever size or construction, employed by a trader in carrying on his trade.

- It has been submitted on behalf of the defendants that the word derives a more restricted flavour from its juxtaposition with the word “provided” and that that word imports the notion of something provided to the employee for use in the course of his work and is therefore more appropriate to the type of small tool provided to the appellant in *Davie v. New Merton Board Mills Ltd.* [1959] A.C. 604. There is, however,
- F no context from which this can properly be deduced—indeed the extended definition in subsection (3) leads to a precisely contrary conclusion—and I can see no reason for reading the word “provided” in anything other than its normal signification of “furnished.”

- Then it is said that “equipment” is to be distinguished from the factory or workplace in which working tools or machinery are provided
- G or to which they are affixed and that a ship—or, certainly, an ocean-going vessel of the size of *Derbyshire*—is akin to a factory in the sense that it provides the accommodation within which the employee does his work. Whilst, therefore, it is accepted that the various mechanical contrivances which are installed in or affixed to a vessel are properly described as equipment, the ship itself, taken as a whole, is, it is argued,
- H not “equipment” because it constitutes the employee’s “workplace.” It is, of course, true that the provisions of the Occupiers’ Liability Act 1957 apply to a ship as they do to real property, but they equally apply, in appropriate circumstances, to a vehicle or an aeroplane, so that nothing can, I think, turn on this. It is also true that it is inherent in the nature of a vessel that those whose task it is to navigate it are accommodated within it for the purposes of their employment. But here, as it seems to me, any analogy with real estate ends. No one, I

venture to think, would regard the power-boat provided for the purpose of a water-skiing school or a pleasure launch on the river Thames as being in the slightest degree akin to real estate or as being anything other than a chattel employed in a business. Such a vessel would, in my judgment, be comprehended in the term "equipment of the business" even in the most everyday use of language and I can see no justification for excluding from it some category of vessel merely by reason of its size and of its necessarily providing accommodation for the crew who are required to be on board in order to operate it for the proper carrying on of the business of carrying cargo from one part of the world to another.

It is, however, argued that subsection (1) does not stand alone. It has to be read in the context of an Act which also contains subsection (3) and it is this which, in my judgment, constitutes the strongest argument for the defendants. Here, it is said, is a specific definition of "equipment" which goes out of its way to include plant and machinery, vehicles and aircraft and clothing. Is it conceivable, it is asked, that the draftsman of the statute, who evidently regarded himself as indicating, in subsection (3), particular articles which might possibly not be thought of as ordinarily embraced in the phrase "equipment provided . . . for the purposes of . . . business," should have specifically included vehicles and aircraft but should have omitted any reference to vessels if such omission were not intentional? Thus, it is argued, if vessels were omitted deliberately from the expanded or clarifying definition in subsection (3) this demonstrates that the word is used in subsection (1)(a) in a more restricted sense. My Lords, I have found myself unable to accept this approach to the problem of construction. To begin with, it is quite clear, as was pointed out by Lloyd L.J. [1987] 2 W.L.R. 1098, 1104, that the word "includes" in subsection (3) cannot be construed as "means and includes" so as to confine that which is embraced in the word "equipment" to the exemplars there specified. Granted that there may be circumstances in which an inclusive definition of this sort can have a restrictive effect, that cannot, in my judgment, possibly apply in the case of this statute. Here, where the draftsman intends a restricted meaning, he makes it quite clear. One has only to contrast the definitions of "business," "equipment" and "personal injury," all of which are by reference to what is included, with those of "employee" and "fault," where the Act makes it clear that there is to be a single exclusive meaning for the purposes of the Act. Subsection (3) cannot, therefore, be used to cut down the meaning of the word "equipment" as it is used in subsection (1). It must have been inserted in the statute either for the purpose of enlarging the word by including in it articles which would not otherwise fall within it in its ordinary signification or it must have been inserted for clarification and the avoidance of doubt. For my part, I agree with Lloyd L.J., at p. 1105, that the definition is a clarifying and not an enlarging one. Why the draftsman felt it necessary to clarify in this way is a matter for speculation. Quite clearly, for instance, some "plant and machinery" would be properly described as "equipment" even in the most ordinary use of the term and the purpose of the express inclusion of plant and machinery can, I think, only have been to make it clear that every type of plant and machinery is to be regarded as equipment within the meaning of the Act. The key word in the definition is the word "any" and it underlines, in my judgment, what I would in any event have supposed to be the case, having regard to the purpose of the Act, that is to say, that it should be widely construed so

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- A as to embrace every article of whatever kind furnished by the employer for the purposes of his business. Thus it is not just particular plant and machinery or vehicles (for instance, a combined harvester) or particular types of aircraft (for instance, a crop-spraying aeroplane) which are to be regarded as “equipment” but plant and machinery, vehicles, aircraft and clothing of all types and sizes subject only to the limitation that they are provided for the purposes of the employer’s business.
- B It is certainly curious that, having resolved to refer specifically to means of transport, the draftsman should have omitted to refer in terms to water transport. Indeed, it is difficult to see why, after the express inclusion of “plant and machinery,” it was thought necessary to refer to any further examples. The word “plant” is itself one of the widest import and is apt to embrace anything from a wharfinger’s cart-horse
- C (see *Yarmouth v. France* (1887) 19 Q.B.D. 647) to a lawyer’s text book (see *Munby v. Furlong* [1977] Ch. 359). “Plant and machinery” is even wider and had at the date of the passing of the Act a well recognised meaning to those familiar with taxing statutes. In the ordinary way, therefore, had it not been for the express reference to vehicles and aircraft, I would, in any event, have been disposed to regard a ship as something properly embraced in the phrase “plant and machinery”—see,
- D for instance, the Capital Allowances Act 1968, section 31, where new ships are specifically referred to and are treated as a special type of plant and machinery for the purposes of initial allowances. However, the express reference to vehicles and aircraft, whilst it indicates that the word “equipment” is to be construed in its widest sense—a conclusion reinforced by the inclusion also of “clothing”—does seem to indicate at
- E least a doubt in the draftsman’s mind whether every type of vehicle or aircraft had been embraced in what had gone before and highlights the omission of any express reference to water-borne means of transport, for if the draftsman considered that some or all of the possible land-borne or airborne means of locomotion might not properly be described as “plant and machinery” it seems curious that he did not entertain at least equal doubt about water-borne craft. It has been suggested that a ship
- F may properly be described as a water-borne vehicle and reference has been made to the Hovercraft Act 1968 in which a hovercraft is defined as a “vehicle . . . designed to be supported . . . by air expelled from the vehicle . . .”: section 4(1). It would, it is submitted, be absurd that a hovercraft should be a vehicle for the purpose of the definition and that a water-borne craft of commensurate size and purpose should not be. I
- G find myself, however, unpersuaded by the transposition into this Act of a definition from a quite different statute. The juxtaposition of “vehicle” and “aircraft” demonstrates, I think, that “vehicle” is used in this Act as referring specifically to a land-borne means of transport. It must, in the light of this, be at least doubtful whether, in the context of this Act, the expression “plant and machinery” is properly to be construed as including ships, and I am, for my part, content to approach the problem on the
- H footing that it is not. The omission is certainly curious but I find myself entirely unpersuaded that there can be deduced from it an intention to cut down the very wide meaning of “equipment” in subsection (1) which is indicated both by the legislative purpose of the statute and by the width of the clarifying definition. Various explanations have been suggested for what it is submitted was a deliberate omission. It is said, for instance, that having regard to the provisions of section 458 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) a ship may have been

deliberately omitted because of a perceived possible conflict between liability of the shipowner under that section (which imposes only an obligation of reasonable care to ensure seaworthiness) and the vicarious liability imposed by this Act. It is also submitted that there could be difficulty in reconciling that vicarious liability with the limitation of a shipowner's liability for injury or loss of life under section 503 of the Act of 1894 in the absence of actual privity or fault. Again, it is said that to apply the provisions of the Act to a ship would give rise to problems of conflict of laws in cases where injury was caused on ships under foreign flags or where it occurred on the high seas or in a foreign port—a difficulty, however, which would equally arise in the case of an aircraft. These suggested difficulties are to my mind more illusory than real and, in so far as they exist at all, constitute a quite insufficient reason for imposing on the wide words of the statute an unexpressed limitation which would produce some quite extraordinary anomalies. Whatever may be embraced in the expression “plant and machinery” it quite clearly includes any machinery installed in or affixed to a ship in the absence of some compelling context to the contrary; and there is no context whatever in this Act for reading the expression as excluding maritime machinery from “any” plant and machinery. Unless, therefore, one is to read the Act as if it contained some unexpressed limitation excluding from its operation plant or machinery which comes to be installed in a ship, the exclusion from the definition of “equipment” of a ship itself produces the absurd position that the employer is liable for injury caused by defective machinery on or in the ship but not for injury caused by anything which can properly be described as constituting the ship itself, i.e. the hull or a part of the hull. This at once raises almost insoluble problems of demarcation between those constituent parts of the ship which may properly be described as “plant” or “machinery” and those parts which are properly to be described as the hull or parts of the hull. There simply is no context in the Act which enables one to read “equipment” as including the ship's winches, derricks, generators, pumps, engine-room plant, steering gear and so on, but as excluding the structure of the ship itself. The alternative approach of treating all ships and all their gear, machinery and accoutrements as sub silentio excluded from the operation of the Act raises, to my mind, equal difficulty. It seems to me almost unarguable that “equipment” does not include at least some vessels. The example of a dredger, for instance, was suggested by Lloyd L.J. [1987] 2 W.L.R. 1098, 1105 in his judgment and it is not difficult to think of other examples of water-borne craft which would clearly be properly styled “business equipment.” “Business” includes, by definition, the operations of a public body. The customs cutter, the fire-tender or the Trinity House launch, would, I should have thought, be quite clearly “equipment” of the operations for which they were provided. If, then, some ships are equipment, where is the line to be drawn? It cannot, in my judgment, be drawn simply by reference to size as the majority of the Court of Appeal appear to have concluded. There is no logic in such a criterion nor any functional difference between vessels of different types which enables a line to be sensibly drawn. The purpose of the Act was manifestly to saddle the employer with liability for defective plant of every sort with which the employee is compelled to work in the course of his employment and I can see no ground for excluding particular types of chattel merely on the ground of their size or the element upon which they are designed to operate.

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A Indeed, the express inclusion of all vehicles and all aircraft militates strongly against any such distinction. Like Lloyd L.J., I am impressed both by the width of the words used by the legislature and by the legislative purpose behind the statute and I am driven to the same conclusion that he reached.

B I would allow the appeal and answer the question raised on the preliminary issue in the same sense as it was answered by Sheen J.

C LORD GOFF OF CHIEVELEY. My Lords, I am entirely in agreement with my noble and learned friend, Lord Oliver of Aylmerton, that, for the reasons he gives, a ship may form part of the "equipment" of the business of a shipowner, on the natural and ordinary meaning of that word. Accordingly, if the word "equipment" were not defined in the Act of 1969, I would have no difficulty in deciding the present case in favour of the plaintiffs. The real difficulty in the case, as it seems to me, arises from the fact that the word "equipment" is defined in section 1(3) of the Act, and that the definition expressly includes any vehicle and aircraft, but makes no mention of ships or vessels. This fact provided the basis for the powerful submission advanced on behalf of the defendants that Parliament could not, in these circumstances, have inadvisedly excluded ships or vessels from the definition and must therefore have intended, for some reason, to exclude them.

E I have struggled to discover any rational basis for such a deliberate exclusion. The only possible basis which has occurred to me is as follows. It is, I understand, accepted that, in respect of operations on land, the Act only provides protection for the employee in respect of defects in equipment provided by the employer on the premises, but provides no protection in respect of defects in the premises themselves. It might therefore have been thought that, in respect of operations at sea, a similar distinction should be drawn between defects in equipment provided by the employer on the relevant ship, and defects in the structure of the ship itself. In both cases, whether the defect is in the structure of a building or in the structure of a ship, the employee would, on this hypothesis, be restricted to his rights against his employer as occupier, even where the defect in the building or the ship was attributable to the fault of a third party. In both cases, no doubt, nice distinctions might have to be drawn between equipment on the one hand, and the structure of the building or the ship on the other hand; but since it is plain that in any event such distinctions would have to be drawn in the case of premises on land, it is not necessarily surprising that Parliament should have intended similar distinctions to be drawn in respect of a ship at sea, although it is likely that more difficult questions could arise in the case of ships than in the case of premises on land. If this were to be right, it would explain why ships or vessels were excluded from the definition of "equipment" in the Act, and it would follow that the appeal in the present case would have to be dismissed.

H I must confess to having felt some attraction for this approach, as a matter of logic; but I have come to the conclusion that its practical consequences are such that I do not think that it can have been the intention of the legislature so to provide. As my noble and learned friend, Lord Oliver of Aylmerton, points out in his speech, ships or vessels may vary enormously in character and in size, from the Trinity House launch or even a speedboat to a supertanker or a bulk carrier. It is very difficult indeed to imagine that small craft should be excluded

from "equipment" provided by the employer for the purposes of his business; but no sensible distinction can be drawn between small and large vessels for present purposes—certainly the approach which I have set out provides no basis for any such distinction. Moreover it seems to me that, in the case of ships, the distinction between the equipment on the ship and the structure of the ship is not only very difficult to draw in practice, but is artificial in the extreme. In any event, the duty of care imposed under the Occupiers' Liability Act 1957 may apply not only in respect of vessels, but also in respect of vehicles and aircraft: see section 1(3)(a). I have therefore come to the conclusion, in agreement with my noble and learned friend, and with Lloyd L.J. in the Court of Appeal, that the definition of equipment in section 1(3) of the Act of 1969 must have been included in the Act for the purpose of clarification only, and that the mere fact that ships and vessels were not expressly included in the definition cannot have been intended to have the effect of cutting down the ordinary meaning of the word "equipment" by excluding ships or vessels from that word.

For these reasons I too would allow the appeal.

*Appeal allowed with costs in House
of Lords and Court of Appeal.
Order of Sheen J. of 14 March 1986
restored.*

Solicitors: Evill & Coleman; Holman Fenwick & Willan.

M. G.

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[HOUSE OF LORDS]

BANKAMERICA FINANCE LTD. RESPONDENT

AND

B NOCK APPELLANT

1987 Oct. 27, 28;
Dec. 3Lord Bridge of Harwich,
Lord Brandon of Oakbrook,
Lord Templeman and Lord Ackner

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Costs—Appeal, Court of—Jurisdiction—Successful defendant seeking to recover costs against plaintiff—Order for defendant to recover costs against insolvent co-defendant—Appeal against judge's exercise of discretion—Whether defendant to be granted leave to appeal—Supreme Court Act 1981 (c. 54), s. 18(1)(f)

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In May 1981 car dealers sold a car to a finance company for £20,000 and then let the car to a hirer under a hire-purchase agreement providing for payment by a deposit and 36 monthly payments totalling £25,627. In July 1982 the hirer discovered that the car had been stolen before it had come into the possession of the dealers. The police took possession of the car. The hirer claimed to terminate the hire-purchase agreement on the ground that the finance company were in breach of an implied condition as to good title. The finance company brought an action for damages for £13,176 for breach of the agreement, to which the hirer counterclaimed £7,450 paid by him under the agreement. The finance company denied that the car had been stolen and joined the dealers as second defendants. The dealers later ceased trading and took no part in the trial of the action, by which time they were in the process of liquidation. The judge dismissed the finance company's claim against the hirer, gave judgment for the hirer on his counterclaim against the finance company and gave judgment for the finance company for £23,996 including interest against the dealers.

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The hirer sought an order whereby the finance company would pay his costs of the claim and counterclaim and the dealers pay the costs of the finance company but the judge made the order, as sought by the finance company, that the dealers pay the costs of both the finance company and the hirer. The hirer sought leave to appeal on the question of costs alone and sought a declaration that the prohibition in section 18(1)(f) of the Supreme Court Act 1981¹ against an appeal on costs without the leave of the trial judge did not apply where the judge had not exercised his discretion judicially. The Court of Appeal refused the application.

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On the hirer's appeal:—

Held, dismissing the appeal, that the Court of Appeal had been within its jurisdiction in laying down a practice that an appeal as to costs alone should only be set down for hearing if it was satisfied that there was an arguable case that the judge had acted outside the bounds of judicial discretion, so as to constitute an exceptional case falling outside the prohibition contained in section 18(1)(f) of the Act of 1981; that the judge

¹ Supreme Court Act 1981, s.18(1)(f): see post, p. 1194F–G.

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had had discretion to make either of the orders as to costs sought and by having regard to the balance of hardship had made a judicial exercise of his discretion, and accordingly the hirer had not made out a prima facie case that he had a right to appeal without the leave of the judge (post, pp. 1192G-H, 1195D-E, 1198B-D, G, H—1199C).

Marshall v. Levine (Practice Note) [1985] 1 W.L.R. 814, C.A. and *Scherer v. Counting Instruments Ltd. (Note)* [1986] 1 W.L.R. 615, C.A. approved.

Order of the Court of Appeal affirmed.

The following cases are referred to in the opinion of Lord Brandon of Oakbrook:

Bullock v. London General Omnibus Co. [1907] 1 K.B. 264, C.A.

Marshall v. Levine (Practice Note) [1985] 1 W.L.R. 814; [1985] 2 All E.R. 177, C.A.

Mayer v. Harte [1960] 1 W.L.R. 770; [1960] 2 All E.R. 840, C.A.

Rudow v. Great Britain Mutual Life Assurance Society (1881) 17 Ch.D. 600, C.A.

Sanderson v. Blyth Theatre Co. [1903] 2 K.B. 533, C.A.

Scherer v. Counting Instruments Ltd. (Note) [1986] 1 W.L.R. 615; [1986] 2 All E.R. 529, C.A.

The following additional case was cited in argument:

Campbell (Donald) & Co. Ltd. v. Pollak [1927] A.C. 732, H.L.(E.)

APPEAL from the Court of Appeal.

This was an appeal by the appellant, Gerard Nock, from the order of the Court of Appeal (Sir John Donaldson M.R., Stephen Brown and Woolf L.JJ.) dated 18 February 1986 dismissing his ex parte application for a declaration that he was not precluded by virtue of section 18(1)(f) of the Supreme Court Act 1981 from proceeding with an appeal against an order for costs made by Cantley J. on 18 July 1985 in an action by the respondent, Bankamerica Finance Ltd., against the appellant whereby he had ordered that the costs of the action be paid by the second defendants, Lotmate Ltd. (trading as Principal Garages), a company in liquidation, which took no part in the action or the appeals.

The facts are set out in the opinion of Lord Brandon of Oakbrook.

David Ashton for the appellant.

Adrian Brunner for the respondent.

Their Lordships took time for consideration.

3 December. LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Brandon of Oakbrook. I agree with it and for the reasons he gives I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, this appeal is unusual in that it relates solely to the costs of an action. The action concerned was brought in the Queen's Bench Division of the High Court. It arose out of a hire-purchase transaction, the subject matter of which was a second-hand Porsche motor car. That motor car later turned out to be stolen property: hence the litigation about it.

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Lord Brandon
of Oakbrook

A The person who sought to acquire the car on hire-purchase terms was Gerard Nock ("the hirer"). The company purporting to own the car was Lotmate Ltd. trading as Principal Garages ("the dealers"). The company affording hire-purchase facilities to the hirer was Bankamerica Finance Ltd. ("the finance company").

B On 10 May 1981 a contract of sale was made between the dealers and the finance company, under which the latter bought the car from the former for a cash price of £20,000. On 12 May 1981 a hire-purchase agreement was made between the finance company and the hirer under which the latter hire-purchased the car from the former for a total price of £25,627.76, payable by an initial deposit followed by 36 monthly instalments over a period of three years. Pursuant to that agreement the hirer took possession of the car.

C In July 1982 the hirer discovered that the car had, before it came into the possession of the dealers, been stolen in Italy from its true owner, a German. During the same month the Metropolitan Police took possession of the car from the hirer and did not return it to him.

D By a letter to the finance company dated 30 July 1982 solicitors acting for the hirer claimed on his behalf to terminate the hire-purchase agreement on the ground that the finance company were in breach of the condition as to good title implied in it. At that time the hirer had paid £7,450.83 to the finance company under the agreement.

E On 14 December 1982 the finance company began an action against the hirer in the Queen's Bench Division of the High Court by specially indorsed writ claiming damages of £13,176.93 for breach of the hire-purchase agreement. On 31 January the hirer served a defence and counterclaim. By his defence he resisted the claim on the ground that, since the car had been stolen earlier in Italy, the finance company had never had a good title to it and accordingly had never passed one to him. By his counterclaim the hirer claimed £6,874.92, later amended to £7,450.83, as moneys paid on a consideration which had wholly failed. On 8 February 1983 the finance company served a reply and defence to counterclaim, in which it expressly denied that the car had been stolen.

F On 21 July 1983 the finance company amended its writ and statement of claim so as to join the dealers as second defendants to the action. By the amended statement of claim the finance company claimed against the dealers, in the event of it being found that the car was stolen, damages for misrepresentation and/or breach of the contract of the sale of the car.

G The action was tried by Cantley J. on 18 July 1985. Before then, in or about January 1985, the dealers had ceased trading, and by then they were in the process of liquidation. These facts, however, were not known to the hirer before the trial. Neither the dealers, nor their liquidator if there was one, attended or took any part in the trial.

H Cantley J. found that the car had been stolen earlier in Italy, as alleged by the hirer but denied by the finance company. On that basis the judge (1) dismissed the finance company's claim against the hirer; (2) gave judgment for the hirer for £8,344.93 including interest on his counterclaim against the finance company; and (3) gave judgment for the finance company for £23,996.34 including interest on its claim against the dealers.

With regard to costs the judge heard submissions from counsel for the two parties before him. Counsel for the hirer, Mr. Ashton, submitted that the finance company should pay the hirer's costs of both

claim and counterclaim in any case. He further indicated, at one time at any rate, that he would be content with a *Bullock* order, that is to say an order (a) that the finance company should pay to the hirer his costs of both claim and counterclaim and (b) that the dealers should pay the finance company's costs of claim to which should be added the costs payable by the finance company to the hirer. Counsel for the finance company, Mr. Brunner, submitted that the appropriate order would be what is known as a *Sanderson* order: that is to say no order as to costs as between the finance company and the hirer, but an order that the dealers should pay all the costs of both the finance company and the hirer. The expression *Bullock* order is derived from *Bullock v. London General Omnibus Co.* [1907] 1 K.B. 264; the expression *Sanderson* order is derived from *Sanderson v. Blyth Theatre Co.* [1903] 2 K.B. 533.

My Lords, if the dealers had been financially sound, it would not in the end have mattered whether the order made had been a *Bullock* order or a *Sanderson* order. But, because the dealers were insolvent it mattered a great deal to both the hirer and the finance company. So far as the hirer was concerned, if a *Bullock* order was made, he would be assured of recovering his costs of the action in full from the finance company; but, if a *Sanderson* order was made, the likelihood was that he would be unable to recover his costs from the dealers. So far as the finance company was concerned, if a *Bullock* order was made, it would be obliged to pay the hirer all his costs of the action, and the likelihood was that it would be unable to recover such costs from the dealers; but, if a *Sanderson* order was made, the finance company would escape any liability for the costs of the hirer.

The judge, expressing the view that he had a discretion to make either the one order or the other, and purporting at least to exercise such discretion, decided to make a *Sanderson* order. He further refused the hirer leave to appeal against that order.

The hirer wished to appeal to the Court of Appeal on the question of costs. Such an appeal is *prima facie* precluded by the combined effect of sections 51 and 18(1)(f) of the Supreme Court Act 1981. Section 51 provides that the costs of and incidental to proceedings of the Supreme Court shall be in the discretion of the court and that the court shall have full power to determine by whom and to what extent the costs are to be paid. Section 18(1) provides:

"No appeal shall lie to the Court of Appeal— . . . (f) without the leave of the court or tribunal in question, from any order of the High Court or any other court or tribunal . . . relating only to costs which are by law left to the discretion of the court or tribunal; . . ."

These provisions are re-enactments of similar provisions in earlier Acts.

It has, however, been held that, despite these provisions, an appeal against an order of the High Court relating to costs alone will lie without the leave of that court in certain exceptional cases. Those cases are cases in which it can be shown that the judge who made the order either did not exercise his discretion at all, or did not exercise it judicially. Principles relating to these matters were stated by the Court of Appeal in *Scherer v. Counting Instruments Ltd. (Note)* [1986] 1 W.L.R. 615, an authority to which I shall refer later.

That being the state of the law, the hirer's solicitors on or about 19 August 1985 attempted to enter a notice of appeal against the order of Cantley J. as to costs only. The registrar, pursuant to the ruling of the

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Bankamerica Finance Ltd. (H.L.(E.))

Lord Brandon
of Oakbrook

A Court of Appeal in *Marshall v. Levine* (*Practice Note*) [1985] 1 W.L.R. 814, refused to enter the appeal and caused the matter to be referred to that court in order to enable the hirer to satisfy it, if he could, on an ex parte application, that he had an arguable case for a hearing inter partes having regard to the principles stated in the *Scherer* case. The matter came before the Court of Appeal (Sir John Donaldson M.R., Stephen Brown and Woolf L.JJ.) on 18 February 1986 in the form of an

B application by the hirer for a declaration that he was not precluded by section 18(1)(f) of the Supreme Court Act 1981 from proceeding with his notice of appeal. That application was refused. Sir John Donaldson M.R. said to counsel for the hirer:

C “We cannot help you, Mr. Ashton. We ourselves would never have made this decision on costs and it was probably an unjust one, but it was within the judge’s discretion and you do not come within the *Scherer* principles. Therefore we shall not set the appeal down.”

By an order dated 17 June 1986 the Court of Appeal allowed an application by the hirer for leave to appeal to your Lordships’ House.

D On the appeal two submissions were made for the hirer. The first submission was that the ruling in *Marshall v. Levine* [1985] 1 W.L.R. 814 was wrong and that the hirer should accordingly have been allowed to enter his appeal without first having to satisfy the Court of Appeal, on an ex parte application, that he had an arguable case. The second submission was that the Court of Appeal erred in law, on hearing such application, in holding that the hirer did not have an arguable case.

E The first submission relates to a matter of procedure only. The ruling in *Marshall v. Levine* was clearly designed to provide a filter for appeals of the kind here concerned, so as to eliminate unarguable cases at an early stage and by doing so save both time and costs. In my opinion the Court of Appeal, as master of its own procedures, was entitled to make that ruling, which can work no injustice to an appellant who has a genuinely arguable case, and I see no good reason why your Lordships’ House should hold it to be invalid.

F The second submission relates to a matter of substance, which merits consideration by your Lordships’ House. I have already referred to the provisions of sections 51 and 18(1)(f) of the Supreme Court Act 1981, which are directly relevant to the issue raised. Also directly relevant are certain provisions of R.S.C., Ord. 62 relating to costs. That order is divided into a number of parts. Of these two parts are material: Part I headed “Preliminary” and Part II headed “Entitlement to Costs.” Rule

G 2(4), which is in Part I, is headed “Application” and provides:

H “The powers and discretion of the court under section 51 of the Act (which provides that the costs of and incidental to proceedings of the Supreme Court shall be in the discretion of the court and that the court shall have full power to determine by whom and to what extent the costs are to be paid) . . . shall be exercised subject to and in accordance with this Order.”

The reference in this sub-rule to “the Act” is a reference to the Supreme Court Act 1981. Rule 3, which is in Part II, is headed “General Principles” and provides:

“(1) This rule shall have effect subject only to the following provisions of this Order. (2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings . . . except

under an order of the court. (3) If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs. . . .”

Similar rules were in force when *Scherer v. Counting Instruments Ltd (Note)* [1986] 1 W.L.R. 615 was decided by the Court of Appeal (Buckley, Bridge and Cumming-Bruce L.J.J.) in 1977. The judgment of the court was given by Buckley L.J. He referred to a number of authorities, including one in your Lordships’ House and five in the Court of Appeal, and derived from them ten principles. Excluding principle (8), which is not relevant in the context of the present case, these principles were as follows, at p. 621:

“(1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the court, or given another party cause to have recourse to the court to obtain his rights is required to recompense that other party in costs; but (2) the judge has under section 50 of the Judicature Act 1925 an unlimited discretion to make what order as to costs he considers that the justice of the case requires. (3) Consequently a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has no right to such an order, for it depends upon the exercise of the court’s discretion. (4) This discretion is not one to be exercised arbitrarily; it must be exercised judicially, that is to say, in accordance with established principles and in relation to the facts of the case. (5) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge’s function. (6) The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties’ conduct in it, and also to the circumstances leading to the litigation, but no further. (7) If no such ground exists for departing from the normal rule, or if, although such grounds exist, the judge is known to have acted not on any such ground but on some extraneous ground, there has effectively been no exercise of the discretion. . . . (9) If a judge, having relevant grounds upon which to do so, has upon those grounds, or some of them, made an order as to costs in the exercise of his discretion, his decision is final unless he gives leave to a dissatisfied party to appeal. (10) If, however, he has made his order having no relevant grounds available or having in fact acted on extraneous grounds, this court can entertain an appeal without leave and can make what order it thinks fit.”

Subject to two modifications, I consider that these principles stated by Buckley L.J. in the *Scherer* case correctly represent the relevant law today. The first modification is the substitution in principle (2) of section 51 of the Supreme Court Act 1981 for section 50 of the Judicature Act 1925. The second modification is the substitution for the phrase “in accordance with established principles” in principle (4), the more complete phrase “in accordance with the provisions of Part II of R.S.C., Ord. 62 and any other established principles.”

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of Oakbrook

A My Lords, Mr. Ashton for the hirer put forward three contentions. The first contention was that, as between the hirer and the finance company, the former was the successful party and the latter the unsuccessful party. In that situation R.S.C., Ord. 62, r. 3(3) required the judge to make an order as to costs which followed the event unless there were circumstances in the case which justified him in making some other order. An order following the event would have been an order

B either alone, or as part of a *Bullock* order, that the finance company should pay the hirer's costs of both claim and counterclaim. The second contention was that there were no circumstances in the case which justified the judge in making an order as to costs other than an order following the event, from which it followed that the judge had either failed to exercise his discretion at all or had not exercised it judicially.

C The third contention was that, in these circumstances, the case came within principles (7) and (10) in the *Scherer* case [1986] 1 W.L.R. 615, so that the Court of Appeal had power to entertain the hirer's appeal without leave having been given by the judge, and having done so to substitute a different order from that made by him.

D In order to decide whether these contentions are correct, it is necessary to examine the nature of the discussion with regard to costs which took place between counsel for the hirer and the finance company and the judge after he had given judgment on the merits. That discussion, which is recorded in the transcript before your Lordships, went through four stages. In the first stage Mr. Ashton submitted that, since the hirer had succeeded against the finance company on claim and counterclaim, the finance company should be ordered to pay the hirer's

E costs of both; to which the judge reacted by suggesting to Mr. Brunner that he could not resist such an order. In the second stage Mr. Brunner submitted that the dealers, by asserting in the first place, and then maintaining right up until the trial, that the car had not been stolen, were responsible for the whole of the litigation. That being so, the appropriate order to make as to costs was a *Sanderson* order. In the

F third stage Mr. Ashton said that, while he would be content if the judge made a *Bullock* order, he strongly opposed the making of a *Sanderson* order. He did so on the ground that, since the dealers were insolvent, the result of a *Sanderson* order would be that the hirer, although successful against the finance company, would be left to bear his own costs. In answer to that the judge pointed out that, if a *Bullock* order was made, the finance company would find themselves paying the hirer's

G costs and bearing their own, without being able to recover either from the dealers. In the fourth stage Mr. Ashton resiled from his previous willingness to accept a *Bullock* order on the ground that such an order should not be made when a plaintiff's causes of action against two defendants were not alternative but separate and distinct, which he submitted was the situation in the instant case. In support of this

H proposition Mr. Ashton referred the judge to a passage in *The Supreme Court Practice* (1985), p. 874, para. 62/2/46, dealing with *Bullock* and *Sanderson* orders. In the fourth stage the judge, having read the passage to which he had been referred, expressed the conclusion that he had power to make either a *Bullock* or a *Sanderson* order, and that whether he made the one or the other was entirely in his discretion. He then went on, despite further protestation by Mr. Ashton, to make a *Sanderson* order.

My Lords, three questions arise out of this discussion. The first question is whether the judge was right in holding that the nature of the case was such that he had power to make a *Bullock* or a *Sanderson* order. The second question is whether he was right in holding that, on the basis that he had such powers, the choice between making the one order or the other was in his discretion. The third question is whether, in choosing to make a *Sanderson* order, he exercised his discretion judicially.

With regard to the first question I am of opinion that the finance company's claims against the hirer and the dealer were in substance alternative claims. The finance company was bound to succeed on one or other of the two claims, and could not succeed on both. That being so, the judge clearly had power, without infringing Ord. 62, r. 3(3) and in accordance with long established practice, to make either a *Bullock* or a *Sanderson* order.

With regard to the second question, there is authority in the Court of Appeal, with which I see no good reason to disagree, that, where a judge has power to make a *Bullock* or a *Sanderson* order, the choice between them is a matter for his discretion: see *Mayer v. Harte* [1960] 1 W.L.R. 770.

With regard to the third question, if the dealers had not been insolvent, it would, as I pointed out earlier, have made no difference in the end which of the two forms of order was made. The real question is therefore whether, having regard to the fact that the dealers were insolvent, the judge could not, if he exercised his discretion judicially, have made a *Sanderson* order, but was bound to make a *Bullock* order. As to this it is true that, if a *Sanderson* order was made, the hirer would probably have to bear his own costs. He would, however, recover the sum of £8,344.83 awarded to him against the finance company, whereas the finance company would probably be unable to recover from the dealer either the sum of £23,996.34 awarded to it or its own costs. There would then be hardship to both parties, but more to the finance company than to the hirer. By contrast, if a *Bullock* order was made, the hirer would recover from the finance company both the sum of £8,344.93 awarded to him and his costs. The finance company on the other hand would probably recover nothing: neither the sum of £23,996.34 awarded to it, nor its own costs, nor the hirer's costs which it would have to have paid. All the hardship would then be to the finance company and none at all to the hirer.

The judge must have been aware of these matters. Having regard to them it seems to me impossible to say that the judge could not, in the judicial exercise of his discretion, have made a *Sanderson* order but was bound to make a *Bullock* order. On the contrary the balance of hardship seems to me, not to require the judge to make a *Sanderson* order rather than a *Bullock* order, but at least to provide a legitimate ground for him, in the judicial exercise of his discretion, to do so.

In this connection it is pertinent to observe that in *Rudow v. Great Britain Mutual Life Assurance Society* (1881) 17 Ch.D. 600, 607-608 Jessel M.R. expressed the view that, in a case of the present kind, the established practice was always to make a *Sanderson* order rather than a *Bullock* order. I recognise at once that this extreme approach must be regarded today as going too far. But the fact that it was adopted formerly is a strong indication that, while a *Sanderson* order cannot be mandatory, a *Bullock* order cannot be mandatory either.

Lord Brandon
of Oakbrook

It follows that I would dismiss the appeal.

LORD ACKNER. My Lords, I have had the advantage of considering in draft the speech prepared by my noble and learned friend Lord Brandon of Oakbrook. I agree with it and for the reasons he has given would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Julian Holy; Hill Bailey & Co.

D C. T. B.

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[COURT OF APPEAL]

CHIEF ADJUDICATION OFFICER v. BRUNT

1987 July 15, 16; 29

Kerr and Ralph Gibson L.JJ. and
Sir George Waller

Social Security—Unemployment benefit—Disqualification from benefit—Claimant out of work after full-time work—Claimant obtaining part-time work in community programme scheme—Whether claimant employed to full extent normal in his case—Whether precluded from entitlement to unemployment benefit—Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 (S.I. 1983 No. 1598), reg. 7(1)(e)

The claimant, after a period of full-time employments, was out of work from 4 January 1982 and from January 1982 he received unemployment benefit for the full period of his entitlement under section 18 of the Social Security Act 1975. On 25 October 1983 he started part-time work under a community programme scheme for two and a half days a week. After 13 weeks part-time work he re-qualified for unemployment benefit under section 18(2) of the Act but his application for benefit in respect of the days on which he was not working was rejected by the insurance officer on the ground that the claimant was working regularly the same number of days in a week for the same employer and that he was employed to the full extent normal in his case within regulation 7(1)(e) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983.¹ The claimant's appeal to the local tribunal was dismissed. His appeal, on leave given by a commissioner, was allowed by the Tribunal of Commissioners who decided that the claimant was not precluded from receiving unemployment benefit.

On appeal by the Chief Adjudication Officer:—

Held, allowing the appeal, that whether a claimant was “employed to the full extent normal in his case” within the meaning of regulation 7(1)(e) was to be answered as an issue of fact by reference to the particular circumstances of the claimant and to what was normal in his case; that while the accepted tests of what was “ordinary” and “normal” could be of assistance it was necessary to look at the claimant's pattern of work at the relevant time and decide objectively, having regard to his working history and what might happen to him in the near future, what his normal work pattern was for the week in question; that although a claimant, with evidence of lengthy full-time employment and a short period of unemployment before being employed on a fixed but temporary part-time basis, might, where it could be shown that the part-time employment has not yet become the normal pattern of work, be entitled to benefit for days in that week when he did not work, on the facts, the present claimant's part-time employment, after 16 months of unemployment, had become regular and normal employment within the meaning of regulation 7(1)(e) so that he was employed to the full extent normal in his case and was precluded from receiving unemployment benefit (post, pp. 1207A–C, C–E, 1213B–C, 1215G–1216C, 1219D–E, 1220D–F, 1223A).

Riley v. Chief Adjudication Officer (Note) [1987] 1 W.L.R. 1224, C.A. applied.

¹ Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, reg. 7(1)(e); see post, p. 1206G–H.

3 W.L.R. Chief Adjudication Officer v. Brunt (C.A.)

- A** The following cases are referred to in the judgments:
- Morelle Ltd. v. Wakeling* [1955] 2 Q.B. 379; [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708, C.A.
- Nancollas v. Insurance Officer* [1985] 1 All E.R. 833, C.A.
- Presho v. Department of Health and Social Security* [1984] A.C. 310; [1984] 2 W.L.R. 29; [1984] I.C.R. 463; [1984] 1 All E.R. 97, H.L.(E.)
- Reg. v. National Insurance Commissioner, Ex parte Stratton* [1979] Q.B. 361; [1979] 2 W.L.R. 389; [1979] I.C.R. 290; [1979] 2 All E.R. 278, C.A.
- Riley v. Chief Adjudication Officer (Note)* [1987] 1 W.L.R. 1224, C.A.
- River Wear Commissioners v. Adamson* (1876) 1 Q.B.D. 546, C.A.
- Swan v. Pure Ice Co. Ltd.* [1935] 2 K.B. 265, C.A.

- C** The following additional case was cited in argument:
- Wills v. Bowley* [1983] 1 A.C. 57; [1982] 3 W.L.R. 10; [1982] 2 All E.R. 654, H.L.(E.)

D APPEAL from the Tribunal of Social Security Commissioners.

- The claimant, Vincent Anthony Brunt, having started work in October 1983 under a community programme scheme for two and a half days a week, after a period of unemployment, applied for unemployment benefit for the days of the week he was unemployed. His claim was rejected by the insurance officer on the ground that the claimant came within regulation 7(1)(e) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, since he was working for the same employer for the same number of days in the week and he was “employed to the full extent normal in his case.”

- The claimant’s appeal to the St. Helen’s Social Security Appeal Tribunal was dismissed on 16 February 1984. Supported by his union, General, Municipal, Boilermakers and Allied Trades Union, he was granted leave to appeal to the commissioners by one of the commissioners and his appeal was heard by a Tribunal of Social Security Commissioners on the Chief Commissioner’s order. By their decision dated 4 February 1987, the commissioners decided that pursuant to regulation 7 of the Regulations of 1983 the claimant was not precluded from title to unemployment benefit during 20 January 1984 and 23 April 1984.

- The Chief Adjudication Officer appealed on the grounds that (1) the commissioners erred in law in holding that because the claimant’s employment on the community programme was for a fixed temporary period it could not be regarded as being employment to the full extent normal in his case and (2) the commissioners (a) failed properly to apply the decision of the Court of Appeal in *Riley v. Chief Adjudication Officer (Note)*, post, p. 1224, and in particular failed to apply the passage in the judgment of Slade L.J. (post, p. 1230B–F) and (b) failed properly to apply the ratio of the decision of the Chief Commissioner in CU/255/1984, R(U)3/86, as approved by the Court of Appeal in *Riley v. Chief Adjudication Officer*.

By a respondent’s notice the claimant gave notice that it would be contended that the decision of the Tribunal of Commissioners should be affirmed on the additional ground that on its true construction regulation 7(1)(e) of the Regulations of 1983 applied only to a person who ordinarily worked full-time.

The facts are stated in the judgment of Ralph Gibson L.J.

David Latham Q.C. and *Richard Drabble* for the Chief Adjudication Officer.

Frederic Reynold Q.C. and *Mark Rowland* for the claimant.

Cur. adv. vult.

29 July. The following judgments were handed down.

RALPH GIBSON L.J. This is an appeal by the Chief Adjudication Officer under section 14 of the Social Security Act 1980 with the leave of the Tribunal of Commissioners against the decision of that tribunal given on 4 February 1987. Such an appeal is on a question of law only. The decision was to the effect that Vincent Anthony Brunt ("the claimant") was not precluded from receiving unemployment benefit over the period 20 January to 23 April 1984. The appeal turns upon the construction of regulation 7(1)(e) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 and the application of those provisions to the part-time employment which the claimant had obtained under a community programme scheme.

The facts and the proceedings

The claimant is now aged 26 years. He left school in 1976 and was employed in a car components company for 19 months. He then served in the Army for five months. Next he worked for a carpet firm for one year and after that as a miner for two years. He was then out of work from 4 January 1982 until 25 October 1983 when he started work under a community programme scheme for two and a half days a week, on Wednesday, Thursday and Friday in each week.

The claimant had received unemployment benefit from January 1982 for the full period of his entitlement, namely the one year or 312 working days as provided by section 18 of the Social Security Act 1974. He re-qualified to receive unemployment benefit after being in employment in his part-time work over 13 weeks since he was in each week working for the necessary number of hours, namely 16 hours per week: section 18(2) of the Act of 1975. He was earning at first £41 per week and later £44 per week. The rate of unemployment benefit had been £30.80 per week.

When he had re-qualified the claimant applied for unemployment benefit in respect of the days on which he was not working. The insurance officer on 10 February 1984 rejected his application on the ground that regulation 7(1)(e) and (2) applied, that is to say that the claimant was regularly working the same number of days in the week for one employer and he was "employed to the full extent normal in his case."

The claimant appealed to the local tribunal and on 16 April 1984 the tribunal upheld the decision of the insurance officer. With the advice and assistance of his union, the General, Municipal, Boilermakers & Allied Trades Union, the claimant sought to appeal to the commissioner; leave was refused by the local tribunal but granted by the commissioner on 16 August 1984.

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Chief Adjudication Officer v. Brunt (C.A.)

Ralph Gibson L.J.

A The decision of the Tribunal of Commissioners was not given until
 4 February 1987. There was thus a delay of three years between the
 rejection of the claimant's claim to benefit and the ruling of the
 commissioners that he was entitled to benefit on the days in question.
 Such delay in dealing with a claim to benefit is, as it seems to me,
 unacceptable; and, I am sure, is so regarded by the Chief Adjudication
 Officer and by the commissioners. The explanation for much of that
 B delay is to be found in the fact that the working of the "full extent
 normal" rule in regulation 7(1)(e) has caused much difficulty and
 uncertainty in its application to claimants who, after periods of full-time
 work and of total unemployment, get a part-time job which provides
 them with work on only two or three days in the week. The decision by
 the commissioner upon the claimants' case was postponed on three
 C occasions, namely in May 1985, in July 1985 and in January 1986, in
 order to enable the parties, at the invitation of Mr. Commissioner
 Goodman, to make further submissions by reference to new decisions
 upon the rule by other commissioners and by reference to the decision
 of this court in *Riley v. Chief Adjudication Officer*, post, p. 1224.

D *The Manpower Services Commission "Community Programme"*

E The number of men and women who were able to get part-time
 work, after periods of total unemployment, was increased by the
 introduction of "community programmes" and similar schemes under
 powers given by the Employment and Training Act 1973. By that Act
 the Manpower Services Commission was established. One of its functions
 is to make arrangements for assisting persons to obtain and retain
 employment. The funds of the commission are provided by the Secretary
 of State out of money provided by Parliament. The community
 programme under which the claimant obtained employment on three
 days a week in October 1983 is described as follows in the handbook
 published in December 1982 for the guidance of sponsors under the
 scheme:

F "1. The community programme, which is the successor to the
 community enterprise programme, is administered by the Manpower
 Services Commission ('M.S.C.') on behalf of the Secretary of
 State for Employment to help long-term unemployed adults improve
 their prospects of obtaining permanent jobs by providing them with
 temporary employment, either full-time or part-time, on projects
 G of benefit to the community . . . 3. . . . i. Individual employees may
 not be employed under the programme for more than 52 weeks. . . .

"M.S.C. Financial Assistance

"46. . . . (b) Other workers—the costs of wages for workers up
 to a maximum of £60 per week for each full or part-time worker on
 a project, plus employers' National Insurance contributions."

H By supplement 2:

"15. At the time of recruitment men and women selected for
 employment must have been unemployed for at least the preceding
 two months and in the case of those aged 18–24 years, have been
 unemployed for over six months during the last nine months, and in
 the case of those aged 25 years or over have been unemployed for
 at least 12 months during the last 15 months."

The sort of information provided to persons recruited to a community programme job appears from the leaflet where, in addition to describing the programme and its purpose, it explains:

“Being on the community programme should improve your chances of finding permanent work. So if you are offered a permanent job then of course you are free to move to it straightaway. That way, we can help someone else. Ask your employer about time off to go to interviews.”

The decision of the commissioners

Because of the importance and difficulty of the issues raised the appeal of the claimant was referred by direction of the Chief Commissioner to a tribunal of three commissioners. The unanimous decision of the tribunal was delivered on 4 February 1987. The claimant's appeal was allowed. The ruling was that the claimant was not precluded from title to unemployment benefit from 30 January 1984 to 23 April 1984. Mr. Commissioner J. G. Monroe and Mr. Commissioner M. J. Goodman joined in stating their reasons in paragraphs 2 to 15. Mr. Commissioner D. Reith Q.C. stated his reasons in paragraphs 16 to 21. In summary, the reasons of the majority, after statement of the facts as set out above, were as follows: (i) the contract of employment of the claimant on the community programme, as was apparent from the handbook and leaflet, was for a maximum of 52 weeks; the terms of the scheme made it clear that the work was entirely a temporary expedient; and the claimant's personal contract was on the evidence for six months only; (ii) after reference to the decision of a Tribunal of Commissioners in 1985 in the case CU/255/1984, and to the judgment of Slade L.J. in *Riley v. Chief Adjudication Officer*, post, p. 1224, they held:

“15 . . . a person employed for a fixed temporary period with no intention that employment should continue thereafter is not, by reason only of such employment, to be regarded as employed to the full extent normal in his case.”

The two commissioners expressed their view of the rule contained in regulation 7(1)(e). They said that the “full extent normal” rule had originated in decisions of the umpire under the Unemployment Insurance Acts because it was considered that a man who worked say for 11 hours per day on four days per week was not really unemployed at all. With the coming of the National Insurance Act 1946 an attempt was made to codify the rule. Commissioners had on occasion been forced to conclusions (sometimes in relation to persons employed for only a day or even an hour or two a week) that could not conceivably have been reached by the interpretation of the word “unemployed.” Further they said that the prevailing doubts about the extent of the rule and the parallel “normal idle day” rule have harmful effects. It was their belief that many people who genuinely desire full-time employment and are genuinely available for it hesitate to take up part-time employment in the meanwhile because of the risk that one of these rules may, rightly or wrongly, be applied to them. They suggested that urgent consideration should be given to the extension of the exception in regulation 7(2) of the Regulations of 1983 and the corresponding regulation relating to the normal idle day rule (regulation 19(6)) so as to make express provision for excluding such persons from the operation of the rules.

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A In his reasons, Mr. Commissioner Reith Q.C. reviewed some of the principles laid down by commissioners in connection with the "full extent normal" rule since the National Insurance Act 1946. He then stated the main features relating to employment under the community programme. Such employment, he said, is clearly of a temporary nature. It should normally be held (paragraph 21) that "claimants involved in such employment do not fall to be regarded as struck by the full extent normal rule." The decision of the Court of Appeal in *Riley v. Chief Adjudication Officer* did not render it incumbent upon him to take a different view. He therefore agreed that the appeal be allowed.

B The Chief Adjudication Officer applied on 16 March 1987 for leave to appeal which was granted on 20 March 1987. The grounds of appeal are, in summary, that (i) the commissioners were wrong in law in holding that because the claimant's part-time employment on the community programme was for a fixed temporary period it could not therefore be regarded as "employment to the full extent normal in his case" and (ii) that the commissioners had failed properly to apply the decision of the Court of Appeal in *Riley v. Chief Adjudication Officer*.

D *The new regulations*

E So far as concerns men and women who have obtained part-time employment under schemes sponsored and financed by government the question raised in this case has been settled with effect from 4 March 1987 by new regulations which, as we were told, preclude claims to unemployment benefit by claimants in such part-time employment in respect of days in the week on which they have no work. The issues raised in this appeal, however, with reference to the instruction of regulation 7(1)(e) of the Regulations of 1983 will remain relevant to claimants who have part-time work and who are not within the new regulations.

F *The statutory provisions*

G The construction of the legislative rule now contained in regulation 7(1)(e) of the Regulations of 1983, with which this case is concerned, has, it is clear, given rise over the years to difficult questions for the insurance officers, now known as adjudicators, who are required to apply the rule to the differing facts of very large numbers of claims. The rule must be set in the context of the unemployment benefit scheme as a whole. The law governing that scheme is complicated. It has been said in a well known textbook, *Ogus & Barendt, The Law of Social Security*, 2nd ed. (1982), p. 77:

H "The difficulties result partly from the need to adapt the system to changing industrial practices (particularly the shift from six-day to five-day working) and partly from the relationship between social security and labour law. The problems have been exacerbated by a reluctance in the D.H.S.S. to reformulate traditional concepts, some of which are outmoded, and a tendency instead to prefer patchwork solutions, occasionally implemented by poorly drafted regulations."

That part of the law which has been subjected to scrutiny in this case seems to me to give some support to that critical comment.

Provided that the claimant is qualified by reference to age and contribution conditions he is entitled to unemployment benefit "in

respect of any day of unemployment which forms part of a period of interruption of employment:" section 14(1)(a) of the Act of 1975. The amount payable by way of benefit for any day of unemployment is one sixth of the appropriate weekly rate: section 14(8). The weekly rate at the time of the hearing of this appeal is £30.80.

Next—and this is an essential principle—the unemployment, if it is to give rise to the right to benefit, must be involuntary. Omitting words concerned with sickness and invalidity benefit it is provided by section 17(1):

"For the purposes of any provisions of this Act relating to unemployment benefit . . . (a) subject to the provisions of this Act, a day shall not be treated in relation to any person—(i) as a day of unemployment unless on that day he is capable of work and he is, or is deemed in accordance with regulations to be, available to be employed in employed earner's employment . . ."

Section 17 contains other provisions for determination of days for which benefit is payable and for application of the expression "day of interruption of employment" but it has been common ground that the details of those provisions are not relevant to the question of construction which is before the court. It is sufficient to note that by section 17(2):

"Regulations may—(a) make provision (subject to subsection (1) above) as to the days which are or are not to be treated for the purposes of unemployment benefit . . . as days of unemployment . . ."

The regulation which is the subject of this appeal is contained in the Regulations of 1983 which were made in the exercise of various powers including the power contained in section 17(2).

Once unemployment benefit has become payable its duration is limited by section 18 to benefit for 312 days but a claimant can recover the right to benefit by section 18(2) when he has again been in employment for 13 weeks since the last day for which he was entitled to that benefit if in each of those weeks he has worked in such employment for 16 hours or more.

The relevant parts of regulation 7 of the Regulations of 1983 are as follows:

"Days not to be treated as days of unemployment . . .

"7(1) For the purposes of unemployment . . . benefit—. . . (e) subject to paragraph (2), a day shall not be treated as a day of unemployment if on that day a person does no work and is a person who does not ordinarily work on every day in a week (exclusive of Sunday or the day substituted for it by regulation 4) but who is, in the week in which the said day occurs, employed to the full extent normal in his case, and in the application of this sub-paragraph to any person no account shall be taken, in determining either the number of days in a week on which he ordinarily works or the full extent of employment in a week which is normal in his case, of any period of short-time working due to adverse industrial conditions; . . . (2) Paragraph (1)(e) shall not apply to a person unless—(a) there is a recognised or customary working week in connection with his employment; or (b) he regularly works for the same number of days in a week for the same employer or group of employers."

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A It is thus apparent that a claimant may be in employment in a week,
and work on a day or days in that week, but still be entitled to
unemployment benefit for the day or days on which he does not work.
Such a situation may arise because the employer under the contract of
employment puts the claimant on short-time. The question whether such
B a claimant is, in the week in question, "employed to the full extent
normal in his case" will usually be capable of answer by reference to the
normal number of days worked in that employment. A claimant,
however, whose normal employment has been full-time may lose such
employment and be able to find only part-time employment on certain
days in the week. Questions then arise—assuming the claimant to be at
all times "available to be employed in employed earner's employment"
C on the days on which he has no work—as to when, if ever, the claimant
is to be held to be "employed to the full extent normal in his case" so as
to be not entitled to unemployment benefit in respect of the days on
which he has no work.

The accepted construction of regulation 7(1)(e)

Before the commissioners in this case it was common ground that the
general approach to the proper construction of the regulation which had
D been followed in a number of decisions of the commissioners and in the
decision of this court in *Riley v. Chief Adjudication Officer*, post,
p. 1224, was correct, namely that the words of the regulation are to be
applied according to their ordinary meaning in the statutory context and
that the question whether a claimant, in the week in which the day or
days of no work occurred, was "employed to the full extent normal in
his case," so that he could not for those days claim unemployment
E benefit, was to be answered as an issue of fact by reference to the
relevant circumstances as determined by *Riley v. Chief Adjudication
Officer* and the previous decisions of the commissioners. That approach
means that a person who, having previously worked full-time, is in part-
time work only because unable to get full-time work, may properly be
held to be "employed to the full extent normal in his case" if, despite
F his wish and intention to obtain full-time work, he was during the week
in question in fact employed to an extent which is shown to have
become normal in his case. Within this accepted construction there have
arisen difficult and important questions as to the correct definition of the
facts relevant to the issue of normality and as to the application of those
definitions to the facts of individual cases. The commissioners in this
G case decided the claimant's appeal in his favour in accordance with the
accepted construction of regulation 7(1)(e) as they understood it and as
they judged it to be applicable. Before this court Mr. Latham, for the
Chief Adjudication Officer, has submitted that the commissioners
misapplied the accepted construction, and in particular failed properly to
direct themselves in accordance with the decision of this court in *Riley v.
Chief Adjudication Officer*. Mr. Reynold, on behalf of the claimant, has
H conceded that the approach and reasoning of the commissioners is not
obviously consistent with *Riley v. Chief Adjudication Officer*. While
arguing that the decision of the commissioners should be upheld on the
facts even if the accepted construction is correct, Mr. Reynold put
forward a new ground for upholding the decision in favour of the
claimant which was set out in a respondent's notice under R.S.C., Ord.
59, r. 6(1)(b) for which, without objection from the Chief Adjudication
Officer, leave was given.

The "true but forgotten" construction of regulation 7(1)(e)

The main ground upon which Mr. Reynold's argument has proceeded is entirely new. It was not taken before the Tribunal of Commissioners and, I think, has never before been argued before any of the commissioners, or on applications for judicial review before the right of appeal was introduced by section 14 of the Social Security Act 1980, or in this court since that enactment. It is said that regulation 7(1)(e), when considered in its legislative history, and in the light of the existing law at the time when, in its original form, it was first enacted in 1948, and having regard to the mischief at which the provision was directed, must be construed subject to a gloss or qualification upon the literal meaning of the words. That qualification is that regulation 7(1)(e) can apply only to a person who at the relevant time ordinarily works full-time, on a "full normal week" and does not apply to a person who is working part-time only because he is unable to get full-time employment. This was, of course, a surprising contention. If it were to be accepted, this court would have to set aside a construction of the regulation which has been followed and acted upon for a long time in a large number of decisions by commissioners, and by adjudication officers in reliance upon those decisions; and that is a course which we should not take save in exceptional circumstances and for compelling reasons: see *Presho v. Department of Health and Social Security* [1984] A.C. 310, 319, *per* Lord Brandon of Oakbrook, approving the principle stated by Lord Denning M.R. in *Reg. v. National Insurance Commissioner, Ex parte Stratton* [1979] Q.B. 361, 369. Further the accepted construction has been thus applied to a provision in regulations which, so far as concerns the immediately relevant words, has been left undisturbed in its original form despite amendment of and re-enactment of the provision itself. In addition this court would have to depart from the decision of this court in *Riley v. Chief Adjudication Officer*, *post*, p. 1224 on the suggested ground that it was made *per incuriam*.

On first hearing the contention it seemed to me to be hopeless. Mr. Reynold, nevertheless, in a most persuasive submission, supported by material made available by the research of Mr. Rowland, has shown that the contention is supported by arguments of much force. I have, however, in the end reached the conclusion that, for reasons which are given below, this contention cannot prevail. I will first set out Mr. Reynold's submission, as I understood it, in summary form.

(i) It can be seen from the legislative history of the "full extent normal" rule in regulation 7(1)(e) that the rule itself was developed for the purposes of preventing persons, in particular shift workers, who, by means of contractual or other arrangements with their employers, were enabled to work longer hours on particular days and to compress the full calendar working week into fewer working days, from "topping up" with unemployment benefit in respect of the days in the week on which they did no work.

(ii) The rule first appeared in regulation 6 of the National Insurance (Unemployment and Sickness Benefit) Regulations 1948 (S.I. 1948 No. 1277) made in exercise of powers conferred by sections 10 to 13, 24 and 25 of the National Insurance Act 1946. It was then (omitting irrelevant words) in the following form:

"(1) For the purposes of unemployment . . . benefit—(e) a day shall not be treated as a day of unemployment if on that day a

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A person does no work, and—(i) is on holiday; or (ii) is a person who does not ordinarily work on every day in a week (exclusive of Sunday or the day substituted therefor by paragraph (1) of regulation 4) but who has, in the week in which the said day occurs, been employed to the full extent normal in his case; . . .”

(iii) Prior to enactment of the Act of 1946 certain principles had been laid down by the umpires, who had the task of deciding claims on appeal from the Court of Referees under the statutes which were consolidated in the Unemployment Insurance Act 1935 which came into operation on 18 March 1935. The essential conditions of the statutory scheme for unemployment benefit, including those of contribution conditions and of availability for work, were the same as they now are, and it was possible for any three days of unemployment, whether consecutive or not, within a period of six consecutive days to be treated as a continuous period of unemployment: section 35 of the Act of 1935. The principles so laid down included (decision UD1308/36):

“the principle that when a claimant has done a full normal week’s work he is not entitled to benefit for any day of the week upon which, by the terms and conditions of his contract of employment, he does not normally work.”

It was said by the umpire in that case that he knew

“of no instance in which a claimant, who has been employed under a contract of service for only a definite portion of the week, has been for that reason deprived of benefit for the remainder of the week.”

In decision UD4149/38 the umpire referred to certain “well established principles:”

“The first principle is that a claimant who has worked his full normal working week is not entitled to benefit for any day which is a normal non-working day in that week . . . The second principle is that if a claimant owing to circumstances beyond his control has not worked his full normal working week he is entitled to benefit for all the days of that week upon which he is not at work.”

(iv) No such principle as the “full normal week’s work” was necessary in order to deny unemployment benefit to a claimant who was working part-time from choice and not involuntarily because he would be denied unemployment benefit for days not worked on the ground that he was not on those days “available” for additional work.

(v) Nothing in the main principles or purposes of the then scheme of unemployment benefit required a claimant to be denied unemployment benefit in respect of days not worked, provided he was “available” for full-time work, merely because part-time work had become capable of being regarded as “normal” for him.

(vi) Regulation 6(1)(e) of the Regulations of 1948 was, it should be inferred, made for no reason other than to exclude those who had in the week in question worked a “full normal week’s work.” The other provisions in regulation 6 had prior legislative origins: only paragraph 1(e) was new as a legislative provision. Moreover it was clear, said Mr. Reynold, that paragraph 1(e) of regulation 6 was made pursuant to section 11(3) of the National Insurance Act 1946 (power to make regulations as to the days which are or are not to be treated . . . as days

of unemployment) and not section 13(4) (power to make regulations for imposing in the case of any class of persons additional conditions with respect to the receipt of unemployment benefit etc.). The accepted construction of the regulation in its previous and current forms is, it is said, the imposition of conditions in the case of a class, i.e., part-time workers; and the fact that the regulation was first made under section 11(3) and not section 13(4) of the Act of 1946 demonstrates that such a construction cannot have been originally intended.

(vii) Commissioners who have wide knowledge of this branch of the law have acknowledged that the "full extent normal rule" had its origins in the pre-war decisions of the umpire: see *per* Mr. Commissioner Mitchell CU/444/1984. Reference was made also to the reasons of Mr. Commissioner Monroe and Mr. Commissioner Goodman given in this case.

(viii) Application of the literal meaning of the words in regulation 7(1)(e) of the Regulations of 1983 in accordance with the accepted construction, has given rise to difficulties, injustice and absurdities such that, in accordance with authority, this court should reject the literal meaning and apply the qualification contended for by Mr. Reynold. The injustice and absurdity are exemplified, it is said, by the decision CU/444/1984 where Mr. Commissioner Mitchell on 19 June 1986 rejected a claimant's appeal by applying the "full extent normal rule" so as to produce a result which he described as ludicrous. The claimant was 63 years old. He had been in full-time employment throughout the great majority of his adult life. After some periods of unemployment between 1979 and 1982, in May 1982 he again got full-time work but in September 1982 was again made redundant. His application for unemployment benefit was rejected because he had a job, in which he was self-employed, as a collector of football pool coupons. The work occupied about one hour a week on Friday evening. He earned by it about £3 per week. The commissioner first held that the claimant could not escape from regulation 7(1)(e) by reason of regulation 7(2): he held that on the evidence there was in connection with the claimant's business as a collector a "recognised or customary working week." Applying the tests laid down by Slade L.J. in *Riley v. Chief Adjudication Officer*, post, p. 1224 the commissioner held that looking backward and forward from the date of the insurance officer's decision the pattern of the claimant's working week, i.e., the work as collector, was "normal" in his case. The *de minimis* rule could not be applied because of regulation 7(1)(g) which provides:

"a day shall not be treated as a day of unemployment if on that day a person is engaged in any employment unless—(i) the earnings derived from that employment, in respect of that day, do not exceed £2. . . ."

The commissioner added:

"3 . . . I can see no way in which I can properly circumvent the words of the legislation and thereby obviate a preposterous result. Whether anything will ever be done about it by the legislature, I do not know. In this corner of the law—as with that relating to seasonal workers—there appears to be an extraordinary antipathy to remedying injustices which save departmental money."

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A (ix) Further, said Mr. Reynold, the refinements developed in the
course of applying the accepted construction have produced other forms
of absurdity. Since in deciding whether, in the week in question, the
claimant has been employed to the full extent normal in his case, the
accepted construction requires the adjudication officer to have regard to
the future (*per* Slade L.J. in *Riley v. Chief Adjudication Officer*, post,
p. 1224), it was open to him to conclude that, although the claimant had
B then only part-time work, nevertheless if he had been offered and had
taken that part-time work on a basis that in quite a short time he would
be offered and accept full-time employment with the same employer, the
current short time work might thereby be shown to be temporary only
and not normal for him. That means, said Mr. Reynold, that two
claimants with precisely similar past histories of employment and
C unemployment might at the same time obtain part-time employment
with the same employer. The first is told that he will, after a period, get
full-time employment. The second is not. If the accepted construction is
applied the first will get, in addition to his part-time wages, unemployment
benefit for the days not worked until (if it happens within the period to
which his right to benefit endures) he obtains full-time work. The
D second, who has not such hope of full-time employment, will get his
part-time wages and no unemployment benefit. Such a result, it is said,
cannot have been intended by Parliament.

(x) The injustice and absurdity, it was said, produced by application
of the accepted construction justify rejection of the literal meaning and
adoption of the qualification proposed. Reference was made to *River*
Wear Commissioners v. Adamson (1876) 1 Q.B.D. 546 and to *Swan v.*
E *Pure Ice Co. Ltd.* [1935] 2 K.B. 265.

(xi) The attention of the Court of Appeal in *Riley v. Chief*
Adjudication Officer, post, p. 1224 was not drawn to the argument
summarised above and was thereby led into error. Within the principles
stated by Evershed M.R. in *Morelle Ltd. v. Wakeling* [1955] 2 Q.B. 379,
406-407, this court should regard *Riley's* case as decided *per incuriam*.

F In reply to this contention Mr. Latham did not attack or seek to deal
with each step of Mr. Reynold's argument. In essence he said that,
however attractive be the suggestion as to what in 1948 the policy should
or might have been, the policy which was adopted was expressed in
regulation 6(1)(e) of those regulations and there is no sufficient indication
that the intention of the legislature was anything other than that to be
derived from construction of the words used.

G Next Mr. Latham sought to reverse Mr. Reynold's argument in
paragraph (vi) above. If Mr. Reynold is right the qualification to be put
on regulation 7(1)(e) of the Regulations of 1983 is to the effect that a
particular class of persons should have applied to them an additional
condition in respect of receipt of unemployment benefit, namely those
ordinarily working full-time: i.e., the class of persons identified by the
H umpires' decisions. If that were the purpose, the minister should have
been using his powers under section 13(4) of the Act of 1946 but it is
asserted by Mr. Reynold that in making regulation 6(1)(e) of the
Regulations of 1948 he did not use that power. Therefore regulation
6(1)(e) must have been intended to apply not to a class of persons only
but generally to all persons caught by its terms. The subsequent
application of the regulation in its consecutive forms has been general,
i.e., both to part-time workers who are willing to take full-time work

and to those doing "a full normal week's work" within Mr. Reynold's proposed qualification. A

Further Mr. Latham relied upon the fact that, with knowledge of the application of the accepted construction by insurance officers and commissioners, Parliament has approved successive re-enactments of regulation 6(1)(e) of the Regulations of 1948 in 1965, 1975 and 1983. Further, in 1959 there was added by paragraph 3 of the National Insurance (Unemployment and Sickness Benefit) Amendment (No. 2) Regulations 1959 (S.I. 1959 No. 1278) to regulation 7(1)(e) the final part: B

"and in the application of this sub-paragraph to any person no account shall be taken, in determining either the number of days in a week on which he ordinarily works or the full extent of employment in a week which is normal in his case, of any period of short-time working due to adverse industrial conditions;" C

That addition must be based upon the premise that the accepted construction was correct.

Finally, it was pointed out that the National Insurance Act 1946 was not a consolidating Act but an Act:

"to establish an extended system of national insurance providing pecuniary payments by way of unemployment benefit, sickness benefit . . . to repeal or amend the existing enactments relating to . . . national . . . insurance. . . ." D

The new Act swept up and used many of the concepts and rules previously contained in the statutory schemes but there were changes and new wording was used: for example, compare section 55(2)(a) of the Unemployment Insurance Act 1935 with section 13(4) of the Act of 1946. E

Mr. Latham acknowledged that the accepted construction had produced difficulties and cases of which the result could rightly be regarded as absurd. Correctly applied in accordance with the guidance given by this court in *Riley v. Chief Adjudication Officer*, post, p. 1224, such cases should be rare and any injustices caused by them not great. For example, in the case of the pools collector who lost unemployment benefit because of earning £3 per week, it was suggested that the decision on the facts was perhaps not the only decision fairly open to the commissioner. Applying the ratio in *Riley v. Chief Adjudication Officer*, it was not clear why the work of collecting, which the claimant had been doing in addition to full-time work since 1971, should, after he lost full-time work in September 1983, be regarded by March 1984 as being itself employment to the full extent normal for the claimant. F G

For my part, I have no doubt that Mr. Latham's submissions are in general right and that Mr. Reynold's main contention cannot succeed. There is much force in Mr. Reynold's arguments if we were free to devise and apply a policy but that, of course, is not our task. If we could identify the mischief at which regulation 6(1)(e) of the Regulations of 1948 was directed, or the purpose intended by Parliament to be achieved by that regulation, with sufficient certainty, then we should in construing the regulation try to give to it a meaning which deals with that mischief and which does not go beyond the purpose of Parliament. For my part, I am unable to know what the mischief was, or what the purpose of Parliament was, in enacting regulation 6(1)(e) in 1948 save as is revealed H

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A by the words used. The umpires had devised the principles referred to in
 deciding the cases which had come before them. I am unable to
 conclude that the intention of Parliament was to enact only the principle
 contended for by Mr. Reynold, namely, that the only persons to be
 excluded by the "full extent normal rule" are those who have worked a
 "full normal week's work." If that had been the intention I have no
 B doubt that different and more apt words would have been used. Further,
 since the "full normal week's work" would have to be capable of being
 established for the rule to operate, I would have expected some
 definition of the meaning of the phrase since it must apply to some
 concept of general normality in a trade or a district. The words actually
 used, moreover, not only do not refer to a concept of a full normal
 week's work but refer expressly to employment of the claimant in the
 C week in which the day (of no work) occurs which is "to the full extent
 normal *in his case*," showing thereby, as it seems to me, that the
 regulation requires attention to be paid to the particular circumstances
 of the claimant and to what is normal in his particular case.

Finally, of course, this court is bound, in my judgment, to abide by
 this court's decision in *Riley v. Chief Adjudication Officer*, post, p. 1224.
 D The ratio of that decision must be examined for the purposes of
 considering the Chief Adjudication Officer's ground of appeal and Mr.
 Reynold's answer to it. It is not possible to regard the decision as
 reached per incuriam within the principles stated by Evershed M.R. in
Morelle Ltd. v. Wakeling [1955] 2 Q.B. 379, 406, 407, cited above.

The decisions before Riley v. Chief Adjudication Officer

E Before examining the ground of decision in *Riley's* case it is necessary
 to refer to some decisions which preceded and were considered in
Riley's case. A number of general tests or guides, designed to assist in
 the ascertainment of what is "ordinary" and "normal" for the application
 of regulation 7(1)(e) of the Regulations of 1983 had emerged from
 decisions of commissioners between 1949 and 1985. They were drawn to
 F the attention of the court in *Riley's* case. These tests, to give them the
 names by which Slade L.J. referred to them in his judgment in *Riley's*
 case, can be briefly described as follows:

(i) The "one year before test" was stated in decision CU/518/49:

G "A claimant who has in fact worked only on some days of the week
 for a period of a year or more is 'a person who does not ordinarily
 work on every day in the week,' unless there are some exceptional
 industrial circumstances relevant to his case."

(ii) The "50 per cent. test" was explained in decision R(U)/14/59:

H "during the year ending with the day in question (or such other
 period as may provide a more suitable test in a particular case) a
 claimant has worked on less than 50 per cent. of the days of the
 week in question (excluding any day of incapacity for work or
 holiday on days on which he was unemployed because his
 employment had been terminated) that day should be held to be
 one on which in the normal course the claimant would not work. If
 the claimant has worked on as much as 50 per cent. of such days, it
 should (in my view) be held that it has not been proved that in the
 normal course he would not have worked on the day in question."

(iii) The "stop gap test" was stated in decision CU/518/49:

"On the other hand, if a claimant took up, when unemployed, employment which did not involve working every day of the week as a stop gap, while looking for full-time employment, he could not properly be held to be 'a person who does not ordinarily work on every day in a week.'"

A

Further, in decision CU/255/1984 a Tribunal of Commissioners had considered the entitlement to unemployment benefit of a man aged 53 who, after being in full-time employment for 25 years was unemployed "almost continuously" for two years and four months from November 1980 to April 1983. He then got part-time employment as a painter's labourer for 20 hours on Mondays, Tuesdays and Wednesdays under a community task force scheme. On taking that employment he was told that it was likely to lead to full-time employment with the task force and in the event he got such employment in August 1983. The commissioners held that the claimant was not prevented by regulation 7(1)(e) of the Regulations of 1983 from claiming unemployment benefit on Thursday, Friday and Saturday in each week. The majority applied the "stop gap" test saying:

B

C

"Subject to the principles enunciated above, what constitutes stop gap work will always depend upon the circumstances of each individual case. However, regard must be had to contemporary economic and social conditions. In times like the present where there is a high degree of unemployment, one may more readily accept that part-time work is undertaken as a stop gap exercise. In the present case we are satisfied that the claimant only took up the work he did as such a stop gap."

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The Chief Commissioner's reasons on the other hand were different and were regarded as correct by this court in *Riley v. Chief Adjudication Officer*, post, p. 1224. He said:

"In establishing whether there is a regime or pattern at the time of the day in question the past working pattern is not necessarily conclusive or the only method by which the existence or non-existence of a pattern or regime is to be determined."

F

He considered that the stop gap test must be applied with caution and in particular did not agree that because there was at present a high degree of unemployment, then it might be more readily accepted that part-time work was stop gap. He thought it would be flying in the face of economic reality to rely on the previous working history itself as pointing to a likelihood of a return to a pattern of work established by the claimant's previous employment. Nevertheless, he inferred that the claimant had taken up his new part-time employment in April 1983 on the basis that he would in quite a short time be offered and accept full-time employment with the same employers, which in the event happened. By that route he concurred in the conclusion that the claimant was to be treated as ordinarily working full-time for the community task force at the relevant days.

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The decision in Riley v. Chief Adjudication Officer

The facts in *Riley's* case were these. The claimant was aged 29 and was disabled. He had worked full-time as a clerk for $7\frac{1}{2}$ years until his employment was terminated on 1 October 1982. On 15 November 1982

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A he claimed unemployment benefit. On 1 March 1983 after five months of unemployment he took up employment with the Coventry Sports Association for the Disabled as a salaries and financial controller at a gross wage of £36 per week. He was required to work 16 hours per week, 8 hours on Thursday and 8 on Friday. The job was provided under a job creation scheme intended to help people who had been out of work for some time. Mr. Riley's claim for unemployment benefit on B the days not worked was rejected on the ground that regulation 7(1)(e) of the Regulations of 1983 applied to him. His appeal to the local tribunal was dismissed; and his further appeal to the commissioner was dismissed by Mrs. Commissioner Heggs on the ground that he had a clear pattern of employment from 1 March 1983 when he started the part-time employment. His past history of full-time employment was not C to be regarded as his usual pattern of employment and it was not "material in deciding whether he does not ordinarily work on every day in a week."

The Court of Appeal held that the commissioner had gone wrong in law. Slade L.J., in a judgment with which Ackner and Glidewell L.JJ. agreed, said, at p. 1231A-B that he was in entire agreement with the following statement of principle by the majority in decision CU/255/84:

D "It is clear in our view that the words 'in his case' draw attention to the particular claimant and what is normal for him and do not confine the inquiry simply to what is normal for the particular employment he holds during the week in which the day in question occurs. This is the view which seems to have been universally accepted in commissioners' decisions since the statutory provision E was originally enacted in 1948, and any reinterpretation of the provision some 37 years later (particularly as the relevant words have on various occasions been re-enacted by Parliament in the context of commissioners' decisions) would clearly be wholly unacceptable."

F Slade L.J. therefore held that the commissioner was in error in entirely disregarding the claimant's past history, of both work and unemployment, before 1 March 1983 when the part-time employment had begun. The commissioner's decision was therefore set aside and the claimant's appeal from the local tribunal was remitted to be heard by another commissioner.

G In reaching that conclusion Slade L.J. considered and expressed his view upon the way in which questions arising under regulation 7(1)(e) and (2) should be approached:

(i) Whether the claimant is "a person who does not ordinarily work on every day in a week" and "who is in the week in which the said day occurs employed to the full extent normal in his case" are questions of fact falling to be decided in the light of the particular circumstances of the case.

H (ii) The "one year before test," the "50 per cent. test" and the stop gap test" were general tests or guides to assist in the ascertainment of what is "ordinary" and "normal" but they have not been entirely consistently applied.

(iii) He accepted as broadly correct the submission that regulation 7(1)(e) necessitates the ascertainment of the claimant's ordinary regime or pattern of work as at the relevant week and that his working history is only relevant in so far as it sheds light on what is normal for him in

that relevant week by facilitating the prediction of what may happen in his case in the near future; and the “stop gap test” is of assistance only in so far as it may help to identify the ordinary working pattern as at the relevant week.

(iv) There is no difference between the concepts of “ordinariness” and “normality” embodied in regulation 7(1)(e). The essential question posed by the regulation is: was the claimant’s pattern of work in the relevant week the normal pattern for him at that time? and that question is to be answered objectively according to the facts as they are and not as the claimant would wish them to be.

(v) To answer that essential question requires that the officer or tribunal concerned should try to look into the future in order to decide how permanent or transitory the present pattern of work is likely to be.

(vi) If there is clear evidence as to what is likely in the future, that may well be conclusive. For example, a new part-time occupation may be taken up by a worker with the intention of making it henceforward his normal occupation. But the commissioner must also pay attention to the claimant’s past history of both work and unemployment. Evidence of past regular full-time work may carry little weight if it is succeeded by a long period of unemployment. On the other hand, evidence of full-time employment over several years finishing only a short time before the part-time unemployment started may be strong evidence that the part-time employment has not yet become the normal pattern of work for the particular claimant and is properly to be regarded as “stop gap” employment in his particular case. The stop gap test must be applied with circumspection. Slade L.J. agreed with the opinion of the Chief Commissioner in CU/255/1984 as set out above.

(vii) The “one year before test” is only a guideline which cannot supplant the language of regulation 7(1)(e) but see decision CU/255/1984, para. 26:

“the prima facie approach of adopting a ‘one year before basis’ . . . affords a practical—but certainly not inviolable—approach which ought not to be disturbed. . . .”

(viii) Finally, provided attention is properly directed to all the circumstances including the claimant’s pattern of work over the one year (or such other period as may be thought more appropriate) preceding the week in question; and to any evidence upon which it is possible to assess his working prospects for the immediately foreseeable future; “in an appropriate case normality is capable of being established from a pattern of work over a much shorter period than a year.”

If I have understood it correctly the precise ground of decision of the court in *Riley’s* case was that the commissioner had misdirected herself in failing to have regard to the past history of both work and unemployment of the claimant. The court, however, also gave guidance as to the way in which the essential questions of fact arising under regulation 7(1)(e) should be addressed and as to the use of the various tests and guides which have been developed. I do not find it necessary to consider to what extent it might be open to this court to depart from the guidance so given because I respectfully agree with all that was said.

The problems which have arisen in the application of regulation 7(1)(e) to the different facts of the history and future prospects of large numbers of claimants, and the tests and guides which have been developed in the effort to deal with the problems and to ensure, as far

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A as possible, that essentially similar cases are decided in the same way by different adjudication officers, resemble in their nature the problems which arose and the tests which were devised with reference to the question under the Workmen's Compensation Acts and under section 50 of the Social Security Act 1975 whether a claimant suffered the accident "in the course of his employment." In *Nancollas v. Insurance Officer* [1985] 1 All E.R. 833, 835, Sir John Donaldson M.R. said:

B "In the course of his employment"
 "These apparently clear and simple words gave rise to endless litigation in the context of the Workmen's Compensation Acts and have proved no less prolific in their present context. None of these authorities purports to construe the words other than in their natural meaning. None provides a simple formula which, on application to the facts, provides a ready answer to the question, 'Did he suffer the accident in the course of his employment?' and, in the nature of things, none could do so, because the incidents of employment are so varied. All that they can and do attempt is to draw attention to factors which are material and should be taken into account and balanced one against the other in answering the question. The authorities have, therefore, to be studied for guidance as to the approach to be adopted, rather than as providing any answer in particular cases."

D It seems to me that this court in Slade L.J.'s judgment in *Riley v. Chief Adjudication Officer*, post, p. 1224 was "drawing attention to factors which are material and should be taken into account and balanced one against the other" in deciding cases under regulation 7(1)(e).

The present grounds of appeal

F In the first ground of appeal it is contended that the commissioners held that, because the claimant's part-time employment was for a fixed temporary period, it could not be regarded as being employment to the full extent normal in his case, and that in so holding they erred in law. As I understand them, the commissioners did not express their reasons in those terms: the majority said:

G "15 . . . a person employed for a fixed temporary period with no intention that the employment should continue thereafter is not, by reason only of such employment, to be regarded as employed to the full extent normal in his case."

As stated, that ruling admits the possibility that a person who is employed for a fixed temporary period may, having regard to the other evidence, be held to be employed to the full extent normal in his case, and, as so stated, is not in my view contrary to the ruling made and guidance given in *Riley v. Chief Adjudication Officer*.

H However, having directed themselves that a person employed for a fixed temporary period is not by reason only of that employment to be regarded as employed to the full extent normal in his case, the commissioners did not go on expressly to consider in accordance with the guidance given in *Riley's* case whether, having regard to his past history of employment and of unemployment, and to any clear indication of his working prospects for the immediately foreseeable future, the claimant's employment in the week in question was "to the full extent

normal in his case.” They appear to have treated as decisive the finding that the claimant’s part-time work was for a fixed temporary period irrespective of the period of one year and four months of unemployment which had preceded the start of part-time employment. Further, their reference to the ground of decision in *Riley’s* case is not easy to follow: They said:

“12 . . . The Court of Appeal reversed this decision” (of the commissioner that the part-time working immediately became the norm) “. . . on the ground that it was necessary to look forward as well as backward in determining what was normal . . .”

I think that this may have been a transposition of words in dictating because, as explained above, the ground of decision of the Court of Appeal was that the commissioner had wrongly failed to draw attention to the past record of work (which included five months of unemployment) as throwing light upon the essential question of deciding whether the claimant’s pattern of work was the normal pattern for him at that time.

The approach of Mr. Commissioner Reith was, I think, in substance the same. He was of the view that those who obtained employment on the basis set out in the community programme (a 52 weeks maximum coupled with the hope of leaving for other employment before that period expired) “21 . . . were not precluded from receiving unemployment benefit during the days of unemployment because of the provisions of regulation 7(1)(e).” He felt able to lay down a general principle for guidance with reference to such employment:

“Such employment is in my opinion clearly of a temporary nature, and it should normally be held that claimants involved in such employment do not fall to be regarded as struck by the full extent normal rule.”

The commissioner had, of course, referred to the facts but after stating that principle he made no reference to the past record of work and of unemployment or to his view of any prospects which the claimant had of obtaining full-time employment in the future. He also seems to me to have regarded his view as to the temporary nature of the part-time work as decisive.

In my judgment the main grounds of appeal put forward by Mr. Latham have been made out. It seems to me that the commissioners did misdirect themselves in treating as decisive of the essential question of fact before them their view that the part-time employment of the claimant was temporary in the sense described by them; and that, in so doing, they failed to follow or to apply the decision and guidance given by this court in *Riley v. Chief Adjudication Officer*, post, p. 1224. I have great sympathy with the commissioners and with what I think their purpose was: namely to provide a clear and readily intelligible and applicable test for the large number of claimants who have part-time work under the community scheme. It was not, however, as I think, open to the commissioners to lay down any such principle as to any necessary or prima facie effect of the temporary nature of employment under the community programme upon the applicability of regulation 7(1)(e). The temporary nature of the employment is a factor in all the circumstances to be considered in answering the essential questions, as explained in *Riley v. Chief Adjudication Officer*: but as there stated:

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A "the words 'in his case' [in the regulation] draw attention to the particular claimant and what is normal for him and do not confine the inquiry simply to what is normal for the particular employment he holds . . ."

B The commissioners, having stated the terms and purpose of employment under the community programme, did not consider the matters listed in *Riley v. Chief Adjudication Officer*, namely the past and the future in order to determine objectively whether the claimant's pattern of work in the relevant week was the normal pattern of work for him at that time.

C Since the Chief Adjudication Officer has, in my judgment, demonstrated that the commissioners misdirected themselves in law, their conclusion upon the essential questions of fact may be set aside. It is open to this court to decide those questions if it is clear to us that only one answer is consistent with the facts found by the commissioners in the light of the law as it appears to this court to be. It has not been suggested that any further relevant facts could be revealed if the appeal was remitted and counsel for both sides invited the court to decide the issue, each contending that it should be answered in favour of his client.

D For my part I think only one answer is consistent with the facts found when considered in the light of the decision in *Riley v. Chief Adjudication Officer*. There had been full employment before 4 January 1982 but unbroken unemployment for one year and ten months followed by part-time employment from October 1983 until the date of the claim. The only evidence of employment in the future was continuing part-time employment. The fact that the existing pattern of part-time employment had a likely ending six months after it started does not in my judgment provide any basis for saying that such employment was not in the relevant week the normal pattern of work for him: there was no other pattern of work sufficiently close in time in the past or in the immediately foreseeable future to be set against it.

E

F For these reasons I would allow this appeal, set aside the decision of the commissioners and re-instate the unanimous decision of the local tribunal which had upheld the decision of the adjudication officer.

G KERR L.J. It is only with great hesitation and reluctance that I have come to accept the conclusion that this appeal should be allowed, at any rate at the level of this court, because of the decision of this court in *Riley v. Chief Adjudication Officer*, post, p. 1224. My regret is that the combined effect of that decision and of the present one appears to leave the application of regulation 7(1)(e) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 to different situations in a deplorably uncertain state, whereas the decisions of the commissioners which have now been reversed in both these appeals sought to lay down tests which would at any rate have provided some uniformity in the application of the rule in cases like the present.

H

However, their decisions are not satisfactory, though the fault clearly lies with the wording of the regulation. The commissioner's decision which was reversed in *Riley v. Chief Adjudication Officer* could clearly not be allowed to stand, despite the simplicity of its application. Mrs. Commissioner Heggs had in effect held that the necessary criterion for the application of the "full extent normal" rule was simply the claimant's actual time-table of days of work during the week or weeks to which his

(or her) claim related. So, if the scheme of his employment at the time in question involved working on no more than X days per week, then X days per week constituted the full extent of the claimant's normal employment for the purposes of regulation 7(1)(e). The result was that his application for unemployment benefit for the remaining working days of the week must necessarily fail. That could clearly not be right, since it simply substituted the ascertainment of actuality for the prescribed test based on "normality."

The reasoning underlying the decision of the Tribunal of Commissioners in the present case admittedly had the double advantage of ease of application to cases of this kind and of involving the application of a test of normality to some extent. But it is to be noted that by their route of reasoning they reached precisely the opposite conclusion to that of Mrs. Commissioner Heggs. They simply say, in effect, that a person cannot properly be treated as employed to the full extent which is normal in his case if he accepts temporary part-time employment of this nature for a fixed and relatively short period, in anticipation of learning a trade and/or the hope of obtaining full employment thereafter, with permission to leave at any earlier time if an opportunity for obtaining more or full employment should present itself in the interim. I can see no objection to this reasoning in principle. A period of part-time employment of this nature has a makeshift, stop gap or *faute de mieux* character which is the antithesis of what should properly be regarded as constituting the full normal extent of the claimant's employment.

I should therefore have greatly preferred to dismiss this appeal from their decision. But I cannot avoid the conclusion that this would involve a departure from the reasoning of the decision of this court in *Riley v. Chief Adjudication Officer*, post, p. 1224. This requires consideration of the claimant's immediately preceding employment or unemployment record, as well as his future if it is reasonably clear, as mandatory ingredients of the test of "normality" in comparison with the period of part-time employment to which the application relates. This ingredient is entirely absent from the test applied by the Tribunal of Commissioners in the present case.

We do not know whether the problems of uncertainty in the application of the various tests referred to in the judgment of this court in *Riley v. Chief Adjudication Officer* were explored in argument in that case to the same extent as before us on this appeal. The decision in *Riley v. Chief Adjudication Officer* admittedly involves a full assessment of the "normality" of the period of employment in question in comparison with the history of the applicant's employment or unemployment in general, past and foreseeable. In that sense its merit is no doubt that it gives the fullest effect to the ordinary meaning of the phrase "to the full extent normal in his case"—if such a phrase, in a provision which appears at times to contain a treble negative, can in any event be considered to have any ordinary meaning. But, with all due respect, the judgment gives rise to problems of application which may not have been fully appreciated. In comparison with the tests applied by the commissioners who were overruled in *Riley v. Chief Adjudication Officer* and are being overruled again in the present case, the decision in *Riley v. Chief Adjudication Officer* precludes any possibility of ease or uniformity of application. One does not know to what extent that aspect was considered.

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A In that connection it must be borne in mind that decisions about the eligibility or otherwise for unemployment benefit of people who are only able to obtain part-time employment must be made in tens of thousands of cases throughout the country every week. These decisions are made by insurance officers ("adjudicators") in circumstances which presumably allow little time for investigation or reflection. It was accepted on behalf of the representatives of the department who were present in court in support of this appeal that the decisions "on the ground" made in individual cases up and down the country may well vary greatly in their approach, according to local conditions and locally accepted rules of application. These decisions may well bear little or no affinity to the doctrines laid down in the course of appeals to commissioners, which are themselves not easily assimilated, let alone to occasional pronouncements made at the level of this court.

C The foregoing considerations form part of the reasons which cause me to follow the decision of this court in *Riley v. Chief Adjudication Officer*, and consequently to join in allowing this appeal, only with great reluctance. But apart from the uncertainty in its application to individual cases which inevitably results from the *Riley* approach, the unattractive feature which it shares with the simpler decisions of the commissioners in that case as well as the present, is that none of the tests so far discussed appears to have any connection with any consideration of the intended social or other policy which must presumably underlie regulation 7(1)(e) of the Regulations of 1983. The scheme of the legislation is to award or deny unemployment benefit by reference to individual days of unemployment in each week, exclusive of Sundays and any day substituted for it: see section 17(1) of the Social Security Act 1975 and regulation 7(1)(e). The pre-requisite for entitlement to unemployment benefit on any day of unemployment is that the applicant must be capable of work on that day and available, or deemed to be available, to be employed in employed earner's employment on that day: see section 17(1). It follows that all persons are disqualified who only work on certain days because they work part-time by choice, and who are accordingly unavailable for employment on the remaining working days. That leaves those, like the applicants in all the cases which have arisen for consideration, who are at any rate available or deemed to be available for employment on the remaining days. Some of these, depending on the test applied, are then eligible for unemployment benefit for those remaining days, whereas the others are not.

F None of the interpretations of the test "to the full extent normal in his case" which have so far been discussed appear to draw any discernible line of social or other sensible policy distinction between those who are eligible and those who are not. How can that have been in accordance with the intention of the legislation? Presumably the legislation has some underlying policy purpose. But where is it reflected in the various interpretations of regulation 7(1)(e) which have been published and discussed?

H When Mr. Reynold developed what Ralph Gibson L.J. has aptly termed the "true but forgotten" construction of regulation 7(1)(e) as explained in his judgment I was convinced that Mr. Reynold was right in part in claiming to be able to point to its original policy source. But I also felt that the language which was ultimately adopted in regulation 6(1) of the National Insurance (Unemployment and Sickness Benefit) Regulations 1948 may have been intended to take care of a further

aspect of policy, viz. the effort or lack of effort by an applicant for unemployment benefit to find employment on his days of unemployment. Of course, as this court said in *Riley v. Chief Adjudication Officer*, post, p. 1224, the test laid down by the regulation must be applied objectively, according to the facts as they are not as the applicant would wish them to be. But leaving aside all subjective considerations, and allowing for the requirement of availability for employment on the non-working days as a statutory pre-requisite for entitlement to unemployment benefit on those days, why should manifest and verifiable efforts made by an applicant to obtain employment on the "normal idle days" not form part of the test whether the actual extent of his employment during the week in question is employment "to the full extent normal" in his case? If a person shows by his actions that he does not regard his part-time employment as normal, because he actively seeks to obtain full-time employment or further employment on the days when he is unemployed, that would surely be an indication that the limited extent of his actual employment is not employment "to the full extent normal in his case." Conversely, if he makes no such efforts, then it is fair to infer that his actual part-time employment has in his case become the full extent of his normal employment.

I fail to see why an inquiry on these lines should not form part of the "full extent normal" test for the purposes of regulation 7(1)(e) of the Regulations of 1983. An objection which might at first sight be raised to this suggestion is that it is as novel as the "true but forgotten" construction of the regulation. But in fact this does not appear to be the case. It seems that a test on these lines may in fact be applied "on the ground" at the level of insurance officers and local tribunals. In the present case the chairman of the local tribunal, Mr. Dennis H. Greene, signed the "Grounds of decision (including reported decisions of the commissioner considered by tribunal)" on 16 April 1984 in the following terms:

"The claimant states that he inquired about vacancies at Rainhill Hospital last week—i.e., after he had received the papers regarding his appeal—although he has been working in the community programme scheme since last October he does not appear to have taken any steps which would justify a claim that he was actively and caring to obtain full-time employment. The dicta in commissioner's decision CU518/49 & R(U)1/73 followed. Accordingly the claimant is one to whom regulation 7(1)(e) . . . applies."

We were not referred to these commissioners' decisions and they are not in the material before us; nor was there any discussion in argument about these "grounds of decision" at the level of the local tribunal, which only struck me in the course of considering this judgment. I am therefore unable to deal any further with this aspect, except that it somewhat diminishes my reluctance to allow this appeal and thus to deprive the claimant of benefit for the days in question. But there is obviously great need for a re-consideration of the whole position at the level of the House of Lords and/or in relation to the wording of regulation 7(1)(e) of the Regulation of 1983. As mentioned by Ralph Gibson L.J., we have been told that since March 1987 this will no longer apply to community schemes of this nature, since there will be no entitlement to any unemployment benefit in such cases, presumably because they are already publicly funded. But similar problems will

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A continue to arise in the case of many other people who take up part-time employment faute de mieux.

For these reasons, and all those given in the judgment of Ralph Gibson L.J. with which I agree, I would allow this appeal.

SIR GEORGE WALLER. I agree that this appeal should be allowed.

B

Appeal allowed.

No order as to costs.

Leave to appeal.

Solicitors: Solicitor, Department of Health and Social Security; Rowley Ashworth for Rowley Ashworth, Exeter.

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NOTE

[COURT OF APPEAL]

RILEY v. CHIEF ADJUDICATION OFFICER

1985 July 11; 25

Ackner, Slade and Glidewell L.JJ.

Social Security—Unemployment benefit—Disqualification from benefit—Claimant out of work after full-time work—Claimant obtaining part-time work under job creation scheme—Whether claimant person not ordinarily working every day—Whether claimant employed to full extent normal in his case—Test to be applied—Whether claimant precluded from entitlement to unemployment benefit—Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 (S.I. 1975 No. 564), reg. 7(1)(e)¹

APPEAL from Social Security Commissioner.

The claimant, David James Riley, became unemployed and on 15 November 1982 claimed unemployment benefit which he continued to receive until the end of February 1983. On 1 March 1983 he took employment which required him to work only on Thursdays and Fridays each week. On 15 March 1983 he claimed unemployment benefit in respect of the days of the week on which he did not work, and on 10 May 1983 the insurance officer decided that benefit was not payable to him for 9, 12, 14, 15 and 16 March, on the ground that he regularly worked for the same number of days in a week for the same employer and had been employed to the full extent normal in his case in the weeks in which those days fell, and ordered a forward disallowance of benefit for Mondays, Tuesdays, Wednesdays and Saturdays under regulation 12(4) of the Social Security (Claims and Payments) Regulations 1979. The claimant appealed to the Coventry and District Local Tribunal, which dismissed the appeal. On the claimant's appeal from that decision, a social security commissioner, Mrs. R. F. M. Heggs, on 8 May 1984 dismissed the appeal and disallowed any further claim in respect of such days falling before 9 May 1984, and granted the claimant leave to appeal.

By a notice of appeal the claimant, pursuant to that leave, appealed, for an order that he be paid unemployment benefit in respect of the relevant days, on the grounds (1) that the commissioner had erred in holding that the claimant had in the material weeks been a "person who does not ordinarily work on every day in the week" and "employed to the full extent normal in his case," within the meaning of regulation 7(1)(e) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975; (2) that she had erred in law in following decision CU/207/83, which was not correct; and (3) that she should have followed decisions CU/518/49, R(U) 36/51, R(U) 2/52 and R(U) 30/53, which correctly decided the issues in the instant case.

The following case is referred to in the judgment of Slade L.J.:

Presho v. Department of Health and Social Security [1984] A.C. 310; [1984] 2 W.L.R. 29; [1984] I.C.R. 463; [1984] 1 All E.R. 97, H.L.(E.)

The following additional cases were cited in argument:

Calvin v. Carr [1980] A.C. 574; [1979] 2 W.L.R. 755; [1979] 2 All E.R. 440, P.C.

Reg. v. National Insurance Commissioner, Ex parte Stratton [1979] Q.B. 361; [1979] 2 W.L.R. 389; [1979] I.C.R. 290; [1979] 2 All E.R. 278, C.A.

¹ Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975, reg. 7(1)(e)(2): see post, p. 1225G-H.

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Riley v. Chief Adjudication Officer (C.A.)

- A *Mark Rowland* for the claimant.
Richard Drabble for the Chief Adjudication Officer.

Cur. adv. vult.

25 July. The following judgments were handed down.

- B SLADE L.J. With the leave of the commissioner, the claimant, Mr. David James Riley, appeals from a decision of Mrs. R. F. M. Heggs, a social security commissioner, given on 8 May 1984. By this decision she dismissed his appeal from a decision of the Coventry and District Local Tribunal and held that unemployment benefit was not payable to him for 9, 12, 14, 15 and 16 March 1983 on the grounds that those days were not to be treated as "days of unemployment" by virtue of regulation 7(1)(e) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 (S.I. 1975 No. 564). Pursuant to regulation 12(4) of the Social Security (Claims and Payments) Regulations 1979 (S.I. 1979 No. 628), she further decided that her decision was to be treated as a disallowance of any further claim in respect of a Saturday, Monday, Tuesday or Wednesday falling before 9 May 1984 if the grounds for holding that unemployment benefit was not payable continued to exist.

- D The claimant, who at the date of the commissioner's decision was aged 29, is disabled. He worked full time as a clerk for $7\frac{1}{2}$ years until his employment was terminated on 1 October 1982. On 15 November 1982 he claimed unemployment benefit. On 1 March 1983 he took up employment with the Coventry Sports Association for the Disabled as a salaries and financial controller, at a gross wage of £36 per week. His contract of employment required him to work "16 hours per week—Thursday eight hours and Friday eight hours." The commissioner found that "it was expected that his employment would last for one year," although no precise period was stipulated in the contract of employment. The employment, we have been told, was provided by the association as part of a job creation scheme intended to help those who have been out of work for some time.

- E By virtue of section 14(1)(a) of the Social Security Act 1975, a person who satisfies certain specified conditions is entitled to unemployment benefit in respect of any "day of unemployment" which forms part of "a period of interruption of employment." Section 17(2)(a) provides for the making of regulations making provision as to the days which are or are not to be treated as "days of unemployment" for the purposes of unemployment benefit.

- F Such regulations are to be found in regulation 7 of the Regulations of 1975, which it is common ground are the relevant regulations. Regulation 7(1) provides:

- G "For the purposes of unemployment, sickness and invalidity benefit . . . (e) subject to paragraph (2), a day shall not be treated as a day of unemployment if on that day a person does no work and is a person who does not ordinarily work on every day in a week (exclusive of Sunday, or the day substituted for it by regulation 4) but who is, in the week in which the said day occurs, employed to the full extent normal in his case, and in the application of this sub-paragraph to any person no account shall be taken, in determining either the number of days in a week on which he ordinarily works or the full extent of employment in a week which is normal in his case, of any period of short-time working due to adverse industrial conditions; . . ."

H

Regulation 7(2) provides:

"Paragraph (1)(e) shall not apply to a person unless—(a) there is a recognised or customary working week in connection with his employment; or (b) he regularly works for the same number of days in a week for the same employer or group of employers."

By virtue of Schedule 20 to the Social Security Act 1975, "week," in the context of regulations 7(1)(e) and 7(2), means a period of seven days beginning with midnight between Saturday and Sunday. Regulations 7(1)(e) and 7(2) have since been consolidated in regulations 7(1)(e) and 7(2) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 (S.I. 1983 No. 1598).

On 15 March 1983 the claimant submitted a claim for unemployment benefit. On 10 May 1983 the local insurance officer decided that unemployment benefit was not payable to him for the 9, 12, 14, 15 and 16 March on the grounds that he regularly worked for the same number of days in a week for the same employer or group of employers and was employed to the full extent normal in his case in the weeks in which these days fell. He therefore considered that regulation 7(1)(e) precluded these days from being treated as days of unemployment. He also gave a decision of "forward disallowance" under regulation 12(4) of the Regulations of 1979 in respect of the inclusive period from 17 March 1983 to 9 May 1984.

At the time when he gave his decisions of 10 May 1983, the insurance officer was unaware that another insurance officer had already concluded that the claimant was entitled to unemployment benefit up to 29 March 1983 and that such benefit had in fact already been paid to him up to that date.

The claimant appealed against the decisions of 10 May 1983 to the local tribunal, which dismissed his appeal. He then appealed to the commissioner. No application was made to her for an oral hearing, but she had the benefit of written submissions made respectively on behalf of the claimant and by an insurance officer, who in the event supported the appeal.

As at 10 March 1983 the claimant was regularly working "for the same number of days in a week for the same employer." Accordingly, notwithstanding regulation 7(2), regulation 7(1)(e) would prevent each of the five relevant days in March 1983 from being treated as a "day of unemployment" in the case of the claimant if, though only if, the conditions specified in that regulation were satisfied.

On each of the five relevant days, the claimant did no work. Thus, effectively the crucial question for the commissioner and for this court was and is: on each of the five relevant days, did the claimant fall within the descriptions (a) "a person who does not ordinarily work on every day in a week (exclusive of Sunday or the day substituted for it by regulation 4)" and (b) a person "who is, in the week in which the said day occurs, employed to the full extent normal in his case?"

Both these questions must be questions of fact, falling to be decided in the light of the particular circumstances of this case. Nevertheless, they give rise to certain questions of principle. Substantially the dispute has centred on the test which should have been applied by the commissioner in judging ordinariness and normality for this purpose and, in particular, how far back in time this test required her to go in looking at the circumstances of the claimant.

The "one year before" test, the "50 per cent." test and the "stop gap" test

We have been rightly referred to a number of decisions of social security commissioners which are relevant to this question. As Lord Brandon of Oakbrook observed in *Presho v. Department of Health and Social Security* [1984] A.C. 310, 319:

"where there has been a consistent line of decisions in this field of national insurance by specialised tribunals over a large number of years, a court should be slow to depart from them."

A number of general tests or guides designed to assist in the ascertainment of what is "ordinary" and "normal" have emerged from these decisions, though it appears that they have not been entirely consistently applied. One such test (which I will call "the one year before test") was thus stated in paragraph 11 of decision CU/518/49:

3 W.L.R.

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A "A claimant who has in fact worked only on some days of the week for a period of a year or more is 'a person who does not ordinarily work on every day in a week,' unless there are some exceptional industrial circumstances relevant to his case."

Another test (which is a more developed variant of the one year before test and which I will call "the 50 per cent. test") was thus explained by the commissioner in decision R(U) 14/59, when he said that where

B "during the year ending with the day in question (or such other period as may provide a more suitable test in a particular case) a claimant has worked on less than 50 per cent. of the days of the week in question (excluding any day of incapacity for work or holiday and days on which he was unemployed because his employment had been terminated) that day should be held to be one on which in the normal course the claimant would not work. If the claimant has worked on as much as 50 per cent. of such days, it should (in my view) be held that it has not been proved that in the normal course he would not have worked on the day in question."

The 50 per cent. test was referred to in paragraph 10 of decision R(U) 14/60, where it was pointed out that there might be other exceptional days which should in addition be excluded.

D A third test (which I will call "the stop gap test") is to be found stated thus in paragraph 16 of decision CU/518/49 (K.L.):

"On the other hand, if a claimant took up, when unemployed, employment which did not involve working every day of the week as a stop gap, while looking for full-time employment, he could not properly be held to be 'a person who does not ordinarily work on every day in a week.'"

The commissioner's decision

E The principal contentions made in the written submissions to the commissioner on behalf of the claimant were, in effect, that he had only worked part-time for a few days before it was decided that he was "employed to the full extent normal in his case," and, in the light of previous decisions of the commissioner, a period of one year or more immediately preceding March 1983 should have been taken into account in determining the question of normality.

F The insurance officer, in his written submissions to the commissioner, relied principally on the 50 per cent. test. He pointed out that the evidence showed that of the period of a year ending with March 1983, the claimant had been in full-time employment with Courtaulds Ltd. for over 29 weeks. He therefore submitted that, in relation to the five relevant days, the conditions of the 50 per cent. test, propounded in determining whether the claimant's employment might be termed "stop gap," were not satisfied and that accordingly regulation 7(1)(e) did not prevent them from being treated as "days of unemployment."

G The commissioner did not accept these submissions made by or on behalf of the claimant or the insurance officer. She referred to certain decisions which show that a pattern of normality can be established from the pattern of work over a much shorter period than a year: see paragraph 10 of decision R(U) 14/60; decision R(U) 18/62; and paragraph 15 of decision R(U) 2/83. She expressed her own conclusion thus, in paragraph 11 and the first sentence of paragraph 12 of her own decision:

H "In the present case the claimant had a clear pattern of employment from 1 March 1983. Accordingly, although he had a past history of full-time employment, I do not agree with the submissions that that is to be regarded as his usual pattern of employment or that it is material in deciding whether he does not ordinarily work on every day in a week. I agree with the commissioner who considered the matter in a similar case, CU/207/83, at paragraph 9. In the context of the regulation 'ordinarily' operates on the work being done in a week and is conjunctive . . . on that day a person does not work *and* is a person who does not ordinarily work on every day

in a week [my emphasis] It does not refer to part employment and when, as in this case, it is plain from the terms of the contract of employment that the claimant does not work on every day in a week, regulation 7(1)(e) applies, although it is customary, but not required by law, to allow some time to elapse before applying it. Likewise 'the full extent normal in his case' relates to the work being done and not past employment. In the present case the claimant's pattern of work is perfectly clear and is not disputed and accordingly I give the decision set out in paragraph 1 of this decision."

The commissioner thus considered that in the short period between 1 March and 9 March 1983, a "perfectly clear" pattern of work had developed, in which the claimant did not "ordinarily work on every day in a week" (exclusive, etc., etc.) and was, in each of the relevant weeks, "employed to the full extent normal in his case."

The arguments on this appeal

Mr. Rowland, in his argument on behalf of the claimant before this court, did not wholly espouse either of the alternative lines of argument that had been placed before the commissioner in support of the claimant's case. He accepted that the one year before test is not in every instance the appropriate one and that cases may arise where a clear pattern of part-time employment has emerged in a much shorter period than a year. In his submission, however, the present case is a "stop gap" case. Such cases, he submitted, fall into a category all of their own. Ordinarily, in his submission, a person who takes up, when unemployed, employment which does not involve working every day of the week, as a stop gap, while looking for full-time employment is, during the first year when the situation continues, not properly to be regarded as fulfilling the conditions of regulation 7(1)(e). He accepted, however, that if this situation continued for more than one year, a claimant could usually be regarded as fulfilling them, notwithstanding the initially "stop gap" nature of his employment, which could not be regarded as continuing indefinitely. He relied particularly on the sentence from paragraph 16 of decision CU 518 49 which I have already quoted. The stop gap test, he submitted, has been acted on by the social security commissioners ever since, subject only to the customary one year cut off. He accepted that a person's past record of employment may be relevant to a consideration of whether or not his present employment is or is not stop gap. In the present case, however, he submitted that the commissioner had failed to ask herself at all the critically important preliminary question, namely whether the employment which the claimant took up on 1 March 1983 was of a stop gap nature.

Mr. Drabble, in resisting this appeal on behalf of the adjudication officer, submitted that the commissioner correctly applied the statutory language of regulation 7(1)(e). He pointed out that the question for the adjudicating authority in any case such as the present is whether, on the particular facts, this statutory language applies or not, the key words in the regulation being "ordinarily" and "normal," which he submitted are relatively simple words. The stop gap test, he suggested, is a gloss on this language which should be approached with caution; tests which have been spelt out of the regulation in decisions of the commissioners should not be regarded as taking on the character of rules of law. The use of the words "ordinarily" and "normal," in his submission, show that the test is purely an objective one. Regulation 7(1)(e) requires attention to be directed to the state of facts, rather than the state of mind of the individual concerned, which is irrelevant, save in so far as it provides a basis for predicting what will happen in practice. Since the rule has to be applied objectively, it would be wrong in principle to regard the stop gap test as preventing the application of regulation 7(1)(e) to a case where a claimant as a matter of fact has a fixed pattern of part-time working, merely because he desires more extensive work. It is relevant to look at the claimant's past working

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A history only in so far as it may shed light on what is the full extent of work normal in his case *in the relevant week*, i.e. only in so far as it may show what is likely to be his pattern of work in the future. In the case of the claimant, Mr. Drabble submitted, the commissioner was entitled to say that as at 9 March 1983, his past history of full employment was not material on the grounds that it threw no light on what was likely to be his working pattern for the future. In his submission, she reached a conclusion which was maintainable in law on the facts.

B
Decision CU/255/84

C This appeal has been very ably argued on both sides. The respective arguments advanced have to some extent reflected the differing views of the Chief Social Security Commissioner on the one hand and two other commissioners on the other hand, who in the important recent decision CU/255/84 of a Tribunal of Commissioners reached the same conclusion in the result, but by a different route. That case concerned the entitlement to unemployment benefit of a man aged 53 for a period from 28 April 1983 to 15 July 1983, during which he was working 20 hours a week on Mondays, Tuesdays and Wednesdays for the Community Task Force as a part-time painter's labourer. He had taken up this employment in April 1983 after a spell of almost continuous unemployment since November 1980. Before November 1980 he had been continuously in full-time employment for 25 years. On taking up his new employment in April 1983, he was told that the part-time employment was likely to lead to full-time employment with the Community Task Force, which in the event happened in August 1983. The three commissioners unanimously held that regulation 7(1)(e) did not prevent Thursdays, Fridays and Saturdays from being days of unemployment, but for rather different reasons. The majority considered that the stop gap test applied. In paragraph 10 they pointed to a number of qualifications to that principle but concluded:

E "subject to the principles enunciated above, what constitutes stop gap work will always depend upon the circumstances of each individual case. However, regard must be had to contemporary economic and social conditions. In times like the present where there is a high degree of unemployment, one may more readily accept that part-time work is undertaken as a stop gap exercise. In the present case we are satisfied that the claimant only took up the work he did as such a stop gap."

F The Chief Social Security Commissioner, on the other hand (see paragraphs 19 to 21 of his decision) stressed that the point of time to which regulation 7(1)(e) directs attention is the particular day which is under consideration for disqualification. He said at paragraph 22:

G "In establishing whether there is a regime or pattern at the time of the day in question the past working pattern is not necessarily conclusive or the only method by which the existence or non-existence of a pattern or regime is to be determined."

H He considered that the stop gap test must be applied with caution and in particular did not agree that because there was at present a high degree of unemployment, then it might be more readily accepted that part-time work was stop gap: see paragraph 25. On the facts of the case he did not regard the 25-year working history of the claimant, which ended about 2½ years before he started work with the Community Task Force, as relevant to the determination of whether he had a normal working week as at the relevant days in April to July 1983 and whether in the relevant weeks his employment fell short of what was normally worked by him. He thought it would be flying in the face of economic reality to rely on the previous working history itself as pointing to a likelihood of a return to a pattern of work established by the claimant's previous employment. Nevertheless, he inferred that the claimant had taken up his new part-time employment in April 1983 on the basis that he would in quite a short

time be offered and accept full-time employment with the same employers, which in the event happened. By this route he concurred in the conclusion that the claimant was to be treated as ordinarily working full-time for the Community Task Force at the relevant days.

Conclusions

Mr. Drabble has submitted that the approach of the Chief Social Security Commissioner in decision CU/255/84 was the correct one in principle. He indicated that the points of principle which the adjudication officer is particularly anxious to establish on this appeal are that regulation 7(1)(e) necessitates the ascertainment of the claimant's ordinary regime or pattern of work as *at the relevant week* and that his working history is only relevant in so far as it sheds light on what is normal for him in that relevant week, by facilitating the prediction of what may happen in his case in the near future. The stop gap test, he suggested, is of assistance only in so far as it may help to identify the ordinary working pattern as at the relevant week.

I for my part would accept the broad correctness of that submission. I can see no difference between the concepts of ordinality and normality embodied in regulation 7(1)(e). When it is reduced to its essentials, the question posed by that regulation is, in my opinion: was the claimant's pattern of work in the relevant week the normal pattern for him at that time? This question has to be answered objectively according to the facts as they are, not as the claimant would wish them to be: cf. paragraph 3 of decision of R(U) 36/51. Particularly for this reason, I accept that the stop gap test must be applied only with circumspection. With respect to the majority in decision CU/255/84, I agree with the Chief Social Security Commissioner's opinion in that case that the mere fact that the claimant had a past employment record of 25 years continuous full-time employment up to November 1980, and that there was a high degree of unemployment from April to July 1983 did not support the argument that, as at the relevant weeks in April to July 1983, the claimant did not fall within the descriptions specified in regulation 7(1)(e); those points by themselves did not evidence any increased probability that the claimant would in the readily foreseeable future be reverting to full-time, as opposed to part-time, employment. But for the fact that the claimant in that case had taken up his new part-time employment in April 1983 on the basis that it was likely to lead to full-time employment with the same employers in the near future, I find it hard to see on the particular facts how he could properly have avoided the application of regulation 7(1)(e).

Answering the essential question posed by regulation 7(1)(e), in my judgment, requires that the officer or tribunal concerned should try to look into the *future* in order to decide how permanent or transitory the present pattern of work is likely to be. If, as in decision CU/255/84, there is some fairly clear evidence about what is likely in the future, this may well be conclusive. But often such evidence will not be available. Whether or not it is available, I do not see how the commissioner can properly fail to pay attention also to the claimant's *past* history of both work and unemployment. The effect of such evidence will, of course, differ from case to case. Evidence of past regular full-time work will, I think, never be wholly irrelevant. But if, as in decision CU/255/84, full-time work is succeeded by a long period of unemployment, it may carry little weight. If, on the other hand, there is evidence of full-time employment over several years finishing only a short time before the part-time employment started, this may be strong evidence that the part-time employment has not yet become the normal pattern of work for the particular employee and is properly to be regarded as "stop-gap" employment in his particular case.

Though on the contentious points of principle that arose in decision CU/255/84, I find myself more in agreement with the Chief Social Security Commissioner, I am in entire agreement with the following statement of principle by the majority in paragraph 9:

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- A "It is clear in our view that the words 'in his case' draw attention to the particular claimant and what is normal for him and do not confine the inquiry simply to what is normal for the particular employment he holds during the week in which the day in question occurs. This is the view which seems to have been universally accepted in commissioners' decisions since the statutory provision was originally enacted in 1948, and any reinterpretation of the provision some 37 years later (particularly as the
- B relevant words have on various occasions been re-enacted by Parliament in the context of commissioners' decisions) would clearly be wholly unacceptable."

This is the crucial point which the commissioner seems to me to have failed to take into account in the present case and which in my opinion, with all respect to her, led her into error. So far as one can judge from paragraphs 10, 11 and 12 of her decision, she appears to have considered that simply because the

C contract under which the claimant took up employment on 1 March 1983 specifically provided for him to work eight hours on Thursdays and eight hours on Fridays, it inevitably followed from this "clear pattern of employment" that at the relevant times he was a person who did not "ordinarily work in every day in a week" and was employed "to the full extent normal in his case." In her view, apparently, that was that. She would appear to have entirely disregarded his past history of both work and unemployment, before 1 March 1983.

- D In my judgment, however, this approach to the evidence was too narrow. I would accept that the "one year before" test is only a guideline, which cannot supplant the language of regulation 7(1)(e) and that, while there have been many cases in which longer periods have been considered, there have been cases where the necessary findings of fact have been made on the basis of the immediately current circumstances. However, I agree with the view expressed by the Chief Social Security Commissioner in paragraph 26 of decision CU/255/84:

- E "the prima facie approach of adopting a 'one year before basis' specified in the commissioner's decision CU 518/49 at paragraph 11 affords a practical—but certainly not inviolable—approach which ought not to be disturbed; a very large number of cases must have been decided on that basis in the 35 years since 1949 and the legislation has been under the scrutiny of Parliament on a considerable number of occasions since, without apparent disapproval. I would regard it as thoroughly undesirable at this stage to
- F disturb so long-standing a rule of practice."

- In the present case, in the absence of any finding by her that the claimant on 1 March 1983 had adopted his new part-time occupation with the intention of making it henceforth his normal occupation, the commissioner should, in my opinion, have directed her mind to the question whether or not the reasonable inference from all the evidence was that the employment on 1 March 1983 was in truth of a stop gap nature: see and compare paragraphs 4 and 5 of decision
- G R(U) 30/53. For this purpose the nature and terms of his employment were, of course, relevant. However, for this purpose she should, in my opinion, also have considered, and taken into account, inter alia, what had been the claimant's pattern of work over the one year (or such other period as she thought more appropriate) which immediately preceded 1 March 1983. I think she also should have attempted to assess his working prospects for the immediately foreseeable future. As I have already indicated, I accept that in an appropriate case normality is capable of being established from a pattern of work over a much
- H shorter period than a year. However, the crucial point at which I find myself differing from the commissioner arises from her apparent opinion that the terms of the claimant's new contract of employment of 1 March 1983 by themselves sufficed to establish a new pattern of normality. In this opinion I think she erred in law.

Although his notice of appeal asks that it be determined that unemployment benefit is payable to the claimant in respect of the relevant days, this court has not got the benefit of the requisite findings of fact to support any such decision.

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In the circumstances the matter will, I think, have to go back to a commissioner.

In the result, I would allow this appeal. I would set aside the commissioner's decision and remit the appeal from the local tribunal to be heard by another commissioner. I should add for the record that we were informed by Mr. Drabble that there is no question of the claimant being subjected to any claim for repayment of the unemployment benefit which was actually paid to him up to and including 29 March 1983. For practical purposes, therefore, the issue between the parties relates to the disallowance of further claims for benefit in respect of the period from that date to 9 May 1984.

GLIDEWELL L.J. I agree and have nothing to add.

ACKNER L.J. I agree and have nothing to add.

Appeal allowed with costs.

*Appeal from local tribunal remitted to
different commissioner.*

Legal aid taxation of claimant's costs.

*Solicitors: Holyoak & Co., Coventry; Solicitor to Department of Health and
Social Security.*

[Reported by CLIVE SCOWEN ESQ., Barrister-at-Law]

3 W.L.R.

A [FAMILY DIVISION]

In re K. (MINORS) (WARDSHIP: CRIMINAL PROCEEDINGS)

1987 Aug. 20, 21; 24

Waterhouse J.

B *Minor—Ward of court—Police investigation—Children placed in care of local authority—Police investigating whether children victims of criminal offences—Parents charged with offences—Children made wards of court—Whether leave of court required for wards to be called as witnesses at trial*

C Four minors thought to have been sexually abused by their parents were placed by their father in the care of the local authority. The police, with the consent of the local authority, interviewed the minors and took statements from them with the result that the parents were charged with a number of offences of indecent assault and remanded in custody. The local authority then instituted proceedings making the minors wards of court. In January 1987, the parents were committed for trial and in those committal proceedings the minors' statements were tendered in evidence so that, under the provisions of section 1 of the Criminal Procedure (Attendance of Witnesses) Act 1965 and section 102(10) of the Magistrates' Courts Act 1980, they were bound to attend and give evidence at the trial of their parents before the Crown Court.

D On an application in the wardship proceedings to determine whether the prosecuting authority required the consent of the court before calling the minors as witnesses at the trial of their parents:—

E *Held*, that it would be a constitutional impropriety for the wardship court to intervene once a statement had been obtained from a ward of court since it was for the prosecuting authority to decide whether to initiate a prosecution; that, once a prosecution had been instituted, it was contrary to public policy for the wardship court to intervene in the statutory process governing the conduct of a criminal trial and in matters within the jurisdiction of the Crown Court; and that, therefore, the court would refuse to exercise the wardship jurisdiction by granting or refusing leave for the minors to be called as witnesses at the trial or by giving a direction in the matter in another form (post, pp. 1242E—1243A).

F *In re Mohamed Arif (An Infant)* [1968] Ch. 643, C.A. applied.

G *Per curiam*. In many cases, the wardship court is likely to be involved at an early stage because leave will have to be sought for the police to interview a ward and there are occasions when the wardship court is necessarily and properly involved in decisions that will or may affect the conduct of a criminal trial (post, pp. 1242C, 1243A–B).

The following cases are referred to in the judgment:

H *A. v. Liverpool City Council* [1982] A.C. 363; [1981] 2 W.L.R. 948; [1981] 2 All E.R. 385, H.L.(E.)

H. (A Minor) (Wardship: Applications), In re [1985] 1 W.L.R. 1164; [1985] 3 All E.R. 1, C.A.

Harrison v. Goodall (1852) Kay 310

J. (A Minor) (Wardship), In re [1984] F.L.R. 535

M. v. Lambeth Borough Council (No. 3) [1986] 2 F.L.R. 136

Mohamed Arif (An Infant), In re [1968] Ch. 643; [1968] 2 W.L.R. 1290; [1968] 2 All E.R. 145, Cross J. and C.A.

In re K. (Minors) (Fam.D.)

[1987]

- R. (M.J.) (A Minor) (Publication of Transcript), In re* [1975] Fam. 89; A
 [1975] 2 W.L.R. 978; [1975] 2 All E.R. 749
Rex v. Moscovitch (1924) 18 Cr.App.R. 37
Rochford v. Hackman (1854) Kay 308
S. (Infants), In re [1967] 1 W.L.R. 396; [1967] 1 All E.R. 202
S. (Minors) (Wardship: Police Investigation) [1987] 3 W.L.R. 847
X (A Minor) (Wardship: Jurisdiction), In re [1975] Fam. 47; [1975] 2
 W.L.R. 335; [1975] 1 All E.R. 697, Latey J. and C.A. B

The following additional cases, supplied by the courtesy of counsel, were cited in argument:

- J.S. (A Minor), In re* [1981] Fam. 22; [1980] 3 W.L.R. 984; [1980] 1 All
 E.R. 1061, C.A.
Reg. v. Cheltenham Justices, Ex parte Secretary of State for Trade [1977] 1
 W.L.R. 95; [1977] 1 All E.R. 460, D.C. C
Reg. v. Greenwich Justices, Ex parte Carter [1973] Crim.L.R. 444, D.C.

SUMMONS

Four minors, two girls and two boys aged between 6 and 11 years, were placed in the care of the local authority by their father on 29 September 1986. The local authority consented to the minors being interviewed by the police and as a result, the local authority issued an originating summons on 10 December 1986 making the minors wards of court. Their parents were charged with indecent assault and remanded in custody. On 15 January 1987 the parents were committed for trial for a number of offences relating to their own and other children. D

During a hearing in chambers in the wardship proceedings, the issue was raised whether the leave of the court was required before the minors, being wards of court, could be called as witnesses at the forthcoming trial of their parents. Judgment was given in open court. E

The facts are stated in the judgment.

Robin Barda for the local authority.

Evan Stone Q.C. and *Pamela Radcliffe* for the mother. F

Anita Ryan Q.C. and *Karen McLaughlin* for the father.

Margaret Puxon Q.C. and *Janine Sheff* for the Crown Prosecution Service.

Allan Levy for the guardian ad litem.

Cur. adv. vult. G

24 August. WATERHOUSE J. read the following judgment. In these wardship proceedings, following preliminary hearings before Eastham and Heilbron JJ., I have to decide whether leave is required by the prosecution from this court for four minors to be called as witnesses at the forthcoming trial on indictment of the first and second defendants, their father and mother. It is an indictment containing many counts alleging indecent assault and similar offences against children. If such leave is required, it will be necessary for me to decide whether or not it should be granted. The four minors with whom I am concerned (two boys and two girls) are the subject individually of 22 of these counts and they were made wards of court on 10 December 1986. The children named in the other counts, who are aged between six and eight years, are also potential witnesses at the trial but are not wards of court. H

3 W.L.R.

In re K. (Minors) (Fam.D.)

Waterhouse J.

A At the invitation of Heilbron J., the Official Solicitor has agreed to act on behalf of the minors in the wardship proceedings before me. I am grateful to him for doing so and have had the benefit of submissions on the issue before me by counsel on his behalf.

B The relevant history for the purposes of the decision that I have to make can be outlined quite briefly. The minors are now aged respectively nearly 12 years, nearly 10 years, nearly 8 years, and 6 years. They lived with their parents, who were married in March 1975, more or less continuously until 5 September 1986. If the prosecution case is correct, they were subjected to depraved conduct of an appalling kind by both their parents over a long period until the father left the matrimonial home on the latter date, taking the two boys with him and being joined by the elder daughter who had run away to a friend.

C The mother's petition for divorce was filed on 11 September 1986 and there were early interlocutory proceedings in relation to the children. As a result of the elder girl's admission to hospital on 18 September 1986, the social services department of the plaintiff local authority became aware of evidence of sexual abuse in relation to her, which had been suspected by the police four months earlier. The younger girl was also admitted to hospital following place of safety orders in respect of D both girls on or about 20 September 1986. Nine days later, all four children were placed in the care of the local authority voluntarily by the father pursuant to an undertaking given to Judge John Edwards, who had been due to hear the father's application for custody of the children on 29 September 1986.

E The children have remained in the care of the local authority ever since and have been placed with various foster parents, the two girls having gone to foster parents as early as 25 September 1986 pursuant to the place of safety orders on their discharge from hospital. Medical examinations revealed evidence of sexual abuse in respect of all four children and, with the consent of the local authority, each of them was interviewed by the police on two occasions. The first interview with each in October 1986 was quite lengthy. The second, for the purpose of F taking witness statements, was shorter with one exception. The second interviews were preceded by a case conference on 10 November 1986 at which the police, social workers and the foster parents were present. After the statements had been taken from the older three minors on 16 November 1986, both parents were charged with offences involving those three children and another child who is not a ward of court. In G consequence, the parents were remanded in custody on 18 November 1986 and have remained in custody ever since, access by them to the children has been suspended on the same date.

H To complete the evidential picture, the youngest child was interviewed for a second time on 21 November 1986 and he was the subject of two charges in respect of which the parents were committed for trial by a magistrate on 15 January 1987. The committal charges numbered 22 and involved four children in addition to the minors. A total of 31 statements, including those from the eight children involved, were tendered in evidence under section 102 of the Magistrates' Courts Act 1980. The magistrates' court gave a direction, under section 39 of the Children and Young Persons Act 1933, prohibiting publication of any particulars that might lead to identification of the children involved.

The parents were committed for trial pursuant to the provisions of section 6(2) of the Magistrates' Courts Act 1980 so that no evidence was

called before the examining justice. In any event, none of the children could have been called as a witness for the prosecution at that stage except in the circumstances specified in section 103(2) of the Act of 1980. Once their written statements had been tendered in evidence in the committal proceedings, however, they had to be treated as witnesses who had been examined by the court for the purposes of section 1 of the Criminal Procedure (Attendance of Witnesses) Act 1965: see section 102(10) of the Magistrates' Courts Act 1980. Witness orders were therefore made in the prescribed form (see rule 8 of the Magistrates' Courts Rules 1981) in respect of each of the children and they were not made conditional upon receiving notice to attend. There was no basis on the material before the examining justice on which the witness orders in respect of the children could have been made conditional, having regard to the limited discretion conferred by section 1(2) of the Criminal Procedure (Attendance of Witnesses) Act 1965. Moreover, even if the order were to be made conditional now, pursuant to section 1(2)(b), on the ground that the evidence of the relevant child "is unlikely to be required" either of the defendants would still have the right, by virtue of the provisions of section 1(3), to require the attendance of the child at the trial.

It will be apparent from what I have already said that the present issue before me arises because the four minors with whom I am concerned were made wards of court on 10 December 1986 after the prosecution had been set in train and the parents had been charged but before the committal proceedings took place. The wardship proceedings were begun by the plaintiff council on the direction of Judge Hill-Smith given in the divorce proceedings under section 42(1) of the Matrimonial Causes Act 1973 on 4 December 1986. At that stage the minors were in voluntary care only, the place of safety orders in respect of the two girls had expired, and it was obviously necessary that proper steps should be taken to secure their future.

On 19 December 1986 the wardship proceedings came before Ewbank J. who confirmed the wardship, made a care order in favour of the local authority under section 7(2) of the Family Law Reform Act 1969 and ordered that there should be no access by either parent. A number of the directions given by the judge are not material to the issue that I have to decide but I should mention that he gave leave for the minors to be examined and treated by a consultant psychiatrist and directed that the proceedings should be listed for hearing after the criminal trial but, in any event, before the end of July 1987.

It was in these circumstances that the proceedings came before Eastham J. on 20 July 1987 when the issue that I have to decide was first raised. The only other relevant development in the period since the committal proceedings had been single interviews of each of the minors by the police in February 1987 in relation to the activities of the maternal grandfather, as a result of which a voluntary bill of indictment may be sought. Before Eastham J. and subsequently before Heilbron J. and myself, various questions relating to disclosure of documents in the wardship proceedings for the purposes of the criminal trial have been canvassed and decided, but it is unnecessary to refer to the details in this judgment. It is necessary to say, however, that on 13 August 1987, Heilbron J. made orders in wide terms restraining publication of information relating to the wardship proceedings.

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A Mrs. Puxon, for the Crown Prosecution Service, which has helpfully
intervened at the request of the court, now submits that no leave is
required from this court for the minors to be called at the criminal trial.
The foundation of counsel's submission is that by law the decisions
whether or not to prosecute and whether or not to call a specific
prosecution witness at a trial are to be made by the prosecuting authority
and that it would be constitutionally wrong for this court to intervene.
B In the instant case, the minors had been interviewed and the parents
arrested on the basis of the minors' statements before the wardship
proceedings began, so that no question of obtaining leave to interview
them arose, save in relation to the matters canvassed with them in
February 1987 when they were already the subject of witness orders.
C Once the decision to prosecute had been taken it was necessary for the
minors' statements to be tendered as part of the prosecution case and
thereafter their compellability as witnesses was governed by the statutory
provisions that I have outlined and the committing justice was bound to
issue witness orders. As for the question of the competence of the
minors to give evidence, that is a matter to be assessed by the trial
judge on the basis of well established rules: see section 38 of the
Children and Young Persons Act 1933 and, for example, *Rex v.*
D *Moscovitch* (1924) 18 Cr.App.R. 37.

Mrs. Puxon accepts on behalf of the Crown Prosecution Service that,
in general, it is the practice of the police to obtain the consent of a
parent who has the custody of a child before interviewing the child as a
potential witness. Similarly, the police work in close co-operation with
social services departments in whose care children have been placed,
and obtain the consent of the department (as in this case) before
E interviewing a child in care. It is accepted also that, in the case of a
ward of court, leave should be obtained from the wardship court before
an interview by the police takes place. In the instant case, the question
of obtaining leave for the interviews in February 1987 was not considered
and there is some doubt as to when the Crown Prosecution Service
became aware of the wardship proceedings, but the need for leave was
F less clear because the committal proceedings had already taken place by
then.

Once a prosecution has been instituted however, the statutory
procedure must (it is said) take its normal course. The Crown Prosecution
Service will, of course, consider any representation that may be made by
a parent or a local authority about the potential adverse impact upon a
child of having to give evidence. This may be one of the matters to be
G considered in deciding whether or not to proceed with particular charges,
but the discretion is vested in the prosecuting authority rather than the
parent or the local authority. In the present case, it is said further, an
extraordinary and anomalous situation would arise, if the wardship court
were to intervene, because the minors might be "protected" from the
operation of the statutory rules governing the compellability of witnesses,
H whereas the other children involved in the case would have no similar
protection.

The submissions on behalf of the Crown Prosecution Service are
supported by the local authority. Mr. Barda, on their behalf, suggests
that it would be inappropriate for this court to make a direction that
might bring it into conflict with the Crown Prosecution Service and the
Crown Court in the exercise of their statutory powers. Before the
wardship proceedings began, the local authority agreed that the minors

should be interviewed, in the knowledge that a prosecution based on their evidence might ensue. More recently they have obtained a report from a child psychiatrist dealing with the potential impact of giving evidence upon the minors, and the local authority wishes to have leave to inform the Crown Prosecution Service of the contents of that report as it may affect, at least in part, the future conduct of the prosecution. But the local authority would not support the idea that the wards might be treated more favourably, as a result of a ruling from this court, than the other children involved in this case.

In support of the local authority's position on this issue, reliance is placed by way of analogy on the decision of the Court of Appeal in *In re Mohamed Arif* [1968] Ch. 643. In that case the wardship jurisdiction had been invoked by two appellants claiming to be the fathers of immigrants who had been refused admission to the United Kingdom. In wardship proceedings, naming the Home Secretary as a defendant, the appellants sought, *inter alia*, declarations of legitimacy and paternity. Cross J. dismissed both originating summonses and his decision was upheld by the Court of Appeal. Having set out the contentions of the appellants, Lord Denning M.R. said, at p. 662:

"To these contentions I think there is the short answer. The court will not exercise its jurisdiction so as to interfere with the statutory machinery set up by Parliament. The wardship process is not to be used so as to put a clog on the decisions of the immigration officers or as a means of reviewing them. These applications are misconceived. The courts should refuse to entertain them."

In the same case Russell L.J. said, at pp. 662–663:

"When an infant becomes a ward of court, control over the person of the infant is vested in the judges of the Chancery Division of the High Court. It is for the judge to say by order from time to time where the ward is to reside and with whom, and disobedience to such an order is contempt of court by anyone who knowingly breaches or is party to a breach of that order. Moreover, even without any judge's order forbidding it, it is a contempt to remove a ward outside the jurisdiction of the High Court. It is, however, quite obvious that there are circumstances in which control over the person of a ward is not committed or referred to the judge but is by the law of England committed or referred to another agency or person. As a simple illustration, it could not be contended that the judge would have any jurisdiction to order that a criminal ward be transferred from place of detention A. to place of detention B., however much the medical evidence before the judge suggested that the ward would be in better health at place of detention B. The reason is that the jurisdiction of the judge over the person of the ward is necessarily restricted by the fact that the law has given that aspect of control over the ward's person exclusively to another agency. Similarly, the judge would have no right to complain of or countermand a lawful posting overseas of a ward who was in the armed forces. The law refers the military control of the ward to the military authorities. Similarly, any lawful deportation order affecting a ward must be outside the normal position which I have mentioned already, that a ward must not leave the jurisdiction without permission of the judge; indeed, it would override any existing express order of the judge in the wardship proceedings that the

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A infant was not to depart from the jurisdiction. Now these are examples of the proposition that the control of the High Court over the person of a ward is not by any means absolute."

B It is submitted, therefore, by the local authority that the wardship court has no power to interfere with the prosecution of the parents in this case in accordance with due process of law, and the calling of the minors as witnesses if the prosecution so decides.

C The parents have not adopted an agreed position before me and it is likely that there will be a considerable conflict between them at the trial, in which they will be represented by different counsel from those who have appeared for them at the hearing before me. On behalf of the mother, Mr. Stone submits that the giving of evidence by the minors in the criminal proceedings is an important step in their lives and that leave ought to have been obtained, once they became wards, for a prosecution founded largely on their evidence to have been instituted. Moreover, the mother does not wish any of the minors to be called as a witness. Mr. Stone accepts, however, that now that the parents have been committed for trial and the witness orders properly made, they cannot be quashed by this court. Even if judicial review were to be otherwise available, it is excluded by section 29(3) of the Supreme Court Act 1981 in matters relating to trial on indictment. As for the powers of the Crown Court judge, his discretion in relation to a compellable witness is limited, as has already been indicated. Furthermore, section 41 of the Children and Young Persons Act 1933 enables him to dispense with the attendance before the court of a child witness only if it is not essential to the just hearing of the case. Section 43 of that Act, which refers to serious danger to life or health involved in the attendance of a child witness, applies only when there is a deposition of the child.

D In these circumstances, Mr. Stone accepts that the leave of the court is not required for the minors to be called as witnesses at the trial, but he urges that the views of the psychiatrist should be made known to the trial judge as well as the Crown Prosecution Service on the basis that it will be relevant to decisions about the future conduct of the trial.

F The father's position is said to be that he wishes all the minors to be called at the trial, unless they are likely to be damaged by doing so. In his view, their evidence will be necessary to enable him to exculpate himself. Nevertheless, Miss Ryan on his behalf has submitted strongly to me that I should affirm the jurisdiction of this court to intervene and then exercise my discretion in respect of each of the minors in the light of the psychiatrist's report. She suggests that the wardship jurisdiction is, in effect, limitless in matters touching upon the welfare of a ward, and that the court should act in the instant case to protect the minors, if necessary, from potential harm. I confess that I find this submission difficult to reconcile with the father's alleged practical needs, but I accept that Miss Ryan puts it forward on the basis of the best interests of the minors and what is said to be the public interest.

H In support of her submission, Miss Ryan has referred to a number of cases such as *A. v. Liverpool City Council* [1982] A.C. 363; *In re Mohamed Arif* [1968] Ch. 643; *In re X (A Minor) (Wardship: Jurisdiction)* [1975] Fam. 47 and *M. v. Lambeth Borough Council (No. 3)* [1986] 2 F.L.R. 136. I am unable, however, to derive from the speeches and judgments in those cases any support for the proposition that it would be appropriate for this court to intervene in the present case. It is clear

from them that it is both unwise and undesirable to attempt to define limits of the wardship jurisdiction, but it is equally clear that great care must be exercised when invoking that jurisdiction in situations in which third parties are involved and in which a statutory code or framework for dealing with the matters has been established.

A case that is closer in point is *In re J. (A Minor) (Wardship)* [1984] F.L.R. 535. In that case the ward, aged 13 years, was to be the main prosecution witness at the trial of his mother on charges of inflicting grievous bodily harm on him and of attempting to pervert the course of justice. The mother applied for leave to use a psychiatrist's report about the ward as evidence on her behalf in the criminal proceedings and to have the ward further examined by the psychiatrist with a view to giving evidence at the trial. It was common ground that leave was required by the mother in respect of both these matters, and Wood J. refused both applications. After a detailed review of the law and the facts, Wood J. gave as the reasons for his refusal his conclusion that the public interest in a fair trial did not require the evidence to be made available, that the right of the mother to a fair trial would not be adversely affected, and that it would be against the best interests of the ward for either application to be granted.

It follows from what I have said that the decision of Wood J. does not bear directly on the issue before me. It does illustrate how decisions of the wardship court may have impact upon the course of a criminal trial, but this is well recognised: see the helpful judgment of Booth J. in *S. (Minors) (Wardship: Police Investigation)* [1987] 3 W.L.R. 847. Miss Ryan, however, relies upon a passage in the judgment of Wood J. in *In re J. (A Minor) (Wardship)* [1984] F.L.R. 535, in which he formulated the principles to be gleaned from *In re X (A Minor) (Wardship: Jurisdiction)* [1975] Fam. 47 and *In re R. (M.J.) (A Minor) (Publication of Transcript)* [1975] Fam. 89. He said, at pp. 539-540:

"These two cases, as I have said, are clearly distinguishable from the present one. What, then, are the principles to be gleaned from those two authorities? I think they can be formulated as follows. (i) That a judge, when exercising the jurisdiction over wards pursuant to section 41 of the Supreme Court Act 1981, is representing Her Majesty as *parens patriae*, and, in so doing, he has limitless power—it is not created by statute nor limited by statute—to protect the ward from any interference with his or her welfare, direct or indirect: see *In re X* [1975] Fam. 47, *per* Latey J. at p. 52B-c and *per* Lord Denning M.R. in the Court of Appeal at p. 57F-G. (ii) That it is unfruitful to seek to define any limits to such jurisdiction: see *In re X* (above), *per* Roskill L.J. at p. 60c. (iii) That the exercise of that power is one of discretion, and in each case the decision whether and in what way to do so must depend upon the facts of that case. (iv) That the interest of the ward is the first and most important consideration: see *In re R.* [1975] Fam. 89, *per* Rees J. at p. 96H. (v) That where the issue before the court was 'the custody or upbringing of a minor,' then the interest of the minor might well be the first and paramount consideration as required by section 1 of the Guardianship of Minors Act 1971: see *In re X* (above), *per* Sir John Pennycuik at p. 62. (vi) That it is important to bear in mind the desirability of confidentiality in those cases normally heard in private—such as wardship or adoption

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A applications—so that witnesses should not feel inhibited in their evidence with the fear of subsequent disclosure. (vii) That it is in the public interest that all relevant material should, if possible, be before a court so that the law should be upheld and justice should not only be done but should be seen to be done, despite the fact that in some special cases the court acts in private: see *Scott v. Scott* [1913] A.C. 417. (viii) That in exercising their discretionary power, the judges must keep a proper balance between the protection of their wards and the rights of ‘outside parties’ (those not in a family or personal relationship with the ward), whether such rights arise at common law or by statute or otherwise: see *In re X* (above), per Sir John Pennycuik at p. 61D.”

C With respect to counsel, however, I do not think that this passage is of assistance in deciding the first issue before me. Wood J. was considering the exercise of a discretion in a case in which it was conceded that the discretion existed. If it does exist in the case before me, it is at least doubtful whether the best interests of the wards are the first and paramount consideration, because the custody or upbringing of the children may not be in question: see Sir John Pennycuik in *In re X (A Minor) (Wardship: Jurisdiction)* [1975] Fam. 47, 62; but here I am not, at this stage, concerned with a mere balancing exercise. I have to decide whether it is appropriate for the wardship jurisdiction to be invoked in relation to a matter that is already governed by statutory rules and which will pursue its course unless this court purports to intervene.

E Finally, Mr. Levy for the Official Solicitor as guardian ad litem also argues that this court has jurisdiction to decide whether or not the minors should be permitted to give evidence, subject to the separate question of their competence to be decided by the Crown Court, on the basis that it involves an important step in their lives: see Cross J. in *In re S. (Infants)* [1967] 1 W.L.R. 396, 407D. On this footing, it is submitted that the question whether the court should exercise its jurisdiction is a matter of policy and that the decision should be in favour of doing so, notwithstanding the existence of witness orders. Moreover, the wards should not suffer because of a failure to obtain leave of the court before the committal proceedings began. The Official Solicitor recognises that possible conflict may arise between the Crown Court and the wardship court if this submission is accepted, and counsel is not able to point to any means by which an existing and valid witness order may be quashed. It is recognised also that acceptance of the jurisdiction could lead to disparity of treatment between wards and non-wards who are the subject of witness orders in the same case. Nevertheless, it is argued that the wardship jurisdiction and the duty of the court to protect its wards are factors of overriding importance. Alternatively, if it is not accepted that the court has jurisdiction to direct that the minors should not be called as witnesses, Mr. Levy submits that the court should exercise its jurisdiction to the extent of providing the Crown Court and the Crown Prosecution Service with such material as may be necessary for the protection of the minors in relation to decisions about the further conduct of the prosecution.

H In support of his general proposition, Mr. Levy has referred to the fact that as early as 1852, Sir James Parker V.-C., expressed the opinion that it would be a contempt of court for an infant who had enlisted

without permission in the 60th Rifles to be posted abroad without leave of the court: see *Harrison v. Goodall* (1852) Kay 310, and also *Rochford v. Hackman* (1854) Kay 308. The case is not a satisfactory authority, however, because the point was not argued; in the event, the ward was posted to Ireland without the leave of the court and the arrangements were approved retrospectively by the Vice Chancellor. It does not, in my view, diminish the persuasive force, at the very least, of what Russell L.J. said in *In re Mohamed Arif (An Infant)* [1968] Ch. 643.

I am grateful to counsel for the very full arguments that have been addressed to me on this issue but, in the end, I have no doubt that I should decline to exercise the wardship jurisdiction by either giving leave for the minors to be called as witnesses or by giving a direction in the matter in another form. In my judgment, it is neither necessary nor appropriate in child abuse cases for the Crown Prosecution Service to seek the leave of the wardship court to call a ward as a witness either before or after committal proceedings.

It is necessary, first of all, to set my conclusion in its proper context. In many cases, the wardship court is likely to be involved at an early stage because leave will have to be sought for the police to interview a ward. In such circumstances it is inevitable that the court will have to perform a balancing exercise, weighing the potential damage to the child against the public interest, as a responsible parent would do. In reaching a decision, the best interests of a child may not be the first and paramount consideration, for reasons that I have sufficiently explained. It is clear also that the court will have in mind that, if leave to interview the child is granted, a prosecution based on the child's evidence, at least in part, may ensue. Once a statement has been obtained, however, the responsibility for deciding whether or not a prosecution shall be initiated rests with the prosecuting authority and, in my view, it would be a constitutional impropriety for this court to intervene at that stage. To do so would be to invoke powers not possessed by any responsible parent or custodian of a child. More seriously, it would involve the court ultimately in assessment of matters of policy and discretion that are vested by law in the prosecuting authority as a branch of the executive.

The argument against intervention by the wardship court is even more overwhelming, in my judgment, once the prosecution has been set in train. By that time the defendants will have been arrested and charged, and may (as in this case) have been detained in custody. The procedure to be followed is strictly prescribed by statute, as I have outlined earlier in this judgment, and the limits of the discretion in relation to the calling of witnesses whose statements have been tendered are closely defined. On the other hand, a defendant has a virtually unfettered right to call as a witness anyone who can give relevant and admissible evidence on his behalf. If the wardship court were to attempt to intervene in this process, it could lead to conflict between it and the Crown Court, to the prejudice of the administration of justice generally, and could result in disparate treatment of child witnesses, despite the express statutory provisions dealing with them.

For all these reasons, therefore, I rule that it is unnecessary for this court to give leave for the minors to be called as witnesses in the pending trial of their parents, and that it would be inappropriate to do so. I prefer not to base my decision on consideration of the theoretical limits of the wardship jurisdiction because it is unwise and undesirable to attempt to define them. It is more correct, in my judgment, to refuse

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A to invoke the wardship jurisdiction for the purpose of granting leave or giving a direction because it would be contrary to public policy to do so. In my view, this conclusion conforms with the reasoning of the Court of Appeal in *In re Mohamed Arif (An Infant)* [1968] Ch. 643.

B I must stress that my decision is limited to the particular issue before me. As I have indicated earlier, there are occasions when the wardship court is necessarily and properly involved in decisions that will or may affect the conduct of a criminal trial. Moreover, the prosecution in the instant case is being conducted by the Crown Prosecution Service as the duly constituted prosecuting authority. There may be other cases in which, for example, a private prosecution is instituted in which other considerations may be relevant: see, for example, *In re H. (A Minor) (Wardship: Applications)* [1985] 1 W.L.R. 1164.

C Before parting with this matter, I should say that the potential damage to child witnesses in cases of this kind is likely to be alleviated in the future if current legislative proposals are enacted. It is worthy of consideration, however, whether or not the provisions of section 43 of the Children and Young Persons Act 1933 should be amended and broadened now that committals for trial are more usually based on
D tendered statements rather than depositions.

E In the course of the hearing there has been discussion as to whether or not the psychiatrist's report, to which I have referred, should be made available to the trial judge and the Crown Prosecution Service. My decision is that leave should be given to the local authority to disclose it to the officers of the Crown Prosecution Service responsible for the conduct of the prosecution of the parents and to prosecuting counsel instructed in the matter. Additionally, there must be leave for
F counsel for the prosecution to supply any part of the information contained in that report to the trial judge, if it becomes necessary and appropriate to do so. I do not think that it would be appropriate to give leave for disclosure generally to the Crown Court because its contents relate to matters that are essentially for the prosecution alone to consider. The local authority will thus be acting as a responsible parent would be entitled to act in similar circumstances without making direct submissions himself to the court.

G I should add finally that, in my judgment, leave should have been sought for the police to interview the minors in February 1987, but I do not think that it would be right to criticise the local authority or the Crown Prosecution Service for the oversight in the particular circumstances of this case. Normally, only one application for leave will be necessary because the possibility that further interviews may be necessary can be canvassed on the first application and dealt with in the order of the court. Where interviews have taken place before the wardship began,
H however, it is right that the court should deal with the matter, if further interviews prove to be necessary when the minors have become wards of court.

There is only one residual point, which relates to information concerning the wardship proceedings. It is appropriate for me to give leave for information about the present wardship proceedings to be given at the trial of the parents to the extent that the trial judge thinks

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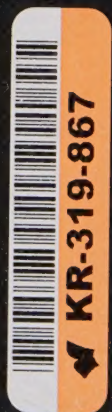
that it is necessary, because the trial will be in public and there might otherwise be some evidential difficulty.

Directions accordingly.

Solicitors: Richard White & Michael Sherwin, Croydon; Bryan Lewis & Co., Sydenham; McMillan Williams, New Addington, Surrey; Central Courts Branch of Crown Prosecution Service; Official Solicitor

M. B. D.

END OF VOLUME 3



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